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Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION AND INTERESTS OF AMICUS

The First Amendment sets the United States apart among the world's nations. For centuries, this country has held sacrosanct the rights to speak and preach freely in public spaces, recognizing their importance to the Nation's Founding. This tradition of public religious speech overcame early colonial restrictions, blossoming into a celebrated feature of American religious discourse by the time of the Founding and continuing into the nineteenth century. Those who inherited that tradition, including Jehovah's Witnesses,

or religions receive attenuated legal protections, and our hard-won constitutional guarantees are subordinate to the whims of an official's discretion in public spaces. In short, the district court's decision is contrary to this country's deeply rooted historical practice and longstanding legal protections.

Amicus Protect the First Foundation (PT1) is a 501(c)(3) organization dedicated to preserving—along with other First Amendment rights—the

ARGUMENT

I. The American

the prospect of speech many disfavored or found offensive. And such speech often came in the form of religious preaching by the nonconformists of the day.

By the mid-seventeenth century, the first groups of Puritan settlers had successfully settled in the New World after fleeing religious persecution in England. Before long, they were followed by diverse waves of nonconforming religious believers migrating from the Old World as well. Yet, though early settlers "had suffered long for conscience' sake . . . they soon employed that power to persecute differing consciences." Roger Williams, *The Bloudy Tenent of Persecution* (Edward B. Underhill ed., Hanserd Knollys Soc'y 1848). All too often, early settlers wielded their authority with "equal intolerance" to that of the rulers they had fled in England. Thomas Jefferson, *Notes on the State of Virginia* 157 (William Peden ed., Univ. of N.C. Press 2011) (1785).

As a result, a "near-theocracy" persecuted religious dissenters in Puritan New England, while "state domination" demanded conformity in the Anglican South. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1989). Virginia, for example, criminalized religious dissent through laws

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intended to serve as havens for those fleeing persecution in Puritan colonies. *McConnell*, *supra*, at 1425–26. Other colonies, like New York and New Jersey, tolerated highly diverse religious populations, despite having established churches.

Edwin B. Bronner, *The Failure of the "Holy Experiment" in Pennsylvania, 1684-1699*, 21 Pa. Hist. 93, 94 (1954). Pennsylvania became a beacon for nonconformists, with its founding document proudly declaring that none "shall . . . be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship." William Penn, Frame of Government of Pennsylvania (1682), *reprinted in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3063 (Francis Newton Thorpe ed., 1909). So, much like their forebears, who came to the New World to escape religious persecution in Europe, religious dissenters in the early colonies fled to the mid-Atlantic to escape the threat of arrest, corporal punishment, and even death to the north and south.

B. Charismatic preachers in the Great Awakenings embedded proselytization into America's religious landscape and freedoms.

With new pilgrims came a new appreciation for free religious expression, beginning in the most tolerant colonies and spreading through what would become the early states. Public preaching in particular became a celebrated practice both leading up to the Founding and then after ratification. Itinerant preachers in the First and Second Great

Awakenings—religious revivals that bracketed the Founding—spurred a transformation of American public spaces into fora for religious expression.

Between 1740 and 1760, for example, First Great Awakening preachers—including George Whitefield, Jonathan Edwards, Gilbert Tennent, and James Davenport—addressed thousands of believers across the Eastern seaboard in outdoor marketplaces, fields, and public parks. They preached both loudly and often, making the public nature of prayer a hallmark of American religion by the end of the century. *See* Letter from Abigail Adams to Isaac Smith Jr. (1771),

law, Reverend

preach his first sermon in the state. Samuel Richards Weed, *Norwalk After Two Hundred and Fifty Years* 296 (1902)

allowing him to preach against slavery all over the antebellum South. Benjamin Brawley, *Lorenzo Dow*, 1 J. Negro Hist. 265, 265, 272–73 (1916).

Over time, these itinerants gave birth to numerous denominations

"[s]tatutory oppressions in religion" to enshrine the "natural right[] that the exercise of religion should be free." *Id.*

Fifteen years later, in 1791, the Founders codified their understanding of this "natural right" in the Free Exercise Clause. *Id.* The Clause sparked little debate, reflecting "an unstated consensus" that the text incorporated "the meaning of [the states'] own guarantees of religious freedom." Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 4 (1986). As a result, state constitutional provisions and associated commentary "shed light" on the Clause's original understanding. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting). State constitutions confirm that the right to public proselytization was central to the understanding of free exercise.

Indeed, of the fourteen states that ratified the First Amendment, ten protected "free exercise" in their constitutions

the free exercise of their religion."). And the wording of several states' constitutional protections incorporated public worship. The New Hampshire Bill of Rights guaranteed residents the "right to worship God . . . in

restrained" because of his "religious profession or sentiments." *Id.* at art. II. And South Carolina had perhaps the simplest approach: protecting "religious societies who acknowledge" that "God is publicly to be worshipped." S.C. Const. art. XXXVIII (1778).

These connections the state constitutions drew between free exercise and public preaching were no accident. Virginia is a case in point. Virginia's Bill of Rights—a close textual predecessor of the federal Bill of Rights—provided a blanket guarantee that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Va. Declaration of Rights art. XVI (1776). Building on that broad protection, the Virginia legislature ratified an act declaring attempts to "restrain the profession or propagation of principles" a "dangerous fallacy, which at once destroys all religious liberty." Act for Establishing Religious Freedom, § 1 (1786), *reprinted in* 8 *The Papers of James Madison* 400 (Robert A. Rutland ed., 1973).

What's more, the Founders' writings further clarify their view that protections for public expression were essential to safeguarding free exercise. James Madison argued that restrictions on public religious

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expression are

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Founding and expanding it as the First Amendment was incorporated against the states.

A. Precedents won by Jehovah's Witnesses safeguard the right to proselytize in public places.

The Jehovah's Witness movement began at the end of the nineteenth century as a reverberation of the Second Great Awakening. *See* Gayle Ann Spiers Lasater, *Jehovah's Witnesses*, *in* 2 *The Encyclopedia of Christian Civilization* 1227–28 (George Thomas Kurian ed., 2011). Echoing the

and in doing so, it confirmed two key principles that vindicate proselytizers' rights. First, the right of proselytization extends to parks and other spaces open to the public. Second, public officials may not impose restraints on proselytizers—even time, place, and manner restrictions—by a system of standardless discretion.

B. The Constitution protects the right to proselytize in public spaces.

The first principle confirms a broadly applicable right to preach in public places—and that means all public places. To start, the Supreme Court ensured access to public streets. In *Jamison v. Texas*, 318 U.S. 413 (1943), a case about a proselytizing Witness who ran afoul of a Dallas ordinance prohibiting distribution of advertisements on city streets, the Court rejected the city's claim that it could limit constitutional rights in public. *Id.* at 415–16. Instead, it affirmed that so long as a preacher is "rightfully on a street . . . left open to the public," he "carries with him" his right to express his beliefs. *Id.* at 416.

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334 U.S. 558 (1948), *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

Then, the Court took on public parks. In *Saia v. New York*, for example, it overturned the conviction of a Jehovah's Witness who used an amplifier to proselytize in a public park without police permission. 334 U.S. 558, 559–60 (1948). The Court looked to centuries of Anglo-American practice and tradition to say that both "streets and parks" bear special significance as being "immemorially . . . held in trust for the use of the public.(s.n323)1 (.T)-68 (th)-13 ( )-82 (tru)-1 (st)m4 nce ath ()Tj /TT. (U)-1 (.561003

v. Alabama, the Court straightforwardly applied the constitutional protections

Indeed, this Court has held that First Amendment rights extend even to fora with limited public access, like a publicly owned hospital, *Dallas Ass'n of Cmty. Orgs. for Reform Now v. Dallas Cnty. Hosp. Dist.*, 670 F.2d 629, 630–31 (5th Cir. 1982), and the inside of an airport, *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 832–33 (5th Cir. 1979); *see also Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (holding a blanket ban on solicitation in airport unconstitutional because the commercial nature of airport terminals makes them a public forum). Discovery Green, by contrast, is a public park—as traditional a public forum as they come. The Witnesses' cases thus squarely preclude any at-

public square. But they cannot do so by giving public officials unbridled discretion over what speech is and is not allowed in the public square. In *Poulos v. New Hampshire*, for instance, the Supreme Court explained that a government can't place "complete discretion to refuse" public access in the hands of officials. 345 U.S. 395, 407 (1953); *see also Eaves*, 601 F.2d at 823 (collecting cases "striking down statutes that allow officials excessively wide discretion").

The removals and arrest of Plaintiffs from the Discovery Green involved precisely the kind of standardless discretion the Court forbade in *Poulos*. Defendants weren't applying any restriction on time, place, or manner. The police removed them simply because officials found the content of their speech "offensive." *Dubash v. City of Houston*, No. 4:23-CV-3556, 2024 WL 4351351, at *6 (S.D. Tex. Aug. 26, 2024). Such broad discretion over who is allowed to speak or proselytize runs directly counter to longstanding precedents.

CONCLUSION

Mr. Dubash exercised his First Amendment rights when he engaged in proselytizing efforts in a public park, a space that has "immemorially been held in trust for the use of the public" for those very purposes. *Saia*,

334 U.S. at 561 n.2 (internal citation omitted). The panel should reverse the district court's order dismissing the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 4,805 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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

Dated: February 28, 2025

/s/ Joshua C. McDaniel
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CERTIFICATE OF SERVICE

I certify that on February 28, 2025, I served this document on all parties or their counsel of record via CM/ECF.

Dated: February 28, 2025

/s/ Joshua C. McDaniel
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