ATTACHMENT A

No. 22-11787-JJ

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
for the Middle District of Florida, Tampa Division
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. AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

*Authorities chiefly relied upon are marked with asterisks

Constitution and Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the Hillsborough Area Regional Transit Authority's ("HART's") Advertising Policy ("Policy"), which prohibits advertisements that primarily promote religious faith, violates the Free Speech Clause.

2. Whether HART's Policy prohibiting advertisements that primarily promote religious faith violates the Free Exercise Clause.

INTEREST OF AMICI AND SUMMARY OF ARGUMENT

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 to this brief.

The judgment of the district court should be affirmed. HART's Policy violates the First Amendment rights of Plaintiff Young Israel of Tampa, Inc. ("Young Israel") by prohibiting its "Chanukah on Ice" advertisement because it "primarily promote[s] a religious faith or

[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.

religious organization." R.1-1 at 146. HART suggested that Young Israel remove "the picture of the menorah and all uses of the word 'menorah,'" because it is a "religion-based icon," thereby confirming that an advertisement "for the exact same event" would have been permitted "if presented with secular symbols or emphasizing a secular viewpoint." R.72. at 13, 26-27. That is impermissible viewpoint discrimination, which violates the Free Speech Clause of the First Amendment. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

The Policy likewise violates the free exercise rights of Young Israel because it conditions participation in a generally available government program—advertising within the HART system—on Young Israel self-censoring its religious character and message. The Free Exercise Clause prohibits the government from requiring religious groups to dilute their religious character or message as a condition for participating in a generally applicable program. Under the Free Exercise Clause, religious groups cannot be treated as second-class citizens who can be denied full participation in public life because they seek to promote a religious message. *See Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022); *see also*

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430 (2022) ("[L]earning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

HART's Policy is antithetical to the understanding of the Founders, who viewed participation by religious voices as something to be encouraged because it fostered goods common to all. That tradition of participation by religious adherents in the public square reflects the ideal that "people of many faiths may be united in a community of tolerance and devotion" and can "tolerate and perhaps appreciate" religious viewpoints different from their own. *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014). The risk of controversy cannot justify the exclusion of advertising that seeks to *promote* religious views when an advertisement would be permitted by HART's Policy if it presented a secular or less religious perspective. *See* Brief of Appellant HART ("HART Br.") at 31 (arguing that "an advertisement promoting the sale of tickets to the Broadway show 'The Book of Mormon' is acceptable, while an advertisement for Sunday worship at the Mormon temple is not").

For these reasons, and those set forth by Appellee Young Israel, the judgment of the district court should be affirmed.

ARGUMENT

I. HART'S POLICY VIOLATES THE FIRST AMENDMENT BY DISCRIMINATING AGAINST RELIGIOUS VIEWPOINTS AND DENYING RELIGIOUS GROUPS THE ABILITY TO ADVERTISE BECAUSE OF THEIR RELIGIOUS MESSAGE.

The HART Policy struck down by the district court violates two core commands of the First Amendment. *First*, the Policy violates the Free Speech Clause because it discriminates against religious viewpoints. *Second*, the Policy 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.

We begin with first principles. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend I. These restrictions apply not only to Congress, but also to State and local governments because "[t]he fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *see also Otto v. City of Boca Raton*,

981 F.3d 854, 860–61 (11th Cir. 2020) (First Amendment applies "to states and municipalities as well as to the federal government").

The Free Speech Clause prohibits the government from discriminating "against speech on the basis of its viewpoint," *Rosenberger*, 515 U.S. at 829, and therefore prohibits restrictions on religious perspectives on otherwise permissible subjects, *id.* at 831–32 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993)); *see Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1592 (2022) (government may not "exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination'") (quoting *Good News Club*, 533 U.S. at 112); *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005) (ruling that local government cannot engage in "viewpoint discrimination"). Religious speech is not merely one subject matter that can be isolated from other subjects of discourse in the public square; rather, religious speech is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831; *see Archdiocese of Wash. v. Wash. Transit Auth.*, 140 S. Ct. 1198 (2020) (Gorsuch, J., respecting the denial of certiorari) (same).

Likewise, "[t]he Free Exercise Clause '[p]rotects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hileah*, 508 U.S. 520, 533 (1993)); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). As the Supreme Court reconfirmed earlier this year, "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996. That is, "a government *violates* the Constitution when . . . it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like." *Shurtleff*, 142 S. Ct. at 1594 (Kavanaugh, J., concurring) (citing cases).

As the Supreme Court recently explained, the Free Speech and Free Exercise Clauses "work in tandem." *Kennedy*, 142 S. Ct. at 2421. "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping

protection for expressive religious activities." *Id.* The First Amendment's "double" protection for "religious speech is no accident," but "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.* (citing A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006)). Indeed, "'[i]n Anglo–American history, . . . 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.'" *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U. S. 753, 760 (1995)).

A. HART's Prohibition of Advertisements That "Primarily Promote A Religious Faith or Religious Organization" Is Impermissible Viewpoint Discrimination.

HART's Policy violates the First Amendment because it reflects viewpoint discrimination against religious speakers. At the outset, this is not a case where the government contends that there is a risk that the public may view an advertisement's message as government speech. Indeed, under the Policy, permitted advertising "does not constitute an endorsement by HART . . . of any of the products, services or messages so advertised," and further "HART reserves the right in all circumstances

to require any advertisement to contain a disclaimer indicating that it is not sponsored by, and does not necessarily reflect the views of HART." R.1-1 at 147. Simply put, because this is a case "[w]hen a government does not speak for itself, [the government] may not exclude speech based on 'religious viewpoint.'" *Shurtleff*, 142 S. Ct. at 1593.

HART's rejection of Young Israel's advertisement is religious viewpoint discrimination. The Policy provides that (i) HART "intends to maximize advertising revenue by establishing a favorable environment *to attract a lucrative mix of commercial advertisers*," R.1-1 at 142 (emphasis added), and (ii) separately prohibits "[a]ny advertising, which demeans or disparages an individual or group," *id.* at 144. There is no suggestion that Young Israel's advertisement—which announces a Chanukah-themed ice-skating event—demeans or disparages any individual or group. Rather, the advertisement was rejected because HART concluded that it violated its prohibition on "[a]dvertisements that *primarily promote* a religious faith or religious organization." *Id.* at 146 (emphasis added).

That action violates the First Amendment because HART cannot reject Young Israel's advertisement on account of the group's religious

viewpoint. As the district court below explained, "HART allowed advertisements for a secular holiday event with ice skating and seasonal food, but it disallowed an ice-skating event with seasonal food that was in celebration of Chanukah." R.72 at 26 (citation omitted). In its interactions with Young Israel, "HART expressly suggested edits to the print ad that removed all references to and images of the menorah," a symbol of the miracle of Chanukah. *Id.* As such, the district court concluded that "HART impliedly would have allowed an advertisement of the *exact same event* if presented with secular symbols or emphasizing a secular viewpoint, but it was not allowed if presented with religious symbols or emphasizing a religious viewpoint." *Id.* at 26-27. Thus, HART's objection was not to an advertisement for an ice-skating event, but to an advertisement for an ice-skating event with a religious message.

The conclusion that the Policy is viewpoint discrimination is further confirmed by HART's acceptance of advertisements designed to foster outreach to the community by secular groups such as Alcoholics Anonymous, Ronald McDonald House Charities, and Florida Healthy

Transitions. *See id.* at 27.[2] Thus, outreach to the community is permissible under the Policy, if offered from a secular perspective. But the same advertisements are impermissible if they provide a religious perspective or viewpoint. The First Amendment prohibits that viewpoint discrimination. *See Shurtleff*, 142 S. Ct. at 1593.

Under the Supreme Court's ruling in *Rosenberger*, the Policy impermissibly excludes Young Israel's religious perspective in violation of the First Amendment. In *Rosenberger*, the University of Virginia funded a wide variety of student clubs, but excluded funding for "religious activity," which it "defined as any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 825. The Supreme Court held that the restriction was impermissible viewpoint discrimination because it precluded a religious

[2] Under the Policy, advertisements must be "strictly commercial in nature," R.1-1 at 142, but the advertisement at issue here was not rejected on that ground and, in fact, states that "Admission of $5.00 includes skate rental." R.72 at 12; *see* R.1-1 at 144 ("'Commercial Advertisement' shall mean an advertisement dealing with commercial speech which is an expression that proposes a commercial transaction related solely to an economic interest of the speaker and his or her audience, but which is intended to influence consumers in their commercial decisions and usually involves advertising products or services for sale.")

perspective as to "a variety of subjects [that] may be discussed and considered." *Id.* at 831.

As in *Rosenberger*, a wide variety of topics can be addressed in advertisements under the Policy; indeed, HART "intends to maximize advertising revenue by establishing a favorable environment to attract a *lucrative mix of commercial advertisers*." R.1-1 at 142 (emphasis added). HART's exclusion of advertisements "that primarily promote a religious faith or organization" is no different than the restriction struck down in *Rosenberger*, which prohibited funding for an activity that "*primarily promotes or manifests a particular belie[f]* in or about a deity or an ultimate reality." 515 U.S. at 825 (emphasis added). Under its Policy, HART excluded Young Israel's advertisement asking the community to attend a Chanukah-themed ice-skating event ***not*** because it prohibits advertisements reaching out to the community, but because the advertisement, which includes a Menorah, promotes a religious perspective.

HART defends its Policy by arguing that "an advertisement promoting the sale of tickets to the Broadway show 'The Book of Mormon' is acceptable, while an advertisement for Sunday worship at the Mormon

temple is not acceptable." HART Br. 31. That argument confirms that the Policy discriminates based upon viewpoint. Under HART's view, advertisements for events that *parody* religious belief are permissible, but advertisements for events that *promote* religious belief are not.[3]

HART also points to *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). *See* HART Br. 23-27. In *Lehman*, a plurality of the Supreme Court upheld a ban on political speech without addressing the issue of viewpoint discrimination. 418 U.S. at 304 (plurality op.). HART's reliance on *Lehman* is misplaced. Indeed, HART makes the same argument as the dissent in *Rosenberger*, which likewise pointed to *Lehman* in support of an unduly narrow understanding of viewpoint discrimination under the First Amendment. *Rosenberger*, 515 U.S. at 894, 899 (Souter, J., dissenting) (citing *Lehman*). The *Rosenberger* Court, however, squarely rejected that position, holding that "the dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate

[3] *See* Michael Otterson, Church of Jesus Christ of Latter Day Saints, *Why I Won't Be Seeing the Book of Mormon Musical* (2022), https://newsroom.churchofjesuschrist.org/article/book-of-mormon-musical-column ("While extolling the musical for its originality, most reviewers also make reference to the play's over-the-top blasphemous and offensive language")

against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech." *Id.* at 831.

Further, HART relies (Br. 8), on the decision of the D.C. Circuit in *Archdiocese of Washington v. Washington Metro Area Transit Authority ("WMATA")*, 897 F.3d 314 (D.C. Cir. 2018). In *WMATA*, the D.C. Circuit sought to distinguish *Rosenberger* by arguing that the University of Virginia's funding policy did not involve the "exclu[sion] [of] religion as a subject matter," whereas the restriction in *WMATA* did expressly exclude religion as a subject matter. *Id.* at 325. Other courts, including the Third Circuit, have rejected the D.C. Circuit's analysis. *See Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424 (3d Cir. 2019) (disagreeing with the D.C. Circuit and holding that ban on religious speech as applied to atheist group was impermissible viewpoint discrimination).[4] As the district court below properly concluded, "the

[4] *See also Archdiocese of Wash. v. Metro. Area Transit Auth.*, 910 F.3d 1248 (D.C. Cir. 2018) (Griffith, J., dissenting from denial of rehearing en banc) ("[T]he government . . . violated the First Amendment by prohibiting religious speakers from expressing religious viewpoints on topics that others were permitted to discuss"); *cf. Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 588, 590–92 (7th Cir. 1995) (following *Rosenberger* and holding that a purported ban on

Third Circuit's approach better conforms to the prevailing Supreme Court caselaw on the issue of religious viewpoint discrimination." R.72 at 25 & n.4. Indeed, HART's Policy precisely tracks and is indistinguishable from the policy struck down in *Rosenberger*. *Compare* 515 U.S. at 825 (striking down policy that denied funding to "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'") *with* R.1-1 at 146 (prohibiting "[a]dvertisements that primarily promote a religious faith or religious organization").

B. HART's Prohibition Of Advertisements That "Primarily Promote a Religious Faith or Institution" Violates The Free Exercise Clause.

The Policy also violates the Free Exercise Clause by preventing religious entities from participating in a program that would be open to

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the subject of religion violated the First Amendment by barring religious views on an "otherwise includible subject"—the "holiday season"—while allowing "non-religious" views); *Byrne v. Rutledge*, 623 F.3d 46, 56–57 (2d Cir. 2010) (applying *Rosenberger* to reject a "ban on religious messages" because it "operate[d] not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views on the same subjects"); *Summum v. Callaghan*, 130 F.3d 906, 917–18 (10th Cir. 1997) ("In *Rosenberger*, the Court . . . adopted a broad construction of [viewpoint discrimination], providing greater protection to private religious speech on public property" so that if "the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective." (citation omitted)).

them if they would self-censor their religious character or views.[5] HART has made available for advertising "space located on [HART's] public information pieces, buses, stops or other HART property." *Id.* at 142. Through its Policy, "HART intends to maximize advertising revenue by establishing a favorable environment to attract a lucrative mix of commercial advertisers," *id.*, but it excludes advertising that "primarily promote[s] a religious faith or religious organization." *Id.* at 146.

Under the Free Exercise Clause, religious groups and individuals may not be excluded from programs for which they would be otherwise eligible because of their religious character or their religious message. For example, in *Trinity Lutheran*, the Court struck down the exclusion of a religious school, because of its religious character, from a public grant program for which the school was otherwise fully qualified. 137 S. Ct. at 2022. In doing so, the Supreme Court relied upon *McDaniel v. Paty*, 435 U.S. 618 (1978), a case in which the Supreme Court struck down a Tennessee law that disqualified ministers from a public office under the Free Exercise Clause. 435 U.S. at 626 (plurality opinion). *Trinity*

[5] The district court did not reach this argument, *see* R.72 at 39, but it is an independent basis for affirming the judgment below.

Lutheran explained that the Tennessee law in *McDaniel* violated the Free Exercise Clause because it put a minister to the choice of either (i) "maintaining his role as a minister" or (ii) participating in public office, thereby "effectively penalize[ing] the free exercise of [McDaniel's] constitutional liberties." 137 S. Ct. at 2020 (quoting *McDaniel*, 435 U.S. at 626).

Likewise, in *Espinoza*, the Supreme Court struck down a Montana Constitutional provision that barred parents from accessing scholarship funds for use *at religious schools* that they otherwise would have been able to use to fund their children's private education. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020). The Supreme Court ruled that the Free Exercise Clause prevented States from subsidizing private education but then "disqualify[ing] some private schools solely because they are religious." *Id.* at 2261. That is because the "'*supreme* law of the land' condemns discrimination against religious schools and the families whose children attend them." *Id.* at 2262.

Finally, in *Carson*, the Supreme Court held that Maine could not make a wide range of private schools eligibile to receive Maine tuition assistance payments, but then disqualify certain schools "solely because

of their religious character" because doing so "'effectively penalizes the free exercise' of religion." 142 S. Ct. at 1997. The Court further rejected the argument that the Maine Program avoided conflict with the Free Exercise Clause because it barred the religious schools from receiving funds not "simply based on their religious identity," but "based on the religious use that they would make of [the funding] in instructing children." *Id.* at 1995. Under *Carson*, a State cannot avoid the Free Exercise Clause by defining the scope of a particular program "to subsume the challenged condition," *i.e.*, by defining the program to exclude religious schools. *Id.* at 1999.

HART's Policy cannot be reconciled with this precedent. HART has created a broadly applicable advertising program, but has attempted to define it to prevent entities from participating if those entities seek to advance their religious faith or religious message. HART cannot avoid that conclusion by arguing that Young Israel is free to advertise so long as it deemphasizes the religious nature of its community outreach. Under *Trinity Lutheran*, *Espinoza*, and *Carson*, a religious entity such as Young Israel may not be put to the choice of (1) diluting its message of outreach in support of its religious faith (for example, by eliminating pictures of a

menorah in its proposed advertisement), *see* R.72 at 13, or (2) remaining true to its religious character (for example, by including a religious symbol) and rendering itself ineligible to participate because the government prohibits advertisements that "promote a religious faith or religious organization." R.1-1 at 146. HART cannot require Young Israel to "renounce [the] religious character" of Chanukah on Ice, as it did here. *Trinity Lutheran*, 137 S. Ct. at 2024.

II. HART'S POLICY IS CONTRARY TO AMERICAN TRADITION SUPPORTING RELIGIOUS PERSPECTIVES AND FREE EXERCISE IN THE PUBLIC SQUARE.

As discussed above, the Policy's viewpoint discrimination is *per se* unconstitutional, and its violation of Young Israel's Free Exercise rights cannot be supported under strict scrutiny. In response, HART argues that its Policy is evenhanded and reasonable because, by way of example, it permits advertisements for the sale of tickets to "The Book of Mormon," a performance that parodies a religious belief, but prohibits "an advertisement for Sunday worship at the Mormon Temple." Setting aside this flawed view of viewpoint discrimination, the United States has long treated public professions of religious conviction as a public good that is important to the survival and success of the nation. Indeed, in a pluralist

society, the sharing of religious viewpoints in the public square is not a problem to be avoided, but a core aspect of the rights protected by the First Amendment.

A. The American Tradition of Religious Freedom Invites Religious People and Institutions to be Full Participants in Public Life.

The Policy is contrary to the Founders' view of the role of religion in public life. The Policy requires that religious people mute their core convictions before they can engage in the same speech as non-religious speakers. The American tradition of religious freedom, by contrast, invites religious people and institutions to be full participants in the public square. *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. The Constitution (i) prohibits "governments from discriminating in the distribution of public benefits based upon religious status or sincerity," *id.* at 828, and (ii) "protects not just the right to *be* a religious person, holding beliefs

inwardly and secretly," but also "the right to *act* on those beliefs outwardly and publicly." *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring) (citing cases).

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 "Republican 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 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2195–96 (2003) ("[C]reation of the American republic . . . stimulated concern for religion that would promote republican virtue").

For example, George Washington, in his Farewell Address (written with Alexander Hamilton), identified "Religion and morality" as the "indispensable supports" of "political prosperity." George Washington, *Farewell Address, Sept. 19, 1796*, *George Washington: A Collection* 521 (William B. Allen ed., 1988). President Washington explained that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." *Id.*

His immediate successor, John Adams, likewise wrote that "Religion and Morality alone . . . can establish the Principles upon which Freedom can securely stand." Letter from John Adams to Zabdiel Adams (June 21, 1776), *Adams Family Correspondence, vol. 2, June 1776–March 1778* (L. H. Butterfield ed., 1963). President Adams later exhorted the Massachusetts militia that "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *The Works of John Adams, vol. IX*, 229 (Charles Francis Adams ed., 1853).

To the same effect are the words of the First Congress that enacted the First Amendment. The First Congress also ratified the Northwest

Ordinance, which made the point about religion and moral formation explicitly: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat 50, 52 (1789).[6]

"[P]luralism," John Courtney Murray has noted, is "the native condition of American society." John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* 27 (2005). The Founders recognized that there was a superficial tension between their embrace of religion as a source of public virtue and the diversity of religious sects in the early republic. "The great solution to the republican problem was to promote public virtue *indirectly*, by protecting freedom of speech, association, and religion, and leaving the nation's communities of belief free to inculcate their ideas of the good life, each in their own

[6] The Founders' position that religion was a "public good" went beyond the instrumentalist argument presented here. The Founders considered religion important for its own sake and, as a result, space for religious expression mandated the utmost protection.

way." Michael W. McConnell, *The New Establishmentarianism*, 75 Chi.-Kent L. Rev. 453, 475 (2000).

HART is thus mistaken in its suggestion that Constitution's express protection of Free Exercise is somehow inconsistent with a public role for religion. The First Amendment's Free Exercise guarantee is aimed simultaneously at tolerance and at public virtue. It asks government not only "to achieve inclusivity and nondiscrimination" but also to recognize "the important role that religion plays in the lives of many Americans." *Am. Legion v. Am Humanist Assoc.*, 139 S. Ct. 2067, 2089 (2019) (plurality opinion).

To secure religious pluralism and the public good of religion, the American tradition of religious freedom welcomes all religious people and institutions as full participants in public life. Government 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 from religion while simultaneously harming religion, which "depends on institutions and associations for its transmission." Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of*

Religion, 42 B.C. L. Rev. 771, 799 (2001) ("[T]he privatization of faith and its retreat to the sphere assigned to it by the state will likely be accompanied by a similar retreat of authentically religious associations and by the hollowing out of civil society."). The worry for civil society is that, if religion is limited by law to a private sphere, religious people and institutions will internalize that lesson and stop serving as society's "mediating" structures. *See* Peter L. Berger & Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Michael Novak, ed. 1977).

If permitted, HART's Policy, and others like it, would drive religious "organizations from the public square" and thereby "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). "A free and liberal society, and the goods for which it aims, depend on a busy and crowded public square . . . . The classical liberal hope, remember, is that this kind of competition is more likely than state-sponsored homogenization to nurture civic virtue and produce citizens

oriented toward the common good." Garnett, *A Quiet Faith?*, 42 B.C. L. Rev. at 800.

B. Concerns That Religious Speech May Stir Controversy Cannot Justify Banishment of Religious Viewpoints.

In its brief, HART argues that advertisements with a religious perspective run too great a risk of "unnecessary controversy," which in turn creates a risk of "alienating any riders, potential riders, employees, or advertisers." HART Br. 31-32. Simply put, the risk of "unnecessary controversy" does not justify the abrogation of free speech under the First Amendment or imposes burdens on the free exercise of religion. "That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection." *McDaniel* 435 U.S. at 640 (Brennan, J., concurring); *see also Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination"); *Good News Club*, 533 U.S. at 106 (the government "must not discriminate against speech on the basis of viewpoint"); *Lamb's Chapel*, 508 U.S. at 395 (rejecting argument that exclusion of religious viewpoints was justified as a means to avoid "threats of public unrest and even violence").

Here, the district court explained that HART "impliedly would have allowed an advertisement of the *exact same event* if presented with secular symbols or emphasizing a secular viewpoint, but it was not allowed if presented with religious symbols or emphasizing a religious viewpoint." R.72 at 26–27. Those facts are materially indistinguishable from the circumstances on *Lamb's Chapel*. There, too, the Supreme Court rejected the same justification offered here, namely, that discrimination against religion was justified to reduce the risk of public unrest. The Court explained that this justification "would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject . . . otherwise open[] to discussion on [government] property." 508 U.S. at 396; *see also Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984) (holding that "political divisiveness" could not invalidate inclusion of creche in municipal Christmas display).

Moreover, such concerns are also easily overstated, and, if accepted, would offer a license for secular authorities to strip the public square of religious groups or viewpoints. Religious messages are not inherently more divisive than other messages that would be permitted by HART's Policy. *See* HART Br. 31 (arguing that "an advertisement promoting the

sale of tickets to the Broadway show 'The Book of Mormon' is acceptable, while an advertisement for Sunday worship at the Mormon temple is not acceptable"); Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 413 ("Religious differences . . . have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."). To the contrary, religious expressions in the public square, like ceremonial prayers, "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *Town of Greece*, 572 U.S. at 584. That is so even when the specific religious expression is sectarian in nature, for "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.*; *see also Kennedy*, 142 S. Ct. at 2416 ("The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.").

The alternative—the approach taken by HART—awards a heckler's veto to the critics of religion. It must be remembered that "efforts to soothe the social irritation of religion-related strife [frequently] have the

effect . . . of silencing or excluding from public deliberation those citizens whose views and values are connected to, or emerge from, their religious commitments." Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L. J. 1667, 1710 (2006). The Constitution permits no such thing. "Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class." *Shurtleff*, 142 S. Ct. at 1595 (Kavanaugh, J., concurring).

CONCLUSION

For these reasons, and those set forth by Appellee Young Israel, the judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29 because this brief contains 5,548 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, 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.

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