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 APPELLEE AND AFFIRMANCE

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SEPTEMBER 14, 2022

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. Prince, Joshua J., *Counsel for Amicus Protect the First Foundation*
2. Protect the First Foundation, *Amicus Curiae*
3. Schaerr, Gene C., *Counsel for Amicus Protect the First Foundation*
4. SCHAERR | JAFFE, LLP, *Counsel for Amicus Protect the First Foundation*
5. 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 appellees and affirmance. Appellees consented to the filing of the brief; Appellants 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 case and provides several additional points about the proper scope of injunctions in First Amendment cases that will be helpful to the Court's resolution of this appeal.

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 Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004). Only by upholding the 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).

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: September 14, 2022

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 305 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 September 14, 2022, 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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SEPTEMBER 14, 2022

No. 22-11787

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

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:

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2. Protect the First Foundation, *Amicus Curiae*
3. Schaerr, Gene C., *Counsel for Amicus Protect the First Foundation*
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/s/ Gene C. Schaerr
Gene C. Schaerr

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Rule

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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 Corrections*, the Ninth Circuit weighed whether a statewide injunction was appropriate or whether the

[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.

injunction should 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 HART urges here—or whether—as Young Israel espouses—the injunction should also prohibit HART from engaging in the same unconstitutional conduct in future instances.

The proper scope of injunctive relief to redress First Amendment violations is an issue of great importance to *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.

This brief complements the points that Young Israel persuasively makes in its case and provides several additional points about the proper scope of injunctions in First Amendment cases.

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

SUMMARY OF ARGUMENT

In recent years, courts have grappled with whether injunctions redressing First Amendment violations should be limited to the facts of

the case—as HART urges here—or whether—as Young Israel espouses—the injunction should also prohibit the defendant from engaging in the same unconstitutional conduct in the future.

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, that discretion is constrained by the responsibility to not only redress the wrong that has occurred, but to also prevent the re-occurrence of such wrongs. As a result, this court should hold that in cases when—through law or policy—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 in its injunction. Without such preventive relief, governments would be free to repeat the same constitutional violation in the future. Any resolution of this case that fails to prevent future harm does not adequately vindicate the First Amendment.

Given this conclusion, the district court's injunction prohibiting HART from engaging in viewpoint discrimination under its current and future advertising policies is not an abuse of the district court's discretion. Not only does the disputed portion of the injunction fall well within the court's discretion, it is also necessary to adequately vindicate free speech rights by preventing HART from engaging in the exact same discriminatory conduct in the future.

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 discrimination, the court has "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). When the government infringes important First Amendment rights, this court should hold that 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, long recognized by courts as necessary for First Amendment injunctions, is warranted both by the nature of the right at stake and by the nature of the remedy.

I. 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). Such rules have long been deemed necessary to adequately protect First Amendment rights.

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

The nature of injunctive relief also justifies 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 illegal conduct 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 conduct, the court's sanction must "abate[] that conduct and prevent[] its recurrence[.]" *Id.* at 186. It is thus necessary for the court to enjoin *future* unconstitutional conduct under that 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).

That portion of the injunction that extends beyond the confines of the facts presented to the court and encompasses future unconstitutional

conduct falls within the power of the court to provide preventive relief. "[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). This power encompasses the ability to award preventive relief. Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff. L. Rev. 301, 316 n.66 (2004) ("The preventive injunction . . . has roots deep in the common law. Its purpose is to prevent the defendant from inflicting future injury on the plaintiff.") (quoting Elaine W. Shoban & William Murray Tabb, Remedies: Cases and Problems 246 (2d ed. 1995)).

III. Preventive injunctions against future First Amendment violations are in harmony with current case law.

Requiring the district court to include preventive relief aimed at future conduct in a remedy redressing a First Amendment violation also aligns with the approach taken by several federal appellate courts. For example, in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, the plaintiffs sought and were granted an injunction prohibiting repetition of the unconstitutional action as a remedy redressing the violation of their free exercise rights. 137 S. Ct. 2012, 2018 (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.*

Similarly, 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 Fourth Circuit 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)).

Finally, in *Atlanta Journal & Constitution v. City of Atlanta Department of Aviation*, this circuit upheld an injunction that prohibited future government policies from repeating the First Amendment harm.

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 by giving 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.

In each of these cases, the court upheld or required injunctive relief that addressed the full scope of the First Amendment violation and prevented repetition of the same constitutional violation in the future.

IV. The scope of the district court's injunction against HART was appropriate.

Especially considering these authorities, the district court's injunction prohibiting HART from engaging in viewpoint discrimination under its current or future advertising policies is not an abuse of the district court's discretion. The part of the injunction that HART opposes—that portion enjoining HART from engaging in viewpoint discrimination under its future advertising policies, Appellant's Br. 13—is well within the court's discretion.

HART argues that the injunction is overly broad because "the injunction ought to be tailored to the constitutionality of HART's current policy." Appellant's Br. 13. But the court's injunction appropriately enjoins *conduct* rather than HART's current *policy*. Thus, having found that HART has engaged in viewpoint discrimination, the appropriate remedy for the court is to enjoin HART from engaging in such conduct again rather than merely enjoining HART from enforcing one policy. Such an injunction is appropriately tailored to the scope of the constitutional violation.

HART further argues that "[a]ny future advertising policies that HART might adopt and/or implement were not properly before the District Court." Appellant's Br. 13. Once again, because the court's injunction properly enjoins specific *conduct*—namely, the act of engaging in discrimination against a religious viewpoint—rather than policy, the court does not need to wait to learn the details of HART's future policies. The court should—and did—tailor its injunction to the scope of the *conduct* that constituted the constitutional violation. Here, the court has enjoined HART from engaging in viewpoint discrimination, "notwithstanding" its written policy. *See California*, 141 S. Ct. at 2115.

Finally, were the court to do as HART advocates and narrow its injunction to address only HART's current policy, Appellant's Br. 12-15, the court's injunction would likely be so narrow as to constitute an abuse of discretion. *See Ostergren*, 615 F.3d at 288-90. The defendant should not be able to evade the district court's injunction by superficially changing the wording, but not the substance, of the discriminatory policy. Because the court's injunction here prohibits HART from engaging in the same constitutional violation in the future, regardless of the parties involved, the injunction is not too narrow and appropriately vindicates the important First Amendment interests at stake.

CONCLUSION

In cases where important constitutional rights have been infringed, the discretion of the district court in fashioning an appropriate remedy is constrained by its responsibility to prevent the re-occurrence of such wrongs. As a result, this court should hold that, where government law or policy infringes First Amendment rights, appropriate relief must include injunctive relief barring the government from engaging in the same conduct in the future. Without such preventive relief, governments

would be free to repeat the same constitutional violation with impunity. To prevent that result, the Court should affirm the judgment below.

Dated: September 14, 2022

Respectfully submitted,

/s/ Gene C. Schaerr

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Counsel for Amicus Curiae

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 2,721 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

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