IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11787

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, Tampa Division
Case No. 8:21-cv-294-VMC-CPT
Honorable Virginia M. Hernandez Covington

MOTION OF CONSTITUTIONAL LAW SCHOLARS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE YOUNG ISRAEL OF TAMPA, INC.'S PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit Rule 26.1, counsel for *amici curiae* hereby certifies that the following persons and entities have or may have an interest in the outcome of this case:

- Adams, David (counsel for Defendant-Appellant)
- Becket Fund for Religious Liberty (counsel for Plaintiff-Appellee)
- Bennett Jacobs & Adams, P.A. (counsel for Defendant-Appellant)
- Burckard, Ruthie Reyes (dismissed Defendant)
- Covington, Honorable Virginia M. Hernandez (Trial Judge)
- Davis, Joseph (counsel for Plaintiff-Appellee)
- Glaser, Zachary (counsel for Defendant-Appellant)
- Goodrich, Luke (counsel for Plaintiff-Appellee)
- Griffin, Christopher (Mediator)
- Griffin Mediation LLC (Mediator)
- Hillsborough Area Regional Transit Authority (Defendant-Appellant)
- Haun, William (counsel for Plaintiff-Appellee)
- Le Grand, Adelee (dismissed Defendant)
- Rivkin, Rabbi Uriel of Young Israel of Tampa (leader of Plaintiff-Appellee)
- Slugh, Howard (counsel for Plaintiff-Appellee)
- Wenger, Edward (counsel for Plaintiff-Appellee)

- Young Israel of Tampa (Plaintiff-Appellee)

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* are private individuals.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

1. *Amici curiae* are a group of constitutional scholars ("Constitutional Scholars"), who respectfully request leave to file an *amicus* brief in support of Plaintiff/Appellee Young Israel of Tampa, Inc.'s Petition for Rehearing and Rehearing En Banc.[1] This Court previously granted the Constitutional Scholars leave to file an *amicus* brief in support of Young Israel. *See* ECF No. 56.

2. Young Israel has consented to the participation by Constitutional Scholars as *amici curiae*. Defendant-Appellant Hillsborough Area Regional Transit Authority ("HART"), has declined to consent to the filing of this brief.

3. *Amici* are a diverse group of scholars of the First Amendment who participate regularly in cases involving the intersection of the Free Speech Clause, the Free Exercise Clause and public life. They have a shared interest in the sound development of First Amendment Law and its interplay with public life. A full list of *amici*, including their titles and university affiliations, is included as an appendix to the proposed *amici curiae* brief attached to this motion as Attachment A.

4. Movant Constitutional Scholars can contribute to the Court's disposition of this case by providing their unique perspectives – as individuals who have studied and written about the First Amendment's Free Speech Clause, the First

[1] Constitutional Scholars are as follows: Professor Richard W. Garnett, Professor Nicole Stelle Garnett, Professor Robert J. Pushaw, and Professor Kate Stith.

Amendment's Free Exercise Clause, and the interplay between free speech, viewpoint discrimination, free exercise of religion and public life. No other party provides this perspective as to the important issues presented in this appeal involving the refusal of HART to permit Young Israel participate in its advertising program with its "Chanukah on Ice" advertisement.

5. Accordingly, Movant Constitutional Scholars respectfully request leave to file the attached brief of *amicus curiae* in support of Young Israel's Petition for Rehearing and Rehearing En Banc. *See* Attachment A.

Dated: February 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 318 words. I have relied upon Microsoft Word to determine the word count.

This motion complies with the typeface requirements of Fed. R. App. 32(g)(1) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: */s/ Paul J. Zidlicky*

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, a true and correct copy of the foregoing was timely filed with the Clerk of the Court using the appellate CM/ECF system, which will send notifications to all counsel registered to receive electronic notices.

By: */s/ Paul J. Zidlicky*

ATTACHMENT A

No. 22-11787

IN THE 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
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Case No. 8:21-cv-294-VMC-CPT
Honorable Virginia M. Hernandez Covington

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLEE YOUNG ISRAEL OF TAMPA, INC.'S PETITION FOR REHEARING AND REHEARING EN BANC

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RULE 26.1 CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to Eleventh Circuit Rule 26.1, counsel for Plaintiff-Appellee hereby certifies that the following persons and entities have or may have an interest in the outcome of this case:

- Adams, David (counsel for Defendant-Appellant)
- Becket Fund for Religious Liberty (counsel for Plaintiff-Appellee)
- Bennett Jacobs & Adams, P.A. (counsel for Defendant-Appellant)
- Burckard, Ruthie Reyes (dismissed Defendant)
- Covington, Honorable Virginia M. Hernandez (Trial Judge)
- Davis, Joseph (counsel for Plaintiff-Appellee)
- Glaser, Zachary (counsel for Defendant-Appellant)
- Goodrich, Luke (counsel for Plaintiff-Appellee)
- Griffin, Christopher (Mediator)
- Griffin Mediation LLC (Mediator)
- Hillsborough Area Regional Transit Authority (Defendant-Appellant)
- Haun, William (counsel for Plaintiff-Appellee)
- Le Grand, Adelee (dismissed Defendant)
- Rivkin, Rabbi Uriel of Young Israel of Tampa (leader of Plaintiff-Appellee)

- Slugh, Howard (counsel for Plaintiff-Appellee)
- Wenger, Edward (counsel for Plaintiff-Appellee)
- Young Israel of Tampa (Plaintiff-Appellee)

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

B. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel states that *amici curiae* are private individuals.

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RULE 35 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel's decision restricting the scope of injunctive relief is contrary to the following decisions of the Supreme Court and this circuit: *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. of Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether a state actor's rejection of an advertisement because the advertisement "primarily promotes a religious faith or religious organization" constitutes viewpoint discrimination in violation of the Free Speech Clause.
2. Whether a state actor's rejection of an advertisement because it "primarily promotes a religious faith or religious organization" violates the Free Exercise Clause.

Dated: February 7, 2024

/s/ Paul J. Zidlicky

Paul J. Zidlicky
Attorney of record for
Amici Curiae

STATEMENT OF THE ISSUES

1. Whether the Hillsborough Area Regional Transit Authority's ("HART's") rejection of an advertisement because it "primarily promotes a religious faith or religious organization" constitutes viewpoint discrimination in violation of the Free Speech Clause.

2. Whether HART's rejection of an advertisement because it "primarily promotes a religious faith or religious organization" violates the Free Exercise Clause.

INTEREST OF AMICI

Amici are scholars of the First Amendment who participate regularly in cases involving the intersection of the Free Speech Clause, the Free Exercise Clause and public life.[1] They have a shared interest in the sound development of the law. A full list of *amici* is included as an appendix.

[1] Young Israel consented to the filing of this brief, but HART did not. Accordingly, *amici* have filed a motion for leave to file with this brief. Under Federal Rule of Appellate Procedure 29(a)(4), *amici* state that no party or party's counsel (i) authored this brief in whole or in part or (ii) contributed money intended to fund preparing or submitting this brief.

BACKGROUND

Young Israel's request for rehearing and rehearing en banc poses the question whether a local transit authority's policy prohibiting advertisements because those advertisements "primarily promote a religious faith or religious organization" (i) is impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment or, alternatively, (ii) violates the Free Exercise Clause because it denies religious groups the ability to participate in a public program based upon the religious character of their message.

The panel agreed that the program violated the Constitution, and at least two of the three panel members agreed that Defendant's policy impermissibly discriminated based upon viewpoint. Nevertheless, the panel as a whole ***narrowed*** the scope of the district court's injunction without deciding the issue of viewpoint discrimination. The panel's failure to address the constitutional arguments that supported the full relief granted by the district court warrants panel rehearing and/or rehearing en banc.

1. The Hillsborough Area Rapid Transit Authority rejected an advertisement submitted by Young Israel of Tampa, a Jewish

congregation, for Young Israel's annual "Chanukah on Ice" event. HART explained that, as a policy, it "does not allow religious affiliation advertising." Young Israel sued, arguing that HART's rejection of the advertisement violated its rights under the Free Speech and Free Exercise Clauses of the First Amendment.

The district court granted summary judgment for Young Israel, reaching only the Free Speech grounds. The district court ruled that "HART's ban on advertisements that 'primarily promote a religious faith or religious organization' targets the 'specific motivating ideology or the opinion or perspective of the speaker'" and was thus viewpoint discrimination in violation of the First Amendment. R.72 at 26 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). As an alternative ground for summary judgment, the district court ruled that HART's policy violated the First Amendment because it lacks "objective, workable standards" and was therefore not reasonable in light of the purposes of the forum. R.72 at 33 (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018)). Having already granted Young Israel summary judgment, the district court declined to address the Free Exercise issue. R.72 at 39. The district court entered a permanent

injunction against HART, prohibiting it "from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization," whether under its current policy "or in any future advertising policy that HART might adopt and implement." R.86 at 1–2.

2. A panel of this Court affirmed the district court's holding that HART's policy against "religious" advertisements is "constitutionally unreasonable because it lacked objective and workable standards." Op. 17. The panel declined to address the district court's principal holding that HART's policy discriminates based on viewpoint, reasoning that the constitutional unreasonableness ground "provides a sufficient basis on which to affirm its judgment." *Id.* But the panel did ***not*** affirm the entirety of the district court's judgment. Rather, it remanded the case to the district court with instructions to modify the permanent injunction and limit its scope to HART's current policy, Op. 30, leaving HART free to try to come up with a new policy against religious advertisements.

The panel acknowledged that it could "see why the district court crafted the permanent injunction the way that it did," given that the district court ruled on the viewpoint discrimination issue. Op. 28.

Despite not formally ruling on the issue, two of the panel members opined that this case involved a clear instance of "viewpoint discrimination." Op. 31 (Newsom, J., concurring) ("HART's policy is self-evidently—in fact, bunglingly—viewpoint discriminatory."); Op. 46 (Grimberg, J., concurring) ("I see no way around concluding … that the public transportation system engaged in unconstitutional viewpoint discrimination."). Yet, because the panel "declined to address whether HART's policy constitutes impermissible viewpoint discrimination," it could not conclude that "any future variation of the policy … would necessarily be unconstitutional," Op. 29, and, therefore, ordered the district court "to limit the scope of its permanent injunction to HART's current policy." Op. 30.

Young Israel has sought rehearing or rehearing en banc, and *amici* submit this brief in support of that relief.

ARGUMENT

I. THE PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE THE PANEL'S DECISION UNDERCUTS THE FIRST AMENDMENT'S PROTECTION AGAINST VIEWPOINT DISCRIMINATION.

Rehearing is warranted to consider the panel's decision to narrow the injunction without reaching the issue of viewpoint discrimination.

1. The panel's avoidance of the issue of viewpoint discrimination undermines a fundamental protection afforded by the First Amendment. As the Supreme Court and this Court have explained, "viewpoint discrimination is an 'egregious form of content discrimination' and is 'presumptively unconstitutional.'" *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)); *see Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999) ("Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship."), *vacated and remanded, Chandler v. Siegelman*, 530 U.S. 1256 (2000), *reinstated on remand*, 230 F.3d 1313, 1314 (11th Cir. 2000); *Otto v. City of Boca Raton*, 981 F.3d 854, 864 (11th Cir. 2020). Indeed, when the government prohibits "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

Under the panel's ruling, however, this "egregious" and "blatant" violation of the First Amendment has been left unaddressed. As explained by Judge Grimberg, "HART can continue drafting viewpoint

discriminatory policies while also failing to reasonably apply them—perpetually evading review of the ultimate constitutional flaw." Op. 49.

2. Moreover, there can be no serious question that HART's policy discriminated based upon viewpoint. As explained by Judge Newsom, "[t]his is an easy case." Op. 31 (Newsom, J., concurring). On the issue of viewpoint discrimination, "[b]y its plain terms, [HART's] policy doesn't just prohibit speech 'about' religion, it singles out speech that 'promotes' religion." *Id.* Indeed, "the lopsidedness of the policy's religious-speech restriction isn't just patent; it's conspicuous." *Id.* As such, "a speech restriction that prohibits only the 'promot[ion]' of a religious faith or organization constitutes viewpoint discrimination, plain and simple." Op. 32.[2]

A second panel member, Judge Grimberg, agreed that HART's policy discriminated based upon viewpoint. Op. 46 (Grimberg, J.,

[2] Given these facts, resolution of the viewpoint discrimination issue would not require the Court to define "religion" for all times and under all circumstances. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("[I]f it is not necessary to decide more, it is necessary not to decide more" (citation omitted)); *cf.* Matthew 6:34 (New American Standard Bible) ("Do not worry about tomorrow; tomorrow will take care of itself. Sufficient for a day is its own evil.").

concurring). As he explained, "[w]hen presented with Young Israel's ad, HART suggested that it would run the advertisement if Young Israel removed references in the ad to Judaism—the menorah and the word Chanukah, for example. HART essentially asked Young Israel to remove the religious angle of the ad, but not otherwise change the content." *Id.* Further, "HART previously had accepted ads for secular holiday events that involved ice skating and seasonal décor." *Id.* Thus, HART's policy "permit[s] advertising on 'a *subject* sure to inspire religious views'—holiday events—'and then suppress[es] those views' while allowing a secular analogue." *Id.* (quoting *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1200 (2020) (Gorsuch, J., respecting the denial of certiorari)). As a result, "HART's policy constitutes unconstitutional viewpoint discrimination, and there is no change in the way its policy is administered or applied that can fix this fundamental constitutional flaw." Op. 48.

3. Nevertheless, the panel declined to reach the issue of viewpoint discrimination. It stated that its ruling that HART's current policy fails on reasonableness grounds "provid[ed] a sufficient basis on which to affirm [the district court's] judgment." Op. 17. That is wrong.

The panel did not ***affirm*** the district court's full judgment, which included a permanent injunction applying both to HART's current policy and to any future policy against advertisements that primarily promote a religion. Indeed, the panel recognized that the relief awarded by the district court was appropriately crafted to remedy "impermissible viewpoint discrimination." Op. 28.

Rather than assessing the propriety of the district court's injunction as a remedy for viewpoint discrimination, the panel addressed only the district court's "more narrow ruling" and then concluded that it warranted restriction of the permanent injunction so that it did not apply to any *future* HART policy. That was error. Although courts strive to avoid deciding ***unnecessary*** constitutional issues, "[w]hen constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.)). That principle highlights the "difference between judicial restraint and judicial abdication." *Id.* Thus, when a plaintiff raises multiple arguments, one of which affords them broader relief than

would be justified under the alternative arguments, a court cannot avoid the argument that would afford the Plaintiff its broader relief. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) ("If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.").

The panel therefore had an obligation to address the viewpoint-discrimination claim that justified the broader relief against future HART policies as held by the district court. Alternatively, the panel should have addressed the other ground for the "broader relief" entered by the district court, namely, Young Israel's free exercise argument. What the panel should *not* have done is "embrace a narrow ground of decision simply because it is narrow." *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring).

The panel or the whole Court sitting en banc should grant the petition to consider the important viewpoint discrimination presented by this appeal.

II. WHETHER A STATE ACTOR CAN EXCLUDE ADVERTISEMENTS SOLELY BECAUSE THOSE ADVERTISEMENTS "PROMOTE RELIGION" IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

This is a case of exceptional importance that poses fundamental questions about the role for religion in the public square. Young Israel's free speech and free exercise arguments, though doctrinally distinct, make a common point: government cannot force religious people to mute their core convictions before they can fully participate in the public square. That proposition is essential to the American traditions of religious freedom and religious pluralism. Here, rehearing is necessary to reaffirm that principle. The panel's decision leaves open the possibility that government may be able to mute speech as "too religious" so long as it develops an objective and workable standard.

The Founders encouraged public religious expression because they "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel*, 508 U.S. at 400–01 (Scalia, J., concurring) (citing *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.")). They understood that "[r]epublican government

presupposes the existence of . . . sufficient virtue," but does not itself create such virtue. *The Federalist* No. 55 (James Madison). To meet our free society's inescapable need for moral formation, the Founders looked to religion. *See, e.g.*, George Washington, *Farewell Address, Sept. 19, 1796*, *George Washington: A Collection* 521 (William B. Allen ed., 1988); An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat 50, 52 (1789) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

To secure the public good of religion and to do so in a manner consistent with American pluralism, the American tradition of religious freedom welcomes all religious people and institutions as full participants in public life. *Full* participation means religious people who "take their religion seriously" and "think that their religion should affect the whole of their lives," *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion), are not required to set aside their religious convictions before they run for office, speak out on the issues of the day, form voluntary associations, or celebrate in public for all to see. *See also*

Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring) (citing cases).

Government thus is not permitted to restrict *public* discourse to secular views while banishing religious speech to *private* houses of worship. Such banishment of religious speech would negate the manifold public goods of religion while simultaneously harming religion itself. Justice Alito recently made this exact point, explaining that removing religious "organizations from the public square would not just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life." *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., respecting the denial of certiorari).

Here, rehearing is required to reaffirm the fundamental principle that government cannot reject speech "on the ground that [it] primarily promotes a religious faith or religious organization."

CONCLUSION

For these reasons, and those set forth by Appellee Young Israel, the petition for rehearing should be granted.

Dated: February 7, 2024

Respectfully submitted,

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[*] Institutions and titles are listed for affiliation purposes only. *Amici* are participating in their individual capacity, not on behalf of their institutions.

CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) and Circuit Rules 29-3 and 29-4 because this brief contains 2408 words, excluding the parts of the brief exempted by Circuit Rule 29-3.

2. This amicus brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point size and Century Schoolbook Style.

/s/ Paul J. Zidlicky
Paul J. Zidlicky
Counsel for Amici Curiae
Dated: February 7, 2024

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, I caused the foregoing to be electronically filed with the U.S. Court of Appeals for the Eleventh Circuit via the CM/ECF system, which will automatically send email notifications of such filing to all attorneys of record.

/s/ Paul J. Zidlicky
Paul J. Zidlicky