No. 22-11787

In the United States Court of Appeals for the Eleventh Circuit

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff-Appellee,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
No. 8:21-cv-00294-VMC-CPT

MOTION FOR LEAVE TO FILE BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING REHEARING EN BANC

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FEBRUARY 7, 2024

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, and in addition to those persons and entities identified by the Parties, Protect the First Foundation identifies all additional people and organizations with an interest in this case:

1. Barkdull, Annika Boone, *Counsel for Amicus Protect the First Foundation*
2. Jaffe, Erik S. *Counsel for Amicus Protect the First Foundation*
3. Protect the First Foundation, *Amicus Curiae*
4. Schaerr, Gene C., *Counsel for Amicus Protect the First Foundation*
5. SCHAERR | JAFFE, LLP, *Counsel for Amicus Protect the First Foundation*
6. Shoell, Megan, *Counsel for Amicus Protect the First Foundation*

Amicus states that no publicly traded company or corporation has an interest in the outcome of this case or appeal. Fed. R. App. P. 26.1; 11th Cir. R. 26.1.

RULE 29(a)(4)(e) STATEMENT

No party's counsel authored this Motion or the accompanying Brief in whole or in part. Further, no party or party's counsel contributed money that was intended to fund their preparation or submission. Finally, no person, other than *Amicus* or its counsel, contributed money that was intended to fund the preparation or submission of either this Motion or the proposed Brief.

MOTION AND INTEREST OF AMICUS

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and (3), proposed *Amicus* Protect the First Foundation (PT1) moves for leave to file the enclosed *amicus* brief supporting rehearing en banc. Appellee consented to the filing of the brief; Appellant did not consent.

PT1 is a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. PT1 advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views. For the following reasons, this Court should allow PT1 to file its brief.

First, the brief complements the points that Young Israel persuasively makes in its petition and provides several additional points about the proper scope of injunctions in First Amendment cases that will be helpful to the Court's decision regarding rehearing en banc.

Second, as an organization committed to protecting the ability of all religious believers to vindicate their religious freedom rights in court, PT1 has a keen interest in advocating for the right of religious

organizations to engage in religious speech on public property. PT1 urges this court to join the other circuits that have addressed the proper scope of injunctive relief by holding that injunctive relief for First Amendment violations must address the entire "extent of the violation established." *Clement v. California Department of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004). Only by reinstating the district court's original injunction will this Court be able to effectively prohibit government entities from repeating the same constitutional violation under the guise of a new policy. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 185 (2000).

Because PT1's brief will assist the Court in deciding the proper scope of the injunction, the motion should be granted, and the brief should be filed.

Dated: February 7, 2024

Respectfully submitted,

/s/ Gene C. Schaerr

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CERTIFICATE OF COMPLIANCE

This Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 303 words.

This Motion also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)(A) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Office 2016 in 14-point Century Schoolbook font.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF SERVICE

On February 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Gene C. Schaerr
Gene C. Schaerr

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FEBRUARY 7, 2024

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Young Israel of Tampa, Inc. v.
Hillsborough Area Regional Transit Authority

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Amicus states that no publicly traded company or corporation has an interest in the outcome of this case or appeal. Fed. R. of App. P. 26.1; 11th Cir. R. 26.1.

/s/ Gene C. Schaerr
Gene C. Schaerr

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*Authorities upon which *amicus* primarily relies are marked with an asterisk

INTRODUCTION, IDENTITY AND INTEREST OF AMICUS AND SOURCE OF AUTHORITY TO FILE[1]

Federal appellate courts have increasingly started to address the proper scope of injunctions remedying First Amendment violations. For example, in *Rodgers v. Bryant*, the Eighth Circuit considered whether an injunction remedying a First Amendment violation should be limited in its application to the plaintiffs themselves, or whether it should apply state-wide. 942 F.3d 451, 458 (8th Cir. 2019). Similarly, in *Ostergren v. Cuccinelli*, the Fourth Circuit considered whether an injunction remedying First Amendment violations should be limited to the facts of the case before it, or whether injunctive relief should encompass analogous conduct. 615 F.3d 263, 287-90 (4th Cir. 2010). And in *Clement v. California Department of Corr.*, the Ninth Circuit weighed whether a statewide injunction was appropriate or whether the injunction should

[1] Young Israel consented to the filing of this brief, but HART did not. PT1 thus files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and (3) while simultaneously seeking the Court's leave. No party's counsel authored any part of this brief. No party, party's counsel, or person other than *amicus* contributed money to the brief's preparation or submission.

be limited to just the offending defendant. 364 F.3d 1148, 1152-54 (9th Cir. 2004).

In each of these cases, courts have grappled with whether injunctions redressing First Amendment violations should be limited to the facts of the case—as the panel opinion determined here—or whether—as Young Israel espouses and as the Fourth, Eighth and Ninth Circuits held—the injunction should also prohibit defendants from engaging in the same unconstitutional conduct in future instances.

The proper scope of injunctive relief to redress First Amendment violations is a key issue for *Amicus* Protect the First Foundation (PT1), a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. PT1 thus advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

Amicus writes to emphasize two main points. First, the panel erred by declining to reach the viewpoint discrimination question and narrowing the district court's injunction without a requisite finding of abuse of discretion. Second, any injunction seeking to vindicate First

Amendment rights *must* include preventive relief. Both the unmatched importance of the rights at stake and the nature of the injunctive remedy as a mechanism for preventing future violations of those rights necessitate that remedy.

As an organization committed to protecting the ability of all religious believers to vindicate their religious freedom rights in court, PT1 has a keen interest in advocating for the right of religious organizations to engage in religious speech on public property. PT1 urges this court to join the other circuits that have addressed the proper scope of injunctive relief by holding that injunctive relief for First Amendment violations must address the entire "extent of the violation established." *Clement*, 364 F.3d at 1153. Only by granting en banc review and restoring the entirety of the district court's injunction here will this Court be able to effectively prohibit government entities from repeating the same constitutional violation under the guise of a new policy. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 185 (2000).

STATEMENT

Young Israel is an Orthodox Jewish synagogue in Tampa, Florida, that hosts an annual "Chanukah on Ice" celebration as one of its largest methods of outreach to the broader Tampa community. Appellee's Br. 6. In 2020, Young Israel sought to advertise "Chanukah on Ice" with the Hillsborough Area Regional Transit Authority ("HART"). Appellee's Br. 2, 7. HART regularly sells advertising space on its vehicles and bus shelters as a means of "maxim[izing] advertising revenues." Appellee's Br. 9. HART's advertising policy, however, specifically prohibits "[a]dvertisements that primarily promote a religious faith or religious organization." *Id.* Consistent with this policy, HART rejected Young Israel's request to advertise its "Chanukah on Ice" event, concluding that the term "Chanukah" and inclusion of the image of a menorah rendered the advertisement religious in nature. Appellee's Br. 16-18.

Young Israel sued, arguing that HART's religious-ad ban was unconstitutional viewpoint discrimination. Appellee's Br. 18. The district court granted summary judgment to Young Israel, concluding that "HART's Advertising Policy . . . is a denial of Young Israel's right to free speech under the First Amendment." *Id.* The court issued a permanent

injunction enjoining HART "from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization." Appellee's Br. 20.

HART appealed, arguing first that its advertising policy was constitutional and second, that the district court's injunction constituted an abuse of discretion. Appellant's Br. 11-34.

On appeal, the panel affirmed the district court's conclusion that HART's advertising policy violates Young Tampa's constitutional rights. But after concluding that HART's advertising policy was "constitutionally unreasonable" under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), because it "lacked objective and workable standards," the panel declined to reach the core issue of viewpoint discrimination, deciding that the reasonableness holding "provide[d] a sufficient basis on which to affirm the [district court's] judgment." Op. at 17. And because it refused to reach the viewpoint discrimination question, the panel ordered the district court to narrow the injunction "to apply only to HART's current policy." Op. at 29.

SUMMARY OF ARGUMENT

District courts have inherent discretion to fashion an equitable remedy appropriate to the scope of the wrong committed. In cases in which constitutional rights have been infringed, however, that discretion is constrained by the responsibility to not only redress the wrong that has occurred, but to also prevent the reoccurrence of such wrongs. The panel decision recognized this responsibility and acknowledged the appropriateness of the district court's injunction here given its finding of unconstitutional viewpoint discrimination. Op. at 28.

But because the panel opinion declined to reach the issue of viewpoint discrimination and instead addressed only the "more narrow" issue of *Mansky* reasonableness, the panel narrowed the district court's injunction to apply only to HART's current policy. Op. at 29. That was an error for two reasons: the reasonableness holding was not "sufficient" to review the scope of the district court's injunction, and the panel reversed a portion of that injunction without the required finding of an abuse of discretion. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005). This court should grant en banc review to address the issue of viewpoint discrimination and hold that, in cases such as this where the

government infringes important First Amendment rights, appropriate relief must include injunctive relief barring the government from engaging in the same conduct in the future. Failure to include such preventive relief should be considered a *per se* abuse of discretion.

This rule is consistent with the approach taken by the other circuits that have addressed the issue, and is warranted both by the nature of the right at stake and by the nature of the remedy. First Amendment rights are fundamental rights essential to every other form of freedom. As a result, First Amendment rights warrant special protection. Because courts enjoin conduct and do not "strike down" unconstitutional laws, a court cannot adequately protect First Amendment interests without including prohibitions against future illegal conduct. Without such preventive relief, governments would be free to repeat the same constitutional violation in the future. As a result, any resolution of this case that fails to prevent future harm does not adequately vindicate the First Amendment.

The district court's injunction prohibiting HART from engaging in viewpoint discrimination under its current and future advertising policies thus was not an abuse of discretion. Indeed, the panel did not

hold that the district court had erred at all, let alone that it had committed a "clear error in judgment." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005). The panel's decision to narrow the injunction violates this Circuit's precedent, *see id.*, and is too narrow to adequately protect Young Israel from experiencing like discrimination in the future. This Court should grant rehearing and, as Judge Grimberg would have done, decide the viewpoint discrimination question. Grimberg concurrence at 7. "Otherwise," HART "can continue drafting viewpoint discriminatory policies while also failing to reasonably apply them—perpetually evading review of the ultimate constitutional flaw." *Id.*

ARGUMENT

District courts have "inherent equitable power to fashion a remedy appropriate to the wrong committed." *Williams v. City of Dothan*, 818 F.2d 755, 760-61 (11th Cir. 1987). The appropriate "scope of the remedy" depends on "the nature of the violation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Where the violation involves constitutionally-prohibited discrimination, courts have "the duty to render a decree which will so far as possible eliminate the

discriminatory effects of the past as well as bar like discrimination in the future." *United States v. Paradise*, 480 U.S. 149, 183 (1987) (quotation marks and citation omitted). Acting on that duty, the district court here issued an injunction enjoining the defendants from engaging in viewpoint discrimination in the future.

On review, however, the panel opinion declined to reach the issue of viewpoint discrimination, even though two of the panel judges published concurring opinions declaring HART's advertising policy "self-evidently" and "clear[ly]" viewpoint-discriminatory. Newsom concurrence at 1; Grimberg concurrence at 7. As a result, the panel opinion limits the scope of the injunction so that it no longer prohibits HART from enacting future policies that discriminate against religious viewpoints. Grimberg concurrence at 7. The end result is an injunction that fails to adequately protect Young Israel's First Amendment rights.

The en banc court should grant review and restore the full scope of the district court's injunction to clarify (1) the necessity of deciding all issues that directly determine the scope of injunctive relief and (2) the necessity of including preventive relief in all injunctions remedying First Amendment violations.

I. Reaching the viewpoint discrimination question is necessary to review the scope of the district court's injunction and afford Young Israel full relief.

After deciding that HART's advertising policy was constitutionally unreasonable under *Mansky* because it "lacked objective and workable standards," the panel declined to reach the issue of viewpoint discrimination because it believed its holding "provide[d] a sufficient basis on which to affirm [the district court's] judgment." Op. at 17. That conclusion was incorrect and contrary to this Court's precedent.

Courts can avoid constitutional questions only if "answering the question is unnecessary to the adjudication of the claims at hand." *PVC Windoors, Inc. v. Babbitbay Beach Const., N.V.*, 598 F.3d 802, 807 (11th Cir. 2010). Where an issue is determinative of the scope of the relief warranted, however, such an issue must be considered "necessary." Here, a determination of viewpoint discrimination was necessary to support the full relief sought by Young Israel. Indeed, the panel acknowledged that its holding of constitutional unreasonableness was a "more narrow resolution of the case" than if they had considered the issue of viewpoint discrimination. Op. at 29. Because a holding of constitutional unreasonableness applies to only HART's current policy, the panel

concluded that "the permanent injunction need[ed] to be revised" to exclude any prohibition against future conduct. *Id.* Thus, by declining to reach the issue of viewpoint discrimination, the panel inherently "change[d] the calculus for the breadth of the injunction." Op. at 28.

Indeed, the narrowing of the injunction itself shows why addressing the issue of viewpoint discrimination was necessary. If the panel's legal conclusions are unable to support the full scope of the district court's injunction, they are not "sufficient" to support the relief sought by Young Israel. Nor is the issue of viewpoint discrimination superfluous. Because the "nature of the violation" directly determines the scope of the injunctive relief, the court was wrong to conclude that it could decline to reach the issue of viewpoint discrimination.

The panel's attempt at "judicial minimalism" was flawed for another reason. Op. at 17. As this Court has repeatedly held, "[w]hen the district court has issued a permanent injunction," it is not only the issuance of that injunction, but the "scope" of it, that is reviewed for abuse of discretion. *U.S. Commodity Futures Trading Commission v. Southern Trust Metals, Inc.*, 894 F.3d 1313, 1322 (11th Cir. 2018); *see also CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 450 F.3d 505, 517 n.25 (11th

Cir. 2006). Indeed, even when a district court expands an injunction, this Court still will not alter the breadth of the injunction unless it finds the district court has committed a clear error. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1298 (11th Cir. 2002). That holds true even when this Court "would have gone the other way." *SEC*, 408 F.3d at 733.

But here, the panel would *not* have gone the other way: two of three judges said so. Judge Newsom wrote that "HART's policy is self-evidently . . . viewpoint discriminatory," Newsom concurrence at 1, and Judge Grimberg likewise stated that "HART's policy constitutes unconstitutional viewpoint discrimination, and there is no change in the way its policy is administered and applied that can fix this fundamental constitutional flaw," Grimberg concurrence at 6. The panel did not find *any* error in the district court's decision—let alone an abuse of discretion. In the absence of that finding, under this Court's' own precedent, changing the scope of the injunction was error. *See U.S. Commodity Futures Trading Comm'n*, 894 F.3d at 1322.

II. The First Amendment rights at issue here can only be protected by an injunction prohibiting HART from enacting viewpoint discriminatory policies in the future.

This court should also grant en banc review to clarify that it is necessary to include preventive relief in *all* injunctions remedying First Amendment violations. When the government infringes important First Amendment rights, appropriate relief must include injunctive relief barring the government from engaging in the same conduct in the future. Failure to include such preventive relief should be considered a *per se* abuse of discretion. Both the crucial nature of the First Amendment rights at stake and the nature of the injunctive remedy necessitate a rule of preventive relief.

A. The importance of First Amendment rights warrants preventive injunctive relief.

The rights protected by the First Amendment are "implicit in the concept of ordered liberty" and the "indispensable condition[] of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 325-27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). First Amendment rights thus warrant special protection and courts typically apply special rules to remedies for First Amendment violations. For example, "[t]he loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to justify a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In fact, most courts hold that a party showing a "likely violation of his or her First Amendment rights" automatically satisfies all "the other requirements for obtaining a preliminary injunction." *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019). As these cases show, such rules have long been deemed necessary to adequately protect First Amendment rights.

Requiring injunctive relief against future First Amendment violations in cases where a final determination of a constitutional violation has been made is another such rule, and rests on the same First Amendment foundation. *See, e.g.*, *Atlanta Journal & Constitution v. City of Atlanta Department of Aviation*, 322 F.3d 1298, 1312 (11th Cir. 2003) (en banc).

In short, courts must award preventive injunctive relief to adequately protect against future violations of First Amendment rights.

B. The purpose of injunctive relief—to abate current constitutional violations and prevent their re-occurrence—necessitates including preventive relief in injunctions seeking to remedy First Amendment violations.

The nature of injunctive relief also requires the inclusion of preventive relief against future conduct in remedies for First Amendment violations. First, courts enjoin conduct, not government policy. When federal courts declare a law or government policy unconstitutional, they do not "eliminate[] the legal effect of the statute in all contexts." *Jacobsen v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018) (explaining that courts do not "strike down" unconstitutional statutes). Indeed, "federal courts have no authority to erase a duly enacted law from the statute books." *Jacobsen*, 974 F.3d at 1255 (quoting Mitchell, 104 Va. L. Rev. at 936). Instead, a court may "enjoin executive officials from taking steps to enforce [the] statute." *Id.* In other words, the court enjoins "not the execution of the statute, but the acts of the official, the statute notwithstanding." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted).

Because courts cannot strike down an unconstitutional law or policy, a plaintiff who suffers a constitutional injury now also "faces the threat of future injury" due to an illegal policy "ongoing at the time of suit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 185 (2000). To adequately redress such injury, the court's sanction must "abate[] that conduct and prevent[] its recurrence[.]" *Id.* at 186. Thus, by its very nature, "injunctive relief looks to the future," *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965), and it is necessary for the court to enjoin *future* unconstitutional conduct that might be taken under a statute. Without such preventive relief, a judicial injunction aimed at protecting First Amendment rights would be "so narrow as to invite easy evasion." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949).

The judicial power to provide preventive relief necessarily extends beyond the facts presented to the court and encompasses future unconstitutional conduct. "[W]here legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). As scholars have explained, "The preventive injunction . . . has roots deep in the common law. Its purpose is to prevent the defendant from inflicting future injury on the

plaintiff." Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff. L. Rev. 301, 316 n.66 (2004) (quoting Elaine W. Shoban & William Murray Tabb, Remedies: Cases and Problems 246 (2d ed. 1995)). For that reason, too, a proper injunction against First Amendment violations must include future as well as current conduct.

C. Courts—including the Supreme Court—routinely issue and uphold preventive injunctions against future First Amendment violations.

Requiring courts to include preventive relief aimed at future conduct in a remedy redressing a First Amendment violation also aligns with the approach taken by the Supreme Court and other federal appellate courts. For example, in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, the plaintiff sought an injunction prohibiting repetition of the unconstitutional action as a remedy redressing the violation of its free exercise rights, and the Supreme Court instructed the lower courts to issue that injunction. 137 S. Ct. 2012, 2018, 2025 (2017). The Supreme Court articulated the remedy as "injunctive relief prohibiting the [defendant] from discriminating against the Church on [a religious] basis in future grant applications." *Id.* at 2018.

Likewise, in *Atlanta Journal & Constitution v. City of Atlanta Department of Aviation*, this Court upheld an injunction that prohibited future government policies from repeating the First Amendment harm—and it did so in a case where, as here, the Court also found that the policy failed to meet the First Amendment reasonableness standard. 322 F.3d 1298 (11th Cir. 2003) (en banc). After holding that a government policy requiring permits for newspaper distribution on city property violated the First Amendment because it gave city officials "unrestrained discretion" in regulating access to speech, the court not only enjoined application of the existing policy but also prohibited any future policy "that did not explicitly constrain official discretion." *Id.* at 1305, 1312. On appeal, this court expressly "retain[ed] that portion of the injunction." *Id.* at 1312.

The Fourth Circuit likewise recognized that an injunction which did not prevent future First Amendment violations was too narrow and thus constituted an abuse of discretion. In *Ostergren v. Cuccinelli*, the Fourth Circuit held that an injunction remedying a First Amendment violation was too narrow because it "only ratifie[d] [the plaintiff]'s current course of conduct" and did not encompass future analogous action. 615 F.3d 263,

288-90 (4th Cir. 2010). The Fourth Circuit emphasized that the district court's injunction limited itself to remedying the free speech violations that had already occurred and failed to address the other circumstances in which the state's policy would violate free speech. *Id.* As a result, the court concluded that the injunction issued by the district court "contradict[ed] [the court's] First Amendment holding" and "ignor[ed]" the full scope of First Amendment rights. *Id.* The Fourth Circuit thus "conclude[d] that the district court abused its discretion by not 'tailor[ing] the scope of the remedy to fit the nature and extent of the constitutional violation.'" *Id.* (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977)).

This Court should likewise hold that an injunction to vindicate First Amendment rights must encompass future conduct, so as to prevent repetition of the same constitutional violation in the future.

CONCLUSION

In cases in which important constitutional rights have been infringed, the discretion of the court in fashioning an appropriate remedy is constrained by the court's responsibility to prevent the reoccurrence of such wrongs. In narrowing the scope of the district court's injunction, the

panel opinion in this case failed to appropriately protect Young Israel's First Amendment rights. As a result, this court should grant rehearing en banc to clarify (1) the necessity of deciding the issue of viewpoint discrimination and (2) the necessity of including injunctive relief barring the government from engaging in the same conduct in the future in all injunctions remedying First Amendment violations. Without such preventive relief, governments will be free to repeat the same constitutional violation with impunity.

Dated: February 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of Protect the First Foundation as *Amicus Curiae* in Support of Appellees and Affirmance complies with the type-volume limit of Fed. R. App. P. 29(a)(5), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,652 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: February 7, 2024

CERTIFICATE OF SERVICE

On February 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Gene C. Schaerr
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