No. 23-1276

In the Supreme Court of the United States

YOUNG ISRAEL OF TAMPA, INC.,

Petitioner,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ALABAMA AND 25 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. Amici have a strong interest in protecting the religious liberties and free-speech rights of their citizens, including when local or county governments in their States offer advertising opportunities on their transit systems. Too often, as here, these systems treat religious speech as a vice, lumping it in with pornography and banishing it from the public square (or bus) while happily carrying non-religious ads on the same topics. Given the entrenched circuit split on whether governments may treat religious speech worse than other speech simply because it is religious—a remarkable state of affairs given this Court's prior rulings—amici urge the Court to grant the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Hillsborough Area Regional Transit Authority ("HART") rejected Young Israel of Tampa's proposed advertisement for its "Chanukah on Ice" event because it was religious. And it accepted another group's advertisement for its "Winter Village" event because it was *not* religious. Under HART's no-religious-speech advertising policy, that singular difference—that one ad was religious and the other was not—led the government entity to reject "Chanukah on Ice" and accept "Winter Village."

HART's discrimination was unconstitutional. The Eleventh Circuit was right to recognize that much. But to the Court of Appeals, the problem with HART's policy was simply that it lacked "objective and workable standards." Pet. App. 3a. According to the court, if only the transit authority could come up with better ways to classify religious advertising, ensuring that it treated "advertisement[s] promoting the reading of the Bible" the same as "advertisement[s] touting the Book of Mormon," then HART could discriminate in a less "inconsistent," and more constitutional, manner. *Id.* at 21a-22a. The appellate court thus narrowed the district court's injunction and remanded the case so HART could try its hand at discriminating with a bit more consistency.

The wild goose chase the Eleventh Circuit sent HART on can end only in continued unlawful discrimination for Young Israel and other religious would-be advertisers. No matter how clear HART spells out its discrimination plan for its employees, it will still be discriminating against religious speech because it is religious. The First Amendment's dictate isn't for HART to discriminate *better*, but for it to stop discriminating against religious viewpoints *altogether*. So long as HART rejects all religious advertisements *because they are religious*, its policy will remain "self-evidently," "bunglingly" "viewpoint discriminatory." Pet. App. 30a (Newsom, J., concurring).

This Court's review is needed because the Eleventh Circuit is not alone in suggesting that governments can enforce no-religious-speech policies so long as they do so in a "reasonable" and "objective" manner. By drawing a line between "secular" organizations

that are allowed to promote their existence, ideas, and messages, and "religious" organizations that are prohibited from doing the same *solely because they are religious*, these policies engage in unlawful viewpoint discrimination. And contra the Eleventh, Ninth, and D.C. Circuits—and as the Second, Third, Seventh, Eighth, and Tenth Circuits have recognized—such discrimination can never be "reasonable," no matter how clear and consistently applied they are. The First Amendment does not allow governments to ban religious viewpoints from the public square, lumping them in with the "profane language," "obscene materials," and "depiction[s] of graphic violence" that HART also prohibits. The Court should grant the petition to resolve the circuit split and make that clear.

ARGUMENT

I. The Decision Below Exemplifies The Consequences Of The Circuit Split Over Whether Public Transit Authorities May Lawfully Ban Religious Viewpoints In Their Advertising Policies.

1. When Young Israel sought to run an ad for its annual "Chanukah on Ice" celebration, HART informed the synagogue that it would need to scrub all the Jewish elements from the advertisement for it to be acceptable to the government entity. HART thus suggested that Young Israel remove "the image of the menorah and all uses of the word 'menorah'" in the ad, and it later admitted that had "it known more about Judaism, it would have proposed eliminating the dreidel as well." Pet. App. 8a & n.3. According to HART, removing the religious elements would bring

the ad into compliance with its policy prohibiting advertisements that "primarily promote a religious faith or religious organization." *Id.* at 2a.

HART's policy is classic viewpoint discrimination. It allows other organizations to promote themselves, just not religious organizations. And it allows other groups to promote their ideas, just not religious ones. An advertisement for the local symphony? Acceptable. One for the worship band at First Baptist? Prohibited. Ads promoting a mindfulness class at the YMCA? Those can run on the buses. Ads promoting a prayer class at the Buddhist temple? Those cannot.

HART's policy also "casts piety in with pornography," *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality op.), lumping in religious advertisements with other forms of speech that HART signals has minimal, or at least controversial, value: "[a]dvertising containing profane language, obscene materials or images of nudity" or "pornography"; "[a]dvertising containing discriminatory materials and/or messages"; advertising containing "an image or description of graphic violence"; and advertising promoting "unlawful or illegal behavior." Pet. App. 51a. Like religious speech, these categories are also prohibited by HART.

But one of these categories is not like the others. Religious speech is not like speech about "adult" content. It is not like alcohol or tobacco advertisements. It is not a vice, relegated to back alleyways or private homes. It is, and always has been, a necessary component of public discourse in America. To treat it as something less, as HART does, is offensive to the

millions of Americans whose religious sentiments shape who they are, in private *and* in public.

Indeed, far from being relegated to private circles to avoid creating offense or disruption, religious speech has long been heard in "[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths, … and all other references to the Almighty that run through our laws, our public rituals, our ceremonies." *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952). Rather than fearing the divisiveness of religious speech, the Founders understood that allowing speech of all kinds serves to "foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). Being exposed to such speech "is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

Conversely, when the government tries to "purge from the public sphere all that in any way partakes of the religious," the result is not harmony but "divisiveness." *Van Orden v. Perry*, 545 U.S. 677, 698-99 (2005) (Breyer, J., concurring in the judgment). "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (internal citations omitted). Far from treating religion neutrally, "[a] government that roams the land … scrubbing away any reference to the divine will strike many as aggressively hostile to religion." *Am.*

Legion, 139 S. Ct. at 2084-85. It will also send the perverse message that religious speech is too controversial, too taboo, and too dangerous for public discussion. Governmental policies like HART's that draw lines between religious and non-religious speech end up "fostering a pervasive bias or hostility to religion" in others as well. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995).[1] These policies harm not only the religious entities facing the discrimination directly but entire communities whose governments send the message that everyone must leave their religious viewpoints at home.

2. Unfortunately, HART is not alone in banning religious speech from the advertisements it carries. As Young Israel points out, "over two dozen transit authorities serving tens of millions of Americans currently ban religious ads." Pet. App. 28 & n.3 (listing no-religious-speech advertising policies for 26 transit authorities across the country). These government policies restrict real people and real organizations

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[1] *Cf., e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (discrimination under Title VII for failing to hire Muslim applicant solely because she might need a religious accommodation to wear a religious headscarf at work); *EEOC v. Hackensack Meridian Health*, No. 2:18-cv-12856 (D.N.J. consent decree entered Oct. 2020) (discrimination against employee who placed a crucifix in his office and was thereafter subject to routine screaming, thrown objects, public belittlement, tearing up of work, and other abuse); *United States v. Wash. Metro. Area Transit Auth.*, No. 1:08-CV-01661 (D.D.C. consent decree entered Feb. 2009) (discrimination against bus drivers who wore religious head coverings); *Draper v. Logan Cnty. Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (discrimination against a librarian who was fired for wearing a necklace with a cross ornament).

from expressing their religious viewpoints in public to the same extent that others are able to opine on the same matters with non-religious viewpoints.

Consider the facts of *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018). In that case, the Washington Metropolitan Area Transit Authority (WMATA) accepted a wide variety of advertisements to run on its buses, but forbade "[a]dvertisements that promote or oppose any religion, religious practice or belief." *Id.* at 320 (alteration in original). Accordingly, WMATA rejected an advertisement from the Archdiocese of Washington that depicted "a starry night and the silhouettes of three shepherds and a sheep on a hill facing a bright shining star high in the sky, along with the words 'Find the Perfect Gift.'" *Id.* "The ad include[d] a web address" for a website that—horror of horrors—"contained substantial content promoting the Catholic Church, including a link to 'Parish Resources,' a way to 'Order Holy Cards,' and religious videos and 'daily reflections' of a religious nature." *Id.* (cleaned up).

Though it was undisputed that WMATA would have run practically the same ad for any store hawking holiday gifts, it rejected the Archdiocese's campaign because its version came with a religious viewpoint: It encouraged riders to look to the Church—not a store—for the perfect gift. Indeed, "[t]he Archdiocese explain[ed] that the 'Find the Perfect Gift' campaign [was] an important part of its evangelization efforts" by "welcoming all to Christmas Mass or joining in public service to help the most vulnerable in [the]

community during the liturgical season of Advent." *Id.* (cleaned up).

Despite the clear discriminatory treatment the Archdiocese faced, the D.C. Circuit refused to step in, holding that WMATA simply "exclude[d] religion as a subject matter from its advertising space." *Id.* at 318-19. As Justices Gorsuch and Thomas explained in their statement respecting this Court's denial of certiorari, that conclusion was at odds with this Court's precedent. *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari). "[O]nce the government declares Christmas open for commentary," they explained, "it can hardly turn around and mute religious speech on a subject that so naturally invites it." *Id.*; *see id.* ("[O]nce the government allows a subject to be discussed, it cannot silence religious views on the topic. So the government may designate a forum for art or music, but it cannot then forbid discussion of Michelangelo's David or Handel's Messiah." (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 110-12 (2001)). Yet that is precisely what the D.C. Circuit allows. *See also DeLoreto v. Downey Unified School District Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (upholding no-religious-speech advertising policy at government baseball field).

Or consider the Third Circuit's decision in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System*, 938 F.3d 424 (3d Cir. 2019)—in many ways the flip side of *Archdiocese of Washington*. Freethought, an association of atheists, sought to run an advertisement with the County of Lackawanna Transit System (COLTS). The

advertisement was simple: It contained the word "Atheists" and listed the group's name and website. *Id.* at 428. As Freethought explained, it sought to use the ad "to tell other nonbelievers in the region that they are 'not alone' and that 'a local organization for atheists exists.'" *Id.* at 429. COLTS rejected the proposed advertisement based on its policy prohibiting ads that "promote the existence or non-existence of a supreme deity" or "are otherwise religious in nature." *Id.* at 430.

Departing from the D.C. Circuit's analysis, the Third Circuit rightly held that the transit system's no-religious-speech policy violated the First Amendment because it discriminated based on Freethought's viewpoint. *Id.* at 435. Because other organizations were allowed to promote messages "of organizational existence, identity, and outreach," the court held, the transit system could not prohibit Freethought from doing the same simply because its ad had a point of view on religion. *Id.*; *see also Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 592 n.12 (7th Cir. 1995) (finding religious viewpoint discrimination by county building authority that "selectively allow[ed] private access for secular holiday displays," and thus allowed a private group to display a Christmas tree, "while excluding access for all private holiday displays expressing a religious viewpoint," and thus prohibited a Jewish organization from displaying a menorah); *Good News/Good Sports Club v. School District*, 28 F.3d 1501, 1506-07 (8th Cir. 1994) (finding religious viewpoint discrimination by school district that permitted the Boy Scouts and Girl Scouts to use school premises to encourage good moral character

but prohibited religious youth organization from doing the same).

This circuit split calls out for the Court's review. The disagreements among courts are not theoretical, but directly determine whether citizens can bring their religious viewpoints with them to the public square (or bus or metro car). Atheists in Pennsylvania and Jews in Indiana can do so, while Catholics in Washington, D.C., and Jews in Florida cannot. This Court's direction is urgently needed.

II. The Decision Below Squarely Conflicts With Decisions Of This Court By Holding That A Ban On Religious Viewpoints Can Be "Reasonable."

The Eleventh Circuit agreed that HART's policy was unconstitutional, but nonetheless *narrowed* the relief the district court had awarded Young Israel so that HART could attempt to discriminate against the synagogue and other religious institutions more consistently. Pet. App. 19a-23a, 28a. Though two of the panel's members acknowledged that HART's no-religious-speech advertising ban was obviously, "self-evidently," "bunglingly" "viewpoint discriminatory," Pet. App. 30a (Newsom, J., concurring), *id.* at 41a (Grimberg, J., concurring), the court tried to avoid the circuit split by "affirm[ing] the district court's alternative ruling that HART's policy, even if viewpoint neutral, is unreasonable due to a lack of objective and workable standards," *id.* at 3a (maj. op.).

Unfortunately, by attempting to write around the circuit split, the court managed only to entrench it further by implicitly holding that no-religious-speech

polices can pass constitutional muster so long as they are "reasonable." But neither the First Amendment nor this Court's precedent leaves any room for "reasonable" viewpoint discrimination. If the Court's trilogy of religious viewpoint-discrimination cases apply—*Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386-90 (1993); *Rosenberger*, 515 U.S. at 829; and *Good News Club*, 533 U.S. at 105-06—then the Court of Appeals erred by purporting to resolve the case based solely on *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Under the trilogy, HART cannot craft a constitutional ban on religious advertisements while accepting advertisements on the same subjects by non-religious organizations.

This should have been obvious to the court below. But rather than exploring whether HART's policy constituted viewpoint discrimination, the Court of Appeals jumped straight to *Mansky* to hold that HART's policy was unreasonable and allow HART another bite at the apple. Pet. App. 17a-23a. Thus confining itself to *Mansky*'s landscape, the court rested its holding on the fact that HART had trouble *consistently* discriminating against religious entities. As the court concluded: "In sum, HART has failed to define the word 'religious' and the term 'primarily promote,' has not provided guidance that sets out 'objective, workable standards' for its agents and employees, and has vested too much discretion in those who apply the policy. These deficiencies are fatal." *Id.* at 22a-23a.

By not paying adequate attention to this Court's trilogy of cases on religious viewpoint discrimination, the Eleventh Circuit lost sight of what was

fundamentally wrong with HART's policy. HART's arbitrary application of its discriminatory policy was an *additional* reason why its policy was unconstitutional. But it was not the fundamental one; fixing it would not resolve the problem or remedy the injury suffered by Young Israel.

Take one example highlighted by the court below. As the Court of Appeals explained, "HART rejected an advertisement from St. Joseph's Hospital based on information that the Hospital was '[f]ounded as a mission by the Franciscan Sisters of Allegany,' but said it would accept the advertisement if the Hospital used the name of its parent company, Baycare." Pet. App. 22a (alteration in original). "Yet HART ran advertisements from St. Leo University—the oldest Catholic institution of higher education in Florida (established in 1889 by the Order of Saint Benedict of Florida)—without any changes because St. Leo is an 'institution of higher learning, not a religious organization.'" *Id.* "By that logic," the court wondered, "why wasn't St. Joseph's Hospital considered a medical institution rather than a religious organization?" *Id.*

This episode indeed highlights the arbitrary way HART enforced its policy. But so what? Is the Constitution satisfied if HART trains its employees to reject ads from *both* St. Joseph's Hospital *and* St. Leo University, while accepting similar ads from Tampa General and the University of Tampa? Of course not—not if that meant HART was discriminating against religious viewpoints. The Court of Appeals jumped the gun by simply assuming that "HART's advertising policy was 'viewpoint neutral'" and skipping directly to a *Mansky* analysis. Pet. App. 12a. But *Mansky* does

not support endless do-overs when the objective itself is unconstitutional, so it matters whether HART's policy is *actually* viewpoint neutral.

Mansky itself made that clear. After noting that restrictions "based on viewpoint are prohibited," the Court emphasized that the petitioner "does not claim" that Minnesota's ban on political apparel inside a polling place "discriminates on the basis of viewpoint on its face." 585 U.S. at 13. Only then did the Court move on: "*[A]ccordingly*," the Court said, "[t]he question" "is whether Minnesota's ban on political apparel is 'reasonable in light of the purpose served by the forum.'" *Id.* (emphasis added) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). After finding that the ban was not reasonable, the Court remanded the case so Minnesota could settle on "a more discernible approach." *Id.* at 22-23. Notably, then, the re-do the Court allowed in *Mansky* made sense only because the political apparel ban was not viewpoint discriminatory; it could be modified and reissued in a constitutionally compliant way. *See id.* The *Mansky* Court answered the question that the Eleventh Circuit simply begged.

The question that must be answered here is whether HART's policy is viewpoint neutral or viewpoint discriminatory. Under this Court's precedent, it's the latter. When the government designates a forum for speech but "denies access to a speaker" because of "the point of view he espouses on an otherwise includible subject," that's unlawful viewpoint discrimination. *Cornelius*, 473 U.S. at 806. So when a transit authority opens up advertising opportunities to the public but rejects an ad "because it's religious," that's

also unlawful viewpoint discrimination. *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring); *id.* at 106 (maj. op.) (restrictions on speech "must not discriminate against speech on the basis of viewpoint").

It does no good for HART to claim that its ban applies to religion as a subject, not a viewpoint. Things aren't that simple. "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." *Rosenberger*, 515 U.S. at 831. While "the government may minimize religious speech incidentally by reasonably limiting a forum like bus advertisement space to subjects where religious views are unlikely or rare," "once the government allows a subject to be discussed, it cannot silence religious views on that topic." *Archdiocese of Wash.*, 140 S. Ct. at 1198 (Gorsuch, J., statement respecting denial of certiorari). So again: If HART allows Tampa General but not St. Joseph's Hospital to run ads for its services simply because St. Joseph's comes from a religious perspective—that's viewpoint discrimination. And when HART allowed "Winter Village" but not "Chanukah on Ice" because the latter ad had a menorah—that's viewpoint discrimination. "[D]iscriminating against religious speech" *is* "discriminating on the basis of viewpoint." *Rosenberger*, 515 U.S. at 831-832.

"Viewpoint discrimination is censorship in its purest form." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) (citation omitted). And "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause

without religion would be Hamlet without the prince." *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 760. Yet where religious speech is "doubly protected by the Free Exercise and Free Speech Clauses," *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022), HART's policy promises double discrimination: not merely a prohibition on a particular viewpoint, but a prohibition on that viewpoint because it is religious. The Court should grant certiorari and reject the Eleventh Circuit's view that such double discrimination can ever be constitutional.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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