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 *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, COALITION FOR JEWISH VALUES, AND ETHICS AND RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are religious organizations committed to furthering the First Amendment rights and religious freedom of their constituents and of all Americans. *Amici* have an interest in clarifying the misperception that religion is a mere "topic" or "subject matter," rather than a viewpoint entitled to the most robust First Amendment protections. Additionally, *Amici* have an interest in the establishment of clear protections for the expression of religious viewpoints in government fora, including the religious viewpoints expressed when advertising in public spaces for their events. Absent such clarity, *Amici* and other religious organizations and individuals like them are left to guess whether certain forms of religious expression are protected, at the risk of significant legal expense and distraction from their core religious mission.

Christian Legal Society ("CLS") is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on over 125 law school campuses. Since 1975, CLS's Center for Law & Religious Freedom has worked to protect religious freedom in the courts, legislatures, and public square. CLS believes that civic pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected. CLS filed *amicus curiae* briefs in support of the inclusion of religious speech and religious speakers in *Lamb's Chapel v. Center Moriches Union Free School District*,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution to this brief's preparation. The parties received timely notice of *Amici*'s intent to file this brief.

508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, as recognized in the First Amendment, and that freedom of speech extends to all content and viewpoints without regard to religion.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations, as well as more than 400 Jewish, non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated as *amicus curiae* in many cases that raise issues of importance to the Orthodox Jewish community, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); and *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022).

The Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing *amicus curiae* briefs in defense of equality and freedom for religious institutions and individuals. Cases in which CJV has filed *amicus curiae* briefs include *Fulton*, 593 U.S. 522, and *Yeshiva University v. YU Pride Alliance*, No. 22A184, 2022 WL 4127422 (U.S. Sept. 9, 2022).

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with approximately 13 million members in more than 45,000 churches and congregations. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

SUMMARY OF ARGUMENT

Can a ban on religious speech *because it is religious* ever be "reasonable" in a government forum? This Court has answered that question no fewer than four times over the last thirty years. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *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); *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). These precedents make clear that a government policy that would prohibit an advertisement for a Chanukah-themed ice-skating party, while welcoming the same advertisement without any references to Judaism, is "plainly invalid" viewpoint-discrimination under the First Amendment. Put simply, "a government violates the Constitution when ... it excludes religious persons, organizations, or speech *because of religion*." *Shurtleff*, 596 U.S. at 261 (Kavanaugh, J., concurring) (emphasis altered).

Nonetheless, a divided Eleventh Circuit panel here joined the Ninth and D.C. Circuits in holding that advertisements like Young Israel's may be excluded on the basis that they have a religious "subject matter," rather than a religious viewpoint. *See Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.*, 89 F.4th 1337 (11th Cir. 2024); *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 319 (D.C. Cir. 2018) ("*WMATA*"); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999).

Amici submit this brief to dispel the offensive notion that religion can be reduced to a "topic" or "subject matter" and to address the impact that the current circuit split has on religious speakers such as

Amici, who face a "chilling of individual thought and expression" (*Rosenberger*, 515 U.S. at 835) under local governments' purported authority to restrict religious speech based on nebulous concerns about "disruption and potential controversy" (*DiLoreto*, 196 F.3d at 968).

ARGUMENT

I. RELIGION IS A "VIEWPOINT," NOT MERELY A "SUBJECT MATTER."

Religion is *both* "a vast area of inquiry" (*i.e.*, a subject matter or a topic) *and* a "premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered" (*i.e.*, a viewpoint). *Rosenberger*, 515 U.S. at 830–31. Given the fundamental role that religion plays in the lives of millions of Americans, even "to speak of religious thought and discussion" as a viewpoint is "something of an understatement." *Id*. at 831; *see also id.* ("The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history."). Although religion transcends neat legal categories, it certainly "is not just a subject isolated to itself." *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari); *see also Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 437 (3d Cir. 2019) ("Religion is not only a subject. It's a worldview through which believers see countless issues.").

In choosing to affirm the district court's decision "due to a lack of objective and workable standards" in HART's advertising policy (*Young Israel of Tampa*, 89 F.4th at 1340), the Eleventh Circuit refused to treat

religion as a viewpoint subject to rigorous constitutional protection. The lower court's unwillingness to correct HART's treatment of religion as merely a subject matter denigrates religion and leaves religious organizations like *Amici* with no consistent guidance on their right to fully participate in public life.

This Court's precedents demand a different approach. Just two years ago, this Court recognized that "there is nothing neutral" about a policy, like HART's, that openly privileges the secular over the religious. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1998 (2022). That same Term, this Court held that the exclusion from a public forum of a religious organization's flag because of its religious character "constitutes impermissible viewpoint discrimination ... and violate[s] the Free Speech Clause." *Shurtleff*, 596 U.S. at 258–59 (internal quotation marks omitted). *Carson* and *Shurtleff* built on this Court's earlier decisions holding "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 111–12.

All of these decisions reflect a more fundamental point: "the complex and multifaceted nature of public discourse" makes it impossible to exclude a category like religion on neutral terms. *Rosenberger*, 515 U.S. at 831. Any attempt to do so "reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech." *Id.* But "[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.*

The lower court's decision—like those of the Ninth Circuit and D.C. Circuit before it—reflects a failure to appreciate that there are no neutral means by which to carve out religion as a subject matter or a topic without discriminating against religion as a viewpoint. The court's attempt to sidestep this viewpoint issue—in favor of a narrow resolution based on "the lack of objective and workable standards" in HART's prior advertising policy—merely opens the door to government officials' further foolhardy attempts at carving out religion from government fora.

Excluding religion as a mere subject matter demeans the views of religious organizations like *Amici* in the process. HART's attempt to "prohibi[t] religious content, not religious viewpoints," shows how poorly these government efforts can go. HART Br. at 30, *Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.,* No. 22-11787 (11th Cir. July 25, 2022), Dkt. No. 26.

For example, HART reasoned that, under its policy, "an advertisement promoting the sale of tickets to the Broadway show 'The Book of Mormon' [would be] acceptable, while an advertisement for Sunday worship at the Mormon temple is not acceptable." HART Br., *supra*, at 31. HART categorized the advertisement for Sunday worship as "prohibited religious content" and the advertisement for the "The Book of Mormon" as "a commercial offering from a religious viewpoint." *Id.*

But the supposed "commercial offering from a religious viewpoint" that HART would permit to be advertised on its buses is a secular musical that *demeans* and *belittles* the beliefs of the Church of Jesus Christ of Latter-day Saints. *See* Michael Otterson, *Why I*

Won't Be Seeing the Book of Mormon Musical, Newsroom, The Church of Jesus Christ of Latter-day Saints, https://bit.ly/3QS7Zxy (last accessed on June 24, 2024) (noting the show's "over-the-top blasphemous and offensive language"). Meanwhile, HART would exclude an advertisement for a pro-religious musical performance put on by the very faith group that "The Book of Mormon" ridicules. Permitting secular views that disparage religion while excluding religious views as such is blatant viewpoint discrimination. HART's "Book of Mormon" example highlights that, far from "exclud[ing] religion as a subject matter," its policies are likely to "selec[t] for disfavored treatment those [advertisements] with religious ... viewpoints." *Rosenberger*, 515 U.S. at 830–31.

The Court should grant certiorari to make clear that discrimination against religious speech because it is religious is facially unconstitutional viewpoint discrimination.

II. THERE IS HARM IN ALLOWING THE CIRCUIT SPLIT TO STAND.

The Court should also grant certiorari because "[v]ital First Amendment speech principles are at stake" (*Rosenberger*, 515 U.S. at 835) so long as the circuit split remains unresolved.

Subjecting religious speech to a reasonableness analysis effectively means "granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger*, 515 U.S. at 835. This is a grave "mistake[]," as the Constitution does not permit "the government ... to ferret out and

suppress religious observances even as it allows comparable secular speech." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543–44 (2022).

The Eleventh Circuit's approach burdens religious speakers, who lack clarity on where they can speak religious messages and what exactly they are permitted to say. This uncertainty exposes religious organizations to the risk of significant legal costs if forced to defend their speech or, worse, discourages them from speaking in the first place. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it … to predict which of its activities a secular court will consider religious.").

The Eleventh Circuit's approach also subjects speakers like *Amici* to the vague standards and discretion of the government agencies tasked with deciding whether to permit particular forms of religious expression. As the court acknowledged, this "*ad hoc* decision-making" will be vested in government bureaucrats with no special knowledge of religion. 89 F.4th at 1348–49 (discussing how, for the HART employee responsible for reviewing proposed advertisements, "an advertisement promoting the reading of the Bible would be prohibited, while an advertisement touting the Book of Mormon would be fine because he does not know what that is"). Such "arbitrary discretion … vested in some governmental authority … has the potential for becoming a means of suppressing a particular point of view." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

The biases and proclivities of the individuals and agencies given rein to make reasonableness determinations are evident and should not be permitted to

drive speech policy. For example, the lower court discussed HART's professed concern that the Chanukah party advertisement may cause "a bad experience for [the public bus] customers" forced to lay eyes on a menorah. 89 F.4th at 1340 (quoting 8-2 C.A. App. 4, at 80:16–20). Courts in the Ninth and D.C. Circuits have similarly invoked the supposed "disruption and potential controversy" an advertisement like Young Israel's may cause. *DiLoreto*, 196 F.3d at 968; *see also WMATA*, 897 F.3d at 332 (endorsing government's argument that "running religious ads caused controversy and even had the potential to cause violence"). This is demeaning to religion and religious speakers. And it "undermine[s] a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'" *Kennedy*, 597 U.S. at 541 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)); *see also id.* at 543 ("Respect for religious expressions is indispensable to life in a free and diverse Republic"); *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014) ("Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate" the religious expressions of others).

This case offers an ideal vehicle for the Court to make clear that religious speech—which "the First Amendment doubly protects" as "a natural outgrowth of the framers' distrust of government attempts to regulate religion" (*Kennedy*, 597 U.S. at 523–24)—should not be subject to the prejudices of a particular government employee. Preventing speech simply because it is religious is unconstitutional and hostile to those who speak from a religious viewpoint. And allowing the circuit split to stand creates a chilling effect on religious speakers in the jurisdictions that have allowed

governments to restrict religious speech. "The Constitution[,] and the best of our traditions[,]" (*id.* at 514) counsel that individuals and organizations like *Amici* not be hindered in expressing their "message ... of organizational existence, identity, and outreach" simply because they are religious (*Ne. Pa. Freethought Soc'y*, 938 F.3d at 435).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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