UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

YOUNG ISRAEL OF TAMPA, INC.,
Plaintiff,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,
Defendant.

Civil No. 8:21-cv-00294

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Plaintiff Young Israel of Tampa, Inc., respectfully moves for summary judgment in its favor on all its claims. In support, Young Israel provides the following brief.

INTRODUCTION

The Supreme Court has repeatedly held that it is unconstitutional to open government property for a wide variety of speech while excluding speech that is "religious." But the Hillsborough Area Regional Transit Authority ("HART") does just that. HART makes its transit system available for advertisements on a virtually unlimited array of subjects. But it bans any ads that "primarily promote a religious faith or religious organization." Citing this policy, it rejected Young Israel's ad for its annual "Chanukah on Ice" event, deeming the ad "primarily religious." At the same time, it accepted numerous ads for comparable events that it deemed non-religious.

HART's policy is facially unconstitutional in multiple respects. *First*, it violates the Free Speech Clause because it discriminates based on viewpoint—by allowing ads on various subjects, but banning ads addressing those subjects from a religious viewpoint. *Second*, it violates the Free Speech Clause because it is an unreasonable restriction

based on content—by banning religious speech even when HART has no evidence that such speech would disrupt its transit system. *Third*, it violates the Free Speech Clause because it is standardless and arbitrary—with one of HART's own board members admitting it is "unconstitutionally vague." *Finally*, it violates the Free Exercise Clause because it singles out religion for disfavored treatment.

The Third Circuit recently enjoined a nearly identical transit policy banning ads "religious in nature." *Ne. Pa. Freethought Soc'y v. COLTS*, 938 F.3d 424, 430 (3d Cir. 2019). It held that the policy facially "discriminates on the basis of viewpoint" and "is not a permissible limitation on [the] forum." *Id.* at 442. This Court should do the same.

STATEMENT OF MATERIAL FACTS

A. Young Israel of Tampa.

1. Young Israel is an Orthodox Jewish synagogue in Tampa, led by its Board president, Rabbi Uriel Rivkin. Ex. 1 ¶ 2; Ex. 2-A (12-13). It has hundreds of attendees. *Id.* at 14:4-16. It conducts charitable endeavors. *See id.* at 64:23-24, 185:8-25; Ex. 2-E; Ex. 1 ¶ 7. It also reaches the community via publicly advertised celebrations of Jewish holidays like Passover and Chanukah. *Id.* ¶¶ 6-7. *See, e.g.*, Ex. 2-A (57:4-12, 28:11-23); Ex. 1 ¶ 6; Ex. 2-E.

B. Chanukah on Ice and Young Israel's desire to advertise with HART.

2. For over 14 years, Young Israel has hosted "Chanukah on Ice," celebrating Chanukah. Ex. 2-A (50:11-18); *see also id.* at 24:9-17; *id.* at 53:25-54:1; 76-77; Ex. 2-F (advertisements). Chanukah on Ice is "a very big event" with "at least 200 people"

typically attending. Ex. 2-A (28:12-13).

3. It starts with an hour of ice skating with "Jewish music playing and Jewish food." *Id.* at 28:17-18. Next, Rabbi Rivkin lights a large menorah. *Id.* at 30:1-12. Then Rabbi Rivkin offers two or three blessings, depending on which night of Chanukah it is. *Id.* at 30:9-10. Attendees sing Jewish songs, and Rabbi Rivkin speaks about the Chanukah miracle. *Id.* at 30:11-12; Ex. 2-G (pictures).

4. Rabbi Rivkin usually begins planning Chanukah on Ice in September by booking a rink. *See* Ex. 2-A (54:20-55:2). Though the location and price vary, the latest venue was the AdventHealth Center Ice rink at around $800. *Id.* at 29:14-17; *see id.* at 24-26; *see also, e.g.*, Ex. 2-F (advertisements).

5. The AdventHealth rink is ideal given its proximity to the synagogue. *Id.* at 26:19-20. The rink is also on one HART bus line (275LX) and near another (Local Route 400 Metro Rapid). Ex. 1 ¶ 9. Unfortunately, the 2020 Chanukah on Ice event did not happen due to COVID-19. Ex. 2-A (32:15-18); *see also id.* at 56:13-14. But Young Israel intends to return to the AdventHealth rink for 2021. *See id.* at 55-56. If COVID-19 precludes an indoor gathering, Young Israel is considering an outdoor rink. *Id.*; *see also* Ex. 1 ¶ 10.

6. Young Israel has historically promoted the event via advertising in the "Jewish Press and Facebook." Ex. 2-A (33:3); *see also* Ex. 2-F (ads); Ex. 2-E (receipts); Ex. 2-H (same); *see also id.* at 154:1-9. "The Jewish press designed [an ad] for [Young Israel]," and "for the 14 years we've run the same ad, carbon copy pretty much." Ex. 2-A

(104:1-9). The ad features a menorah and dreidel, both major symbols of Chanukah. Ex. 2-A (130:12-16); *see also id.* at 133:10-16, 107:14-15. The ad for 2020 is depicted here (Ex. 2A-1 at 41):

7. Young Israel was interested in running this ad "on the back of [a] bus" before Chanukah on Ice. *Id.* at 240:1-12. This would enhance "Jewish pride" and "advertise our synagogue" to the "many Jews in the Tampa Bay area that are unaffiliated." *Id.* at 41:14-18; *id.* at 83:9-16 ("bring our organization to the next level"); 84:16-21 (similar).

8. A small ad was within Young Israel's budget. *Id.* at 240:1-2. It was also prepared to find a donor for larger advertising. *Id.* at 240:5; *see also* Ex. 2-I (ad prices).

C. HART's religious-ad ban.

9. HART is the government agency charged with operating mass transit in Hillsborough County and the City of Tampa. Doc. 1 ¶ 31; Doc. 17 ¶ 31.

10. Under its governing advertising policy, enacted in 2013, HART has selected an "Advertising Contractor" that is "responsible for the administration of the HART advertising program consistent with HART's adopted policies and guidelines." Ex. 2-J (HART Policy Manual § 810.10(2)). This includes "initially address[ing] the application of HART guidelines" to "all advertising requests." *Id.* The Advertising Contractor "refer[s]" "[a]ny question or disagreement" about the policy's application to a given ad to a HART employee. *Id.* Those aggrieved by the policy's initial application may "appeal" to HART's CEO (or her designee) "for final resolution." *Id.*

11. The earliest advertising policy HART could produce is from 2008. Ex. 2-C (15:1-3). That iteration prohibits "Advertisements that primarily promote a religious faith or religious organization." Ex. 2-JJ (§ 810.10(4)(d)). The operative policy today has the same prohibition. Ex. 2-J (§ 810.10(4)(e)).

12. Religious organizations are the only organizations under HART's policy that are categorically prohibited from promoting themselves. Ex. 2-C (82:8-12). Any ad "within that realm" gets extra scrutiny. Ex. 2-D (20:23). HART's Advertising Contractor will also "discourage or reject" ads "from churches and other groups" when they call to inquire about advertising. Ex. 2-K (Resp. 1(g)); *see also* Ex. 2-C (59:6-19); Ex. 2-B (47:13-15).

13. HART says it "refus[es] to accept primarily religious advertisements" because it doesn't want to "alienat[e] any riders, potential riders, employees, or advertisers." Ex. 2-K (Resp. 9). HART further says that religious ads could "be deemed either controversial" or "create a bad experience for our customers" "if somebody didn't agree

with [it] and, you know, they're upset about it." Ex. 2-C (80:11-20). However, HART admits it "do[es]n't know what would specifically upset customers on religious ads." *Id.* at 81:1-2. And it admits it has no record of disruptions, vandalism, or threats of violence attributable to any ad. Ex. 2-K (Resp. 5-7).

14. HART asserts this same interest in all areas of its transit system—no distinction is made between exterior spaces (like bus exteriors or shelters) and bus interiors. *See* Ex. 2-C (78:22-25); Ex. 2-B (60:4-10).

15. HART's ban on primarily religious ads is accompanied by other "[p]rohibitions." Ex. 2-J (§ 810.10(4)). These include ads for alcohol and tobacco products, ads containing profanity or "discriminatory materials and/or messages," ads for firearms showing violence, various political ads, false or deceptive ads, and ads that are libelous or infringe copyrights. *Id.*

16. Both in its terms and in practice, HART's policy is defined by what it prohibits—not what it allows. *See* Ex. 2-C (33:11). "[I]f the [potential] ad doesn't have any of those prohibitions in it, then, yes, it can—it can run on HART's" system. *Id.* at 33:24-34:1; *see also, e.g.*, Ex. 2-B (18:3-6); *id.* at 18:8-10; *id.* at 18:22-24. HART has allowed ads from a variety of speakers and viewpoints on myriad subjects, and its "objective" is "to maximize revenues." Ex. 2-J; *see also* Ex. 2-OO, 2-PP.

D. Application of the ad policy.

17. "Application of HART's advertising guidelines are fact specific and analysis of a permissible ad, once brought to the CEO (or her designee), is done on a fact-specific basis, with assistance from counsel, when necessary." Ex. 2-K (Resp. 8).

18. HART gives no guidance on how to interpret the policy, and HART is not aware of any guidance ever existing. Ex. 2-C (16:15-18); Ex. 2-B (12:22). HART gives no training in how to implement the policy. Ex. 2-C (15:21-23); Ex. 2-B (12:24-13:1). Should a potential advertiser appeal the initial application of the policy to the CEO, "there is no standard . . . other than what's in the policy." Ex. 2-C (84:9-13).

19. HART has discretion in applying its policy. For example, the policy bans ads for tobacco or alcohol, but HART created an exception for "the Tampa Historic Streetcar." Ex. 2-J (§ 810.10(4)(a)). There, "[a]lcohol and cigar advertisements … will be considered on a case by case basis by the HART CEO or his/her designee under this advertising policy." *Id.* at § 810.10(5). HART made this exception for reasons of "revenue." *See* Ex. 2-C (16:8); *see also, e.g.*, Ex. 2-B (44:10-17); Ex. 2-L (emails). And HART's buses (not the streetcar) have run an ad promoting Tampa's Margarita Festival. Ex. 2-M (Margarita ad).

20. HART also allows secular organizations to run holiday-related advertisements. For example, HART ran an ad for "Winter Village"—advertising "Seasonal eats," "Ice skating on real ice" with "Holiday shops" and "Classic Drinks" like "Hot Toddy" and "Classic Holiday films." Ex. 2-N. It also decorates its buses with Christmas symbols for charitable campaigns. *See, e.g.*, Ex. 2-O.

21. When deposed, HART's corporate representative said "[n]othing" would prohibit Macy's from running "a holiday-based ad" with the slogan "Perfect Gift Sale." Ex. 2-C (38:18-21, 39:15-40:4). Yet, if a church ran an ad saying "Find the Perfect Gift" that was promoting a church, that "would fall into the primarily promoting a

religious organization" prohibition. *Id.* at 41:14-19. HART's Advertising Contractor explained the difference: "the Young Israel ad clearly had a lot of religious wording and imagery, whereas this has Christmas gifts. This is neutral." Ex. 2-B (24:12-14).

22. Similarly, HART's Contractor explained she would "send" along an ad just with Easter eggs to HART—as it's "possible" that there's a secular half of Easter. Ex. 2-B (80:21-25); *see also id.* at 80:15-18. By contrast, an ad just for "Easter" would "maybe" necessitate a preliminary conversation with the advertiser. *Id.* at 81:1-5.

23. HART allows secular entities to run ads promoting themselves with various messages. For example, Florida Healthy Transitions ran an ad saying "We're here to help. You are not alone." Ex. 2-P. Ronald McDonald Charities ran an ad saying "Joy is one of the best gifts you can give." Ex. 2-Q. Tampa General Hospital ran an ad saying "Treasure your family. Value their care." Ex. 2-QQ. And Rhino Lawyers ran an ad stating "No human being is illegal." Ex. 2-R.

24. HART Board members have said HART's ban on primarily religious ads is vague. For example, when discussing an ad campaign from the Council on American-Islamic Relations ("CAIR"), one Board member concluded "that our policy is very vague, it's unconstitutionally vague." Ex. 2-S (Public Hearing Transcript at 43).

25. In 2012, CAIR proposed an ad campaign to HART called "#MyJihad." *See, e.g.*, Ex. 2-T. "This ad campaign was initially denied as a result of HART personnel and board members' initial belief that 'Jihad' meant holy war and primarily promoted the Islamic religion." Ex. 2-K (Resp. 1(a)). HART came to this determination by exploring CAIR's website. *See* Ex. 2-U. CAIR appealed the decision, saying that it was

"a civil rights organization," not a religious group. But HART rejected the appeal because of CAIR's religious connection. Ex. 2-V; Ex. 2-W; Ex. 2-X (Minutes at 7-8).

26. The rejection of CAIR's ad prompted several HART Board members to say that the advertising policy is viewpoint discriminatory. One HART Board Member wondered whether Martin Luther King, Jr. and the Southern Christian Leadership Conference would be allowed to run an ad on HART's system. *See* Ex. 2-S (Minutes at 45); *see also* Ex. 2-X (at 7-8). Others highlighted apparent double standards in running ads from Catholic institutions but not CAIR. *See* Ex. 2-W; Ex. 2-X (at 7-8).

27. HART then ran a "modified" ad from CAIR, while directing HART's General Counsel to revise the policy. *See* Ex. 2-X (at 7); Ex. 2-Z (at 3-7); *see also* Ex. 2-AA; Ex. 2-BB. But the religious-ad ban remained. *See* Ex. 2-BB; *see also* Ex. 2-CC.

28. HART has permitted ads promoting St. Leo's University—"a Catholic liberal arts university rooted in centuries-old Benedictine values" that requires religious classes and facilitates worship. *See* Ex. 2-EE. HART says it permits these ads because "St. Leo University is an institution of higher learning, not a religious organization." Ex. 2-K (Resp. 1(b)); *see also* Ex. 2-DD. HART also permits advertisements from other organizations that include religion in their programs. *See* Ex. 2-K (Resp. 1(c)); Ex. 2-GG (Alcoholics Anonymous); Ex. 2-HH (United Way). However, HART initially rejected an ad for St. Joseph's Hospital because, on reviewing its website, HART saw that St. Joseph's described itself as being a mission of Franciscan sisters. *See* Ex. 2-FF. HART responded that if St. Joseph's "want[ed] to change [the name on the ad to include] Baycare," its parent company, HART could "take it," because it then "can also

be construed as a secular name." *See id.*

29. HART says it is "not part of the practice" to review organizational websites to determine if an ad is primarily religious. Ex. 2-C (93:14-19). However, HART's Advertising Contractor said she might review a religious organization's website to determine if an ad is primarily religious—it depends on "[w]hat was going on with my day." Ex. 2-B (74:1). HART's corporate representative agreed the policy allows "different people in the same roles [to] have different methodologies." Ex. 2-C (96:18-20).

30. HART's Advertising Contractor testified that application of the policy varies depending on her understanding of the ad's symbolism as religious. For example, an ad featuring an image of Jesus Christ would result in the Contractor asking the organization whether it wanted to "pursue" the ad further, because the Contractor knows that "Jesus Christ is associated with religion." Ex. 2-B (75:10-25). But, if she "didn't know that," "then [she] probably wouldn't have a conversation, and [she] would just submit it to HART." *Id.* at 76:1-5.

E. HART's rejection of Young Israel's ad.

31. On October 30, 2020, Young Israel sent HART its Chanukah on Ice ad. Ex. 2-JJ. On November 2, HART's Contractor replied: "Thank you for writing, unfortunately we cannot assist. HART does not allow religious affiliation advertising, as well as banning adult, alcohol, tobacco, and political ads. Thank you again for your interest, [signature]." Ex. 2-JJ; *see also* Ex. 2-C (66:22-24); Ex. 2-B (14:3-9, 24:13, 50:9-51:3).

32. Young Israel expressed "disappoint[ment]" and requested an appeal, and HART's Contractor provided a copy of the ad policy (from 2008). *See* Ex. 2-JJ; *see also*

Ex. 2-A (117:5-17).

33. On November 13, Rabbi Rivkin requested review from HART's interim CEO. Ex. 2-KK. Receiving no response, Rabbi Rivkin then wrote the interim CEO directly on November 25. *See* Ex. 2-NN (Letter).

34. HART's CEO, legal counsel, and Communications Manager met and concluded, "[b]ased off … legal counsel's knowledge of what the menorah meant," that the ad primarily focused on "a religious-based icon." Ex. 2-C (70:7-12). The ad therefore violated the ban on religious ads. Ex. 2-K (Resp. 11); *see also* Ex. 2-C (72-73).

35. Thus, on December 8, HART's Communications Manager emailed Rabbi Rivkin with "suggested edits." Ex. 2-LL. These edits consisted of removing the picture of the menorah and all uses of the word "menorah." *Id.* The Manager testified that had HART known more about Judaism, it would have eliminated the dreidel too. *See* Ex. 2-D (13:12-16, 15:20-22, 24:16-25:2).

36. Rabbi Rivkin found it "offensive" that HART would censor "a central aspect of the Orthodox Jewish celebration of Chanukah." Ex. 2-MM; *see also* Ex. 2-A (130:13-15). He told HART these changes were "not possible to make" and asked HART to approve the ad as originally designed. Ex. 2-MM.

37. On December 15, 2020, HART formally refused. Ex. 2-NN. HART's interim CEO said this rejection was "consistent with prior determinations involving similar advertisement requests under this policy." *Id.*

38. Rabbi Rivkin devoted significant time engaging with HART's policy and proposed edits—diverting his attention away from Chanukah and other synagogue

activities. Ex. 1 ¶ 11. Young Israel wants to advertise future Chanukah on Ice events on HART, as well as its 2021 and future Passover Seders, and fundraise for its mikvah (a Jewish ritual bath). Ex. 1 ¶ 11. But "[n]ow that we know that religion is a problem," Young Israel has refrained from submitting new advertisements until it knows "what would be allowed." Ex. 2-A (58:14-16; 82:8-9).

PROCEDURAL BACKGROUND

Young Israel sued on February 5, 2021, seeking injunctive, declaratory, and monetary relief. Doc. 1. It later voluntarily dismissed its claims against the individual HART officials originally sued alongside HART. Doc. 42. Discovery followed.

STANDARD OF REVIEW

Summary judgment is required if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "'material' if … it might affect the outcome of the case"; a dispute is "'genuine' if the record taken as a whole could lead a rational trier of fact to find for" the nonmovant. *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1311 (11th Cir. 2018).

ARGUMENT

I. HART's religious-ad ban unlawfully discriminates based on viewpoint, violating the Free Speech Clause.

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). HART's policy violates this "core postulate of free speech law." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019).

A. The religious-ad ban is viewpoint-discriminatory.

Free-speech protections sometimes turn on the type of "forum" at issue. *Minn. Voters All. v. Mansky*, 138 S.Ct. 1876, 1885 (2018). But no matter the forum, "the law is clearly established that the state cannot engage in viewpoint discrimination." *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005). Accordingly, if the Court determines that viewpoint discrimination is afoot, it is unnecessary to determine the "forum" of speech. *Freethought*, 938 F.3d at 432.

This case concerns a policy banning ads that "primarily promote a religious faith or religious organization." Ex.2-J. The Supreme Court has repeatedly held that such "blanket bans on religious messages" are viewpoint-based and thus "impermissible." *Byrne v. Rutledge*, 623 F.3d 46, 55 (2d Cir. 2010) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

Rosenberger is instructive. There, a university subsidized the costs of some student publications, but excluded publications that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 822-27. The university argued this limited the forum based on "content, not viewpoint." *Id.* at 830. But the Court rejected this argument and invalidated the policy as viewpoint-based: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831-32.

The Court reiterated the point in *Good News Club.* There, the defendant permitted after-hours use of public-school facilities for various purposes, but prohibited use "by any individual or organization for religious purposes." 533 U.S. at 102-03. The lower courts upheld this as a permissible limit on "subject matter," not viewpoint discrimination. *Id.* at 111. But the Supreme Court disagreed. Speech that "is 'quintessentially religious' or 'decidedly religious in nature'" may still constitute a distinct viewpoint on seemingly secular subjects. *Id.* at 111. Because the group sought to "address a subject otherwise permitted under the rule," albeit "in a nonsecular way," the exclusion was "viewpoint discriminatory." *Id.* at 107-09.

These cases demonstrate that HART's religious-ad ban constitutes viewpoint discrimination. HART's ban is indistinguishable from the one in *Rosenberger*. *Compare* 515 U.S. at 825 ("primarily promotes … a particular belie[f] in or about a deity") *with* Ex. 2-J ("primarily promote a religious faith"). And HART has likewise excluded Young Israel from speaking on "subject[s] otherwise permissible" under its policy, *Lamb's Chapel*, 508 U.S. at 394, simply because it proposed to do so in a "quintessentially religious" way, *Good News Club*, 533 U.S. at 111. Indeed, this Court has already applied *Lamb's Chapel* to hold that a public-school policy banning "advertising" that includes "religious … symbols" is "an unconstitutional viewpoint restriction." *Heinkel ex rel. Heinkel v. Sch. Bd. of Lee Cty.*, No. 2:04-CV-184, 2005 WL 1571077, at *6-7 (M.D. Fla. July 1, 2005) (Covington, J.), *aff'd in part, rev'd in part on other grounds*, 194 F. App'x 604 (11th Cir. 2006). So too here.

Young Israel's ad seeks to send a message of invitation to a cultural event, while also announcing a message of organizational existence, identity, and outreach. Such messages are generally permitted by the ad policy, which permits any message falling outside its list of specific prohibitions. *Supra* ¶ 16. HART has in fact run many ads speaking to these same topics. *Supra* ¶ 16. Indeed, HART ran an ad inviting viewers to spend a winter day consuming "Seasonal eats," partaking in "Holiday" activities, and "Ice skating" for fun. Ex.2-N (Winter Village). But it *excluded* Young Israel's ad extending an identical invitation—seasonal eats ("Latkes"), holiday activities ("Arts & Crafts"), and ice skating ("ice skating")—for a *religious purpose*. When promoting ice skating for fun is allowed, but promoting ice skating for a religious celebration is banned, that, "quite clear[ly]," is "viewpoint discrimination." *Good News Club*, 533 U.S. at 109.

The Third Circuit recently held as much on indistinguishable facts. In *Freethought*, a transit authority adopted a policy excluding ads that "promote the existence or non-existence of a supreme deity," "promote, criticize or attack … religious beliefs or lack of religious beliefs," or "are otherwise religious in nature." 938 F.3d at 430. Based on this policy, it rejected an ad from an atheist association "read[ing] 'Atheists,' and including [its] web address." *Id.* at 428-30. The Third Circuit held the religious-ad ban facially invalid. *Id.* at 431. The court explained that the plaintiff's ad "reasonably communicate[d]" a message of "organizational existence, identity, and outreach." *Id.* at 434, 435. Yet "[n]othing in the record suggests [the agency] would prohibit secular associations from" communicating such messages. *Id.* at 434. Because the policy

therefore banned messages that "communicat[e] a religious (or atheistic) viewpoint on a subject to which the forum is otherwise open," it constituted "viewpoint discrimination" under *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. *Id.* at 435.

Freethought is on all fours. Young Israel's ad similarly seeks to raise awareness of its existence, enhance "Jewish pride," and otherwise reach out to the community. *Supra* ¶ 7. Yet while HART permits secular associations to send such messages—*see, e.g.*, *Supra* ¶¶ 20, 23—Young Israel was barred "because of the [religious] character of [its] speech." *Freethought*, 938 F.3d at 434. HART can't exclude religious speech on these otherwise-permissible topics "in the name of secular purity." *Adler v. Duval Cty. Sch. Bd.*, 206 F.3d 1070, 1081 (11th Cir. 2000) (*en banc*), *reinstated*, 250 F.3d 1330.

Freethought disagreed with the D.C. Circuit's decision in *Archdiocese of Washington v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018), which upheld a prohibition on religious ads and distinguished *Lamb's Chapel*, *Rosenberger*, and *Good News Club* on the ground that those forums were open to a "wide[r] range of subjects." *Id.* at 327. But "viewpoint discrimination is impermissible in *any* forum," whether its "range of subjects [is] narrow, wide, or in-between." *Freethought*, 938 F.3d at 436 (emphasis added; collecting cases); *see Cook*, 414 F.3d at 1321. And as Justices Thomas and Gorsuch have since explained, the Supreme Court denied review in *WMATA* only "[b]ecause the full Court [was] unable to hear" the case. *Archdiocese of Washington v. WMATA*, 140 S.Ct. 1198, 1199 (2020) (statement of Gorsuch, J.). Otherwise, "our intervention and a reversal would be warranted for reasons admirably explained by" *Freethought*. *Id.* Those

same reasons require summary judgment for Young Israel here.

B. The religious-ad ban fails strict scrutiny.

Because HART's ban is viewpoint-based, "there is an argument [it is] unconstitutional per se." *Otto v. City of Boca Raton*, 981 F.3d 854, 864, 870 n.12 (11th Cir. 2020). Indeed, the Supreme Court has repeatedly held that a "finding of viewpoint bias end[s] the matter"—the law "violates the First Amendment." *Brunetti*, 139 S.Ct. at 2302; *accord Freethought*, 938 F.3d at 431.

At minimum, the ban triggers strict scrutiny. *Otto*, 981 F.3d at 861-62. It therefore survives "only if" HART "proves [it is] narrowly tailored to serve" a "compelling" interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Laws "rare[ly]" meet this test, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011), and this ban is no different.

Most of HART's alleged interests can be rejected out of hand. First, the policy says "HART's objective in selling advertising … is to maximize advertising revenues." Ex.2-J. But excluding religious ads cuts *against* this objective. Second, the policy says HART's "goal" is to "keep[]" its advertising space "non-controversial" and "ensure that the advertisement is not offensive to HART customers and the community." Ex. 2-J. But "the First Amendment has no carveout for controversial" or offensive speech. *Otto*, 981 F.3d at 859; *see Matal v. Tam*, 137 S.Ct. 1744, 1751 (2017) (plurality). And rather than being unfit for public consumption, "[r]eligious speech enjoys sanctuary within the First Amendment"—as the *en banc* Eleventh Circuit said in requiring another defendant to allow the display of a large "Chanukah menorah" on public

property. *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1385-87, 1392 (11th Cir. 1993).

Nor can HART prove that its ban is necessary to "maintain a safe environment" and "employee morale" or to avoid "risks of violence," "vandalism," and "alienating … riders." Ex.2-L. Strict scrutiny requires the government to show both "an 'actual problem' in need of solving," and "*evidence*" of a "link between" the problem and the speech. *Brown*, 564 U.S. at 799-800 (emphasis added). Here, HART has conceded it "do[es]n't know what would specifically upset customers on religious ads." *Supra* ¶ 13. HART *admits* it is "not aware of *any*" vandalism, threats of violence, or other "disruptions" resulting from *any* advertisement since 2013 (*supra* ¶ 13)—even though it has run ads from religious organizations (*Supra* ¶ 28), allowed ads with provocative political messages (*e.g. Supra* ¶ 23), and allowed tobacco and alcohol ads (*Supra* ¶ 19). And HART hasn't identified *any* ad-related disruption *before* that period, either.

On strict scrutiny, HART "carries the burden of proof"—and "because it bears the risk of uncertainty, ambiguous proof will not" suffice. *Otto*, 981 F.3d at 868. The religious-ad ban is unlawful viewpoint discrimination.

II. HART's religious-ad ban is an unlawful content-based restriction, violating the Free Speech Clause.

Even if the ban didn't constitute viewpoint discrimination, it is still an unconstitutional content-based restriction. Because the ban's applicability "depend[s] on what is said," it's indisputably content-based. *Otto*, 981 F.3d at 861. And content-based restrictions are unconstitutional, regardless of the forum, unless they are "reasonable[]" "in the light of the purpose of the forum and all the surrounding circumstances."

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985). HART carries the burden of showing this standard is met, *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); it can't do so here.

HART will likely assert that its goal is to "exclud[e] categories of speech it believes likely to inflame passions." *Freethought*, 938 F.3d at 438. But even if this were "a permissible goal sometimes," "it should be viewed with suspicion," since it "conflicts with the core purposes of the First Amendment" and "invites a heckler's veto." *Id.* It is also "hard for officials to apply … objectively." *Id.* And even on reasonableness review, if HART "wants to censor topics it deems 'controversial,' to avoid disruption," "it must make a showing of threatened disruption," not rely on "mere supposition." *Id.* at 439. HART admittedly has no such evidence. *Supra* ¶ 13. As in *Freethought*, then, the ban is not reasonable. *See* 938 F.3d at 438-442. *Accord Cambridge Christian Sch., Inc. v. FHSAA*, 942 F.3d 1215, 1246 (11th Cir. 2019) ("cannot infer … reasonableness … from a vacant record").

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), doesn't change this result. *Lehman* upheld a transit system's ban on "political advertising" in a vehicle *interior*, emphasizing that riders are a "captive audience." *Id.* at 299, 303-04 (plurality); *see id.* at 307-08 (Douglas, J., concurring). But "much of the relevant forum" here "is the *exterior* of [HART] buses," so *Lehman* can't "bear the weight" of HART's restrictions, which apply inside and outside alike. *Freethought*, 938 F.3d at 439-40. In any event, *Lehman* was a plurality opinion that predates modern forum analysis, didn't involve

viewpoint discrimination, and didn't involve religious speech. And in light of the Court's more recent decision in *Mansky*, *infra* Part III, it is likely "unavailing." *Am. Freedom Def. Initiative v. WMATA*, 901 F.3d 356, 372 (D.C. Cir. 2018).

Further, given the First Amendment's "special protection" for religious speech, it is "unreasonable to so broadly single out [religious speech] for exclusion." *Freethought*, 938 F.3d at 441 (collecting cases). That is because governments can easily craft policies limiting forums to specific topics or subject matters without blanket bans on religious speech. Thus, banning speech simply "because it's religious" is not even "legitimate," much less "reasonable." *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring).

Finally, if the Court did confront the forum question, HART's content discrimination would be unconstitutional for an independent reason: HART's ad space is a designated public forum. The policy "provide[s] for the exclusion of only … very narrow categor[ies] of ads," and in "practice" access has been "virtually unlimited." *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 252 (3d Cir. 1998); *see, e.g.,* Ex.2-B (13:15: "very rare" for an ad to violate the policy); *id.* at 21:18-20 ("only been a couple instances" "in my 20 years"); *supra* ¶ 16 (collecting ads); *cf. Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1279 (11th Cir. 2003) ("City ha[d] never accepted 'virtually all types of advertising'"). The ban is therefore subject to "strict scrutiny," *Chabad-Lubavitch*, 5 F.3d at 1387, 1391 n.13—which it fails, *see supra* Part I.B.

III. HART's religious-ad ban is standardless and arbitrary, violating the Free Speech Clause.

The religious-ad ban is also unconstitutional because it is standardless and

arbitrary. In administering a forum, the government "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 138 S.Ct. at 1888. In applying this requirement, courts have struck down forum restrictions barring "political" speech, *id.* at 1888-92—including on transit systems like HART's, *see Am. Freedom Def. Initiative v. SMART*, 978 F.3d 481 (6th Cir. 2020); *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 304 (3d Cir. 2020). The same principle applies to HART's restriction on "religious" speech.

"Religious" isn't self-defining. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *see SMART*, 978 F.3d at 494. HART's policy supplies no definition. And HART admits that whether an ad promotes a religious faith or organization "may turn in significant part on the background knowledge … of the particular [HART official] applying it." *Mansky*, 138 S.Ct. at 1890; *see* Ex.2-C (72:9-12: whether a symbol will be viewed as "religious" depends on the "life, or you know, experience" of the reviewer).

HART therefore identified the menorah on Young Israel's ad as "religious," but not the dreidel. *Supra* ¶ 35. And HART's advertising contractor testified that Young Israel's Chanukah ad "clearly had a lot of religious wording and imagery," but an ad depicting "Christmas gifts" would be "neutral." *Supra* ¶ 21. This latter example—of *de facto* discrimination *between* religious holidays based on their relative familiarity—illustrates why courts must be especially alert to standardless policies relating to religious speech. *Cf. Mansky*, 138 S.Ct. at 1891 (without "objective, workable standards," an official's "own politics may shape his views on what counts as 'political'").

The problem is only compounded by consideration of the ban's full phrasing—ads that "*primarily* promote" a religious faith or organization. Ex.2-J. No other provision of the ad policy requires HART to decide what an ad "primarily" promotes. And HART has conceded that "primarily" is a "subjective" determination, "based off of, you know, professional experience." Ex. 2-C (78:17-21). This "lack of structure and clear policies governing the decision-making process creates a real risk that it may be arbitrarily applied." *Ctr. for Investigative Reporting*, 975 F.3d at 317; *see also Fla. Beach Advert., LLC v. City of Treasure Island*, 511 F. Supp. 3d 1255, 1274 (M.D. Fla. 2021) (Covington, J.) ("subjective standards" allow "arbitrary" enforcement).

Nor does HART have any "official guidance" or "training manuals" helping officials apply the ban. *SMART*, 978 F.3d at 495. And the "process" in practice is riddled with "inconsistencies." *Id.* at 496. For example, HART now claims it is "not part of the practice" to review an organization's website to determine whether an ad is religious. *Supra* ¶ 29. Yet it has repeatedly done so (*supra* ¶¶ 25, 28), and its contractor testified that whether she does so depends on "[w]hat was going on with [her] day," Ex.2-B (74:1). Thus, HART conceded that "different people in the same roles [could] have different methodologies." Ex.2-C (96:18-20); *see also Freethought*, 938 F.3d at 440-41.

There have also been "haphazard interpretations" of the policy. *Mansky*, 138 S.Ct. at 1888. HART rejected an ad from St. Joseph's Hospital—a Catholic hospital—until it used the name of its parent company, BayCare. *Supra* ¶ 28. But it ran ads from St. Leo's University—a Catholic university—with no such change. *Supra* ¶ 28. Too, while

the policy prohibits political ads, Ex.2-J, HART ran an ad featuring the political message "No human being is illegal." *Cf. Ctr. for Investigative Reporting*, 975 F.3d at 316-17 (agency permitted ad alluding to Black Lives Matter). While the policy prohibits alcohol advertisements everywhere but the streetcar, Ex.2-J, HART ran an ad for the "Margarita Festival" on its buses, Ex.2-M. And here, of course, HART suggested the ad could be turned from "primarily" religious to acceptable by deleting the menorah—but leaving the dreidel and references to "Chanukah," "Jewish music," and "kosher food." Ex.2-LL. *See Cambridge*, 942 F.3d at 1245-46 ("inconsistent" enforcement of prayer ban suggests lack of "reasonableness").

In 2013, a HART board member said the ad policy is "unconstitutionally vague." *Supra* ¶ 24. She was right; Young Israel is entitled to summary judgment.[1]

IV. HART's religious-ad ban violates the Free Exercise Clause.

HART's religious-ad ban also violates the Free Exercise Clause. A law burdening religion is subject to "strict scrutiny" if it is not "neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876-77 (2021).

First, "the minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). HART's ban fails this test. The ban excludes ads "that primarily promote a religious faith or religious organization." Ex.2-J. So secular organizations may promote

[1] For similar reasons, HART's ban also violates the Due Process Clause. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process than an enactment is void for vagueness if its prohibitions are not clearly defined."); *Am. Freedom Def. Initiative*, 901 F.3d at 187-88.

themselves by advertising, but religious organizations are barred, "solely because they are religious." *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2261 (2020). Such discrimination based on "religious status" is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021-22, 2025 (2017).[2]

Second, "government regulations are not neutral and generally applicable … whenever they treat *any* comparable secular activity more favorable than religious exercise." *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021); *accord Fulton*, 141 S.Ct. at 1877. HART's ban fails this test, too. The policy generally bans ads for "tobacco, alcohol, or related products" for the same alleged reasons it bans religious ads. Ex.2-J. But HART made an exception permitting alcohol and tobacco ads on the streetcar, for "revenue" reasons. *Supra* ¶ 19. This differential treatment—reflecting HART's value judgment about which "controversial" ads are nonetheless worth running—requires justification on strict scrutiny. *Tandon*, 141 S.Ct. at 1296; *see also Lukumi*, 508 U.S. at 537.

Third, "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S.Ct. at 1877 (cleaned up). And as already explained, the religious-ad ban itself (on its face and in practice) is indeterminate and prone to discriminatory enforcement. *Supra* Part III.

For all these reasons, the religious-ad ban triggers strict scrutiny, which HART

[2] For similar reasons, HART's religious-status discrimination violates the Equal Protection Clause. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (religion is an "inherently suspect" classification for Equal Protection purposes); *see also Trinity Lutheran*, 137 S.Ct. at 2024 n.5.

fails. *See supra* Part I.B; *Fulton*, 141 S.Ct. at 1882 ("speculation is insufficient").

V. Young Israel is entitled to relief.

As a remedy, Young Israel is entitled to declaratory and injunctive relief, and damages. Injunctive relief follows "as a necessary legal consequence of … the merits." *Otto*, 981 F.3d at 870. That is because (1) "an ongoing violation of the First Amendment constitutes an irreparable injury," *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); and (2) "neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance." *Otto*, 981 F.3d at 870; *accord Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1229-30 (11th Cir. 2017). Moreover, Young Israel has been chilled from speaking and exercising its religion because of HART's unconstitutional ban on primarily religious ads. *See, e.g.*, *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010); *supra* ¶ 38.

Young Israel is also entitled to compensatory damages as determined at trial, *see generally Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-07 (1986), and nominal damages, *Uzuebunam v. Preczewski*, 141 S.Ct. 792, 802 (2021); *supra* ¶ 38.

CONCLUSION

The Court should declare that HART's policy violates the Constitution, permanently enjoin HART from applying it, and schedule proceedings to assess damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 4, 2021 a copy of the foregoing was furnished by electronic transmission to:

David W. Adams
Zachary J. Glaser
Bennett, Jacobs & Adams, P.A.
P.O. Box 3300
Tampa, Florida 33601
dadams@bja-law.com
zglaser@bja-law.com
Attorneys for Defendant

Dated: October 4, 2021

Howard Slugh
Jewish Coalition for Religious Liberty
2400 Virginia Avenue N.W.
Apt C619
Washington, D.C. 20037
Telephone: (954) 328-9461
Email: hslugh@jcrl.org

/s/ Luke Goodrich
Luke Goodrich
Lead Counsel
William J. Haun
Joseph C. Davis
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave NW
Suite 400
Washington, D.C. 20006
Telephone: (202) 955-0095
Fax: (202) 955-0090
lgoodrich@becketlaw.org

Edward M. Wenger
FBN 85568
Holtzman Vogel Baran Torchinsky & Josefiak, PLLC
2300 N. Street N.W., Ste. 643-A
Washington, D.C. 20037
Telephone: (202) 737-8808
Fax: (540) 341-8809
emwenger@holtzmanvogel.com