NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

HAROLD SHURTLEFF and
CAMP CONSTITUTION,

Petitioners

v.

CITY OF BOSTON and
ROBERT MELVIN, in his official capacity as
Commissioner of the City of Boston
Property Management Department,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Where possible, the [City] seeks to accommodate *all applicants* seeking to take advantage of the City of Boston's *public forums*."[1]

The City of Boston designated its City Hall Flag Poles as one of several "public forums" for "all applicants," and encourages private groups to hold flag raising events at and on the Flag Poles "to foster diversity and build and strengthen connections among Boston's many communities." Over the course of twelve years, the City approved 284 such flag raisings by private organizations, with zero denials, allowing them to temporarily raise their flags on the City Hall Flag Poles for the limited duration of their events. But when Petitioners' Christian civic organization, Camp Constitution, applied to raise its flag during a flag raising event to celebrate the civic contributions of Boston's Christian community, **the City denied the request expressly because Camp Constitution's proposed flag was called "Christian" *on the application form* but, other than a common Latin cross on the flag itself, there is nothing to identify the flag as a "Christian" flag.**

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[1] Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the **City Hall Flag Poles**, infra pp. 7–8 (emphasis added).

The questions presented are:

1. Whether the First Circuit's failure to apply this Court's forum doctrine to the First Amendment challenge of a private religious organization that was denied access to briefly display its flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, conflicts with this Court's precedents holding that speech restrictions based on religious viewpoint or content violate the First Amendment or are otherwise subject to strict scrutiny and that the Establishment Clause is not a defense to censorship of private speech in a public forum open to all comers.

2. Whether the First Circuit's classifying as government speech the brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, unconstitutionally expands the government speech doctrine, in direct conflict with this Court's decisions in *Matal v. Tam*, 137 S. Ct. 1744 (2017), *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

3. Whether the First Circuit's finding that the requirement for perfunctory city approval of a proposed brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a

public forum open to all applicants with hundreds of approvals and no denials, transforms the religious organization's private speech into government speech, conflicts with this Court's precedent in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and Circuit Court precedents in *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020), *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018), and *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004).

PARTIES

Petitioners are Harold Shurtleff and Camp Constitution. (Unless otherwise indicated, Petitioners are referred to collectively herein as "Camp Constitution.")

Respondents are the City of Boston and Robert Melvin, in his official capacity as Commissioner of the City of Boston Property Management Department. (Unless otherwise indicated, Respondents are referred to collectively herein as "Boston" or the "City.")

CORPORATE DISCLOSURE STATEMENT

Petitioner Shurtleff is an individual, and Petitioner Camp Constitution is an unincorporated association and public charitable trust. Neither Petitioner has a parent corporation or publicly held stock owner.

DIRECTLY RELATED PROCEEDINGS

HAROLD SHURTLEFF and CAMP CONSTITUTION, a public charitable trust, Plaintiffs, Appellants, v. CITY OF BOSTON and GREGORY T. ROONEY, in his Official Capacity as Commissioner of the City of Boston Property Management Division, Defendants, Appellees, No. 20-1158 (1st Cir. Judgment Jan 22, 2021).

HAROLD SHURTLEFF, and CAMP CONSTITUTION, a public charitable trust, Plaintiffs, v. CITY OF BOSTON, and GREGORY T. ROONEY, individually and in his official capacity as

Commissioner of the Property Management Department for the City of Boston, Defendants, No. 1:18-cv-11417-DJC (D. Mass. Judgment Feb. 4, 2020).

HAROLD SHURTLEFF, and CAMP CONSTITUTION, a public charitable trust, Plaintiffs–Appellants v. CITY OF BOSTON, and GREGORY T. ROONEY, in his official capacity as Commissioner of the City of Boston Property Management Division, Defendants–Appellees, No. 18-1898 (1st Cir. Judgment June 27, 2019).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES iv

CORPORATE DISCLOSURE STATEMENT iv

DIRECTLY RELATED PROCEEDINGS iv

TABLE OF CONTENTS vi

TABLE OF CITED AUTHORITIES xi

DECISIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

A. Camp Constitution's Flag Raising Request. 2

B. The City's Flag Raising Approvals Under Its Policies and Practices Designating the City Hall Flag Poles a Public Forum. 4

C. The City's Denial of Camp Constitution's Application to Use the City Hall Flag Poles Forum. 14

D. The City's Subsequent Written Flag Raising Policy. 19

II. PROCEDURAL HISTORY 20

REASONS FOR GRANTING THE PETITION 22

I. THE FIRST CIRCUIT'S FAILURE TO APPLY FORUM ANALYSIS TO THE CITY'S POLICY AND PRACTICE INTENTIONALLY CREATING A DESIGNATED PUBLIC FORUM AT AND ON THE CITY HALL FLAG POLES, THEREBY EXCUSING THE CITY'S VIEWPOINT AND CONTENT-BASED CENSORSHIP IN RELIANCE ON THE ESTABLISHMENT CLAUSE, CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS. 22

A. The First Circuit's Novel "*Summum*/*Walker* Test" Is Not Supported by *Summum* or *Walker* and Conflicts With This Court's Forum Doctrine. 22

1. This Court's precedents require forum analysis when the government excludes protected expression from government property designated a "public forum" for "all applicants." 23

a. The City Hall Flag Poles are a designated public forum 26

b. The City's exclusion from its public forum of the Camp Constitution flag solely because it was called a "Christian flag" on the application does not satisfy the requisite standard. 29

2. The First Circuit's application of its novel and rigid "three-part *Summum/Walker* test" to Camp Constitution's requested flag raising conflicts with this Court's forum precedents and unconstitutionally expands the government speech doctrine. 29

B. The First Circuit's Opinion Conflicts With This Court's First Amendment Precedents Regarding Viewpoint Discrimination. 34

C. The First Circuit's Opinion Conflicts With This Court's First Amendment Precedents Requiring Content-Based Speech Restrictions to Satisfy Strict Scrutiny. 37

D. The First Circuit's Opinion Conflicts With This Court's Precedents Holding That the Establishment Clause Is Not a Defense to Private Speech In a Public Forum. 39

II. THE FIRST CIRCUIT'S FAILURE TO APPLY FORUM ANALYSIS TO THE CITY'S POLICY AND PRACTICE INTENTIONALLY CREATING A DESIGNATED PUBLIC FORUM AT THE CITY HALL FLAG POLES, THEREBY EXCUSING THE CITY'S VIEWPOINT AND CONTENT-BASED CENSORSHIP IN RELIANCE ON THE ESTABLISHMENT CLAUSE, CONFLICTS WITH THE FIRST AMENDMENT DECISIONS OF NEARLY EVERY OTHER CIRCUIT. 41

A. The First Circuit's Opinion Conflicts With the Second, Eighth, and Ninth Circuits Regarding Application of the First Amendment Forum Doctrine..... 41

B. The First Circuit's Opinion Conflicts With the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits Regarding Viewpoint and Content-Based Discrimination Against Protected Speech. ... 42

C. The First Circuit's Opinion Conflicts With the Decisions of the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits Holding the Establishment Clause Is No Defense to Viewpoint or Content-Based Discrimination Against Protected Speech. 44

CONCLUSION..... 45

APPENDIX..... 1a

FIRST CIRCUIT OPINION AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS AND DENIAL OF SUMMARY JUDGMENT FOR PETITIONERS, FILED JANUARY 22, 2021 ..... 1a

DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENTS AND DENYING SUMMARY JUDGMENT FOR PETITIONERS, FILED FEBRUARY 4, 2020 .... 41a

FIRST CIRCUIT OPINION AFFIRMING DENIAL OF PRELIMINARY INJUNCTION, FILED JUNE 27, 2019 ..... 60a

DISTRICT COURT ORDER DENYING JUDGMENT ON THE PLEADINGS, FILED MAY 3, 2019 ..... 83a

DISTRICT COURT ORDER DENYING PRELIMINARY INJUNCTION, FILED AUGUST 29, 2018.....103a

JOINT STATEMENT OF UNDISPUTED FACTS, FILED JANUARY 22, 2021.....128a

THE BOSTON GLOBE ARTICLE, *WHY IS BOSTON CITY HALL THE WAY IT IS?* FILED JULY 29, 2019.....161a

CITY OF BOSTON FLAG RAISINGS 2005–2017, FILED JULY 8, 2019 .....173a

EXCERPTS OF GREGORY T. ROONEY DEPOSITION TRANSCRIPT, FILED JULY 8, 2019 .....188a

TABLE OF CITED AUTHORITIES

Cases

Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) 43,44

Archdiocese of Washington v. Washington Metro. Area Transit Auth., 140 S. Ct. 1198 (2020) 36

Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)..... 28

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011)..... 38

Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987)..... 38

Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990)..... 40

Burson v. Freeman, 504 U.S. 191 (1992)..... 37

Byrne v. Rutledge, 623 F.3d 46 (2d Cir. 2010) 43

Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996 (8th Cir. 2012) 43

Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004)..... 43

Church on the Rock v. City of Albuquerque,
84 F.3d 1273 (10th Cir. 1996) 44

City of Boerne v. Flores, 521 US. 507 (1997)..... 37

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) 24,26,27,28,29,35

Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9, 880 F.3d 1097
(9th Cir. 2018)..... iii,42

Good News/Good Sports Club v. Sch. Dist. City of Ladue, 28 F.3d 1501 (8th Cir. 1994) 45

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001).....35,36,39

Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth., 63 F.3d 581 (7th Cir. 1995) 43,44,45

Hill v. Colorado, 530 U.S. 703 (2000).....37,38

Hills v. Scottsdale Unified Sch. Dist. No. 48,
329 F.3d 1044 (9th Cir. 2003) 43,44

Int'l Soc. for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) [*ISKCON*] 23,24,28

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)..... 36

Lubavitch of Ga. v. Miller,
5 F.3d 1383 (11th Cir. 1993) 45

Matal v. Tam,
137 S. Ct. 1744 (2017)..... ii,iii,32,34,41

McCullen v. Coakley, 573 U.S. 464 (2014) 38

Minnesota Voters Alliance v. Mansky,
138 S. Ct. 1876 (2018).....23,24,25,35

NAACP v. Button, 371 U.S. 415 (1963)..... 38

New Hope Family Servs., Inc. v. Poole,
966 F.3d 145 (2d Cir. 2020)..... iii,41,42

Peck v. Upshur Cnty. Bd. of Educ.,
155 F.3d 274 (4th Cir. 1998) 44

Pleasant Grove City v. Summum, 555 U.S. 460
(2009).....ii,21,22,26,29,30,31,32,33,35,41

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 37

Robb v. Hungerbeeler, 370 F.3d 735
(8th Cir. 2004)..... iii,42

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).....35,36,39,40,43

Sable Commc'ns of Cal., Inc. v. FCC,
492 U.S. 115 (1989).....38,39

Shurtleff v. City of Boston, 337 F. Supp. 3d 66
(D. Mass. 2018) 1

Shurtleff v. City of Boston, 928 F.3d 166
(1st Cir. 2019) [*Shurtleff I*]..... 1,21

Shurtleff v. City of Boston, 385 F. Supp. 3d 109 (D. Mass. 2019) 1

Shurtleff v. City of Boston, —F. Supp. 3d.—, No. 18-cv-11417-DJC, 2020 WL 555248 (D. Mass. Feb. 4, 2020) 1

Shurtleff v. City of Boston, 986 F.3d 78 (1st Cir. 2021) [*Shurtleff II*] 1,21,23,31,33,34

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000)..... 38

United Veterans Memorial & Partiotic Ass'n of the City of Rochelle v. City of New Rochelle, 72 F. Supp. 3d 468 (S.D.N.Y. 2014) 31

United Veterans Memorial & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle, 615 F. App'x 693 (2d Cir. 2015) 31

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015)..... ii,21,22,29,30,31,32,33,3441

Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018) iii,31,42

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 25

Constitutional Provisions

U.S. Const. amend. I .....*passim*

U.S. Const. amend. XIV 2,21

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Other Authorities

S. Ct. R. 35.3 4

DECISIONS BELOW

Shurtleff v. City of Boston,

986 F.3d 78 (1st Cir. 2021) (affirming summary judgment) (App. 1a);

—F. Supp. 3d.—, No. 18-cv-11417-DJC, 2020 WL 555248 (D. Mass. Feb. 4, 2020) (granting summary judgment) (App. 41a);

928 F.3d 166 (1st Cir. 2019) (affirming denial of preliminary injunction) (App. 60a);

385 F. Supp. 3d 109 (D. Mass. 2019) (denying judgment on the pleadings) (App. 83a);

337 F. Supp. 3d 66 (D. Mass. 2018) (denying preliminary injunction) (App. 103a).

JURISDICTION

The First Circuit issued its decision on January 22, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District of Massachusetts had jurisdiction pursuant to 28 U.S.C. § 1331.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

"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.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Camp Constitution's Flag Raising Request.

Petitioner Camp Constitution is an all-volunteer association formed in 2009, offering classes and workshops on subjects such as U.S. History, the U.S. Constitution, and current events. (App. 129a.) Petitioner Harold Shurtleff is the founder and Director of Camp Constitution. (*Id.*) Camp Constitution's mission is to enhance understanding of the country's Judeo-Christian heritage, the American heritage of courage and ingenuity, the genius of the United States Constitution, and free enterprise. (*Id.*)

In connection with the September 17, 2017 observance of Constitution Day and Citizenship Day, Camp Constitution[2] desired to commemorate the historical civic and social contributions of the Christian community to the City of Boston, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S.

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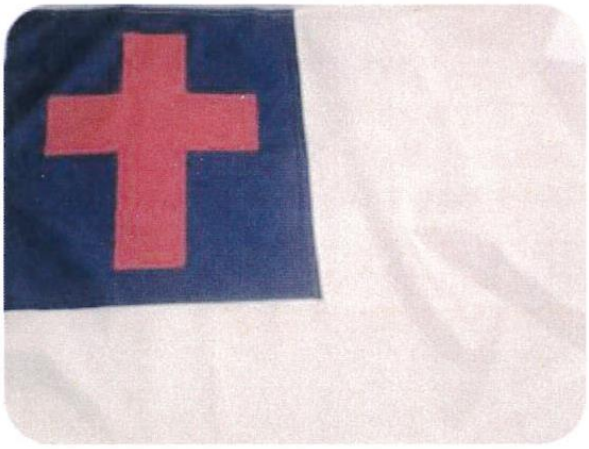
[2] Unless otherwise indicated, Petitioners are referred to collectively herein as "Camp Constitution," and Respondents as the "City" or "Boston."

Constitution, by hosting an event at Boston's City Hall Plaza to feature "short speeches by some local clergy focusing on Boston's history" and "to raise the Christian Flag" on one of Boston's City Hall Flag Poles. (App. 130a–132a.) On July 28, 2017, Shurtleff telephoned and e-mailed Lisa Menino,[3] the City's senior special events official, seeking approval for the flag raising event. (App. 131a–132a.)

Shurtleff's e-mail included a picture of the proposed flag:

This is the flag:



Hal Shurtleff
Director, Camp Constitution

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[3] In record e-mail correspondence Lisa Menino's name appears as Lisa Lamberti, but her name officially had been changed to Menino prior to July 2017. (App. 131a n.2.)

(*Id.*) Menino requested approval from Gregory T. Rooney, Commissioner of the City of Boston Property Management Department,[4] which she expected to receive. (App. 132a, 151a.)

B. The City's Flag Raising Approvals Under Its Policies and Practices Designating the City Hall Flag Poles a Public Forum.

The City has designated some its properties to be available to private persons and groups for events, including Faneuil Hall, Samuel Adams Park, City Hall Plaza, City Hall Lobby, City Hall Flag Poles, and North Stage. (App. 132a–133a.) The City Hall Flag Poles comprise three flag poles on City Hall Plaza, near the entrance to City Hall, as shown here:

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[4] Petitioners originally sued Respondent City and Rooney, in his official capacity as Commissioner of Property Management. Respondent Robert Melvin is Rooney's successor in office and automatically substituted for Rooney herein. *See* S. Ct. R. 35.3. Rooney, however, was Commissioner of Property Management at all material times, including when he gave his deposition testimony on March 20, 2019. (App. 130a.)

(App. 141a, 161a.) The City generally raises the American Flag and the POW/MIA flag on one pole, the Commonwealth of Massachusetts flag on the second pole, and the City of Boston flag on the third. (App. 141a–142a.) But the City regularly allows private groups to raise their own flags on the third flagpole in connection with their flag raising events. (App. 142a–143a.) The City of Boston website states the City's goals for flag raising events:

> *We commemorate flags from many countries and* ***communities*** *at Boston City Hall Plaza during the year.*
>
> **We want to create an environment in the City where everyone feels included**, and is treated with respect. We also want to raise awareness in Greater Boston and beyond about the many countries and cultures around the world. **Our goal is to foster diversity and build and strengthen connections among Boston's many communities**.

(App. 143a (bold emphasis added).)

The City posts on its website written policies and an application process for use of its public fora. (App. 133a–135a.) The online policies provide, in part: "You need our permission if you want to hold a public event at certain properties near City Hall. These locations include . . . **the City Hall Flag Poles** . . . ." (*Id.* (emphasis added).) The policies also provide content-neutral reasons for denying an application, including incompleteness, capacity to contract, unpaid debt to the City, illegality, danger to health or safety, and misrepresentations or prior malfeasance. (*Id.*)

The website allows completion of an application online, or by fax or mail using a printable application form titled, "Property and Construction Management Department City Hall and Faneuil Hall Event Application." (App. 135a–136a.) The printable application identifies the City Hall Flag Poles as one of several public forum options:

Property and Construction Management Department
City Hall and Faneuil Hall Event Application
Boston City Hall, Rm. 811
Boston MA, 02201
Phone: 617-635-4100 Fax: 617-635 -3250

Name of Contact Person:_____

Billing Address: _____

Telephone Number: (_____)-_____

E-Mail Address: _____

Name of Event:_____

Event Date (s):_____

Event Start Time:_____ **a.m./ p.m. Event End Time:**_____ **a.m./ p.m.**

Set-up Date(s): _____

Set-up Start Time:_____ **a.m./ p.m. Break-down Time:**_____ **a.m./ p.m.**

Location:

Faneuil Hall ☐	**Samuel Adams Park ☐**	**City Hall Plaza ☐**
City Hall Lobby ☐	**City Hall Flag Poles ☐**	**North Stage☐**

(*Id.*)

The application also incorporates "**Guidelines for any Person or Group Requesting the Use of** Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or **the City Hall Flag Poles**," stating that the "application applies to any public event proposed to take place at [*inter* alia] the City Hall Flag Poles." (App. 136a (emphasis added).) The guidelines further provide, in part:

> Where possible, the Office of Property and Construction Management **seeks to accommodate *all applicants* seeking to take advantage of the City of Boston's *public forums*.** To maximize efficient use of these **forums** and ensure the safety and convenience of the applicants and the general public, access to these **forums** must be regulated.

(App. 136a–140a (emphasis added).) The form promises a response within ten days and provides eleven possible reasons for denial of a request (similar to the online policies), such as schedule conflict, illegality, danger to health or safety, misrepresentations or prior malfeasance, and various procedural defects. (*Id.*; *see* App. 133a–135a.) Prior to October 2018, the City had no other written policies for use of the City's public forums. (App. 140a.)

The City's Property Management Department receives and processes all applications for public events on City properties, including flag raising events at the City Hall Flag Poles, through the same system. (App. 140a.) The Commissioner has final say over approvals for all events. (App. 141a.)

For the twelve years preceding Camp Constitution's request, from June 2005 through June 2017, the City approved **284 flag raising events, with no record of a denial.** (App. 142a–143a, 149a–150a, 173a–190a.) During the one-year period immediately preceding Camp Constitution's request the City approved **39 flag raisings—**

averaging more than three per month. (App. 142a–143a.)

Approved flag raisings have included ethnic and other cultural celebrations, the arrival of foreign dignitaries, the commemoration of independence or other historic events in other countries, and the celebration of certain causes such as "gay pride." (App. 142a–143a, 173a–187a.) And, while it would be illegal for the City itself to "display[] the flag or emblem of a foreign country upon the outside of a . . . city . . . building ," Mass. Gen. Laws ch. 264, § 8, the City has approved private groups' flag raisings for celebrations of the countries of Albania, Brazil, Ethiopia, Italy, Panama, Peru, Portugal, Puerto Rico, Mexico, as well as China, Cuba, and Turkey, and for the flags of the private Chinese Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, and Boston Pride. (*Id.*)

The City has allowed flags on the City Hall Flag Poles that contain religious language and symbols. (App. 143a–146a.) For example, the City of Boston flag, which is usually raised on one of the Flag Poles, depicts the City Seal, containing the inscription "SICUT PATRIBUS, SIT DEUS NOBIS" which means "God be with us as he was with our fathers":

(App. 143a–144a.) The Turkish flag, which the City has approved at least thirteen times, in 2005, 2006, and 2009–2019, depicts the star and crescent of the Islamic Ottoman Empire:

(App. 144a–145a.) And for at least three years (2016–2018) the City allowed the Bunker Hill Association to raise the Bunker Hill Flag to commemorate the Revolutionary War Battle of Bunker Hill and Bunker Hill Day. (App. 145a–146a.)

The Bunker Hill Flag contains a red cross against a white field on a blue flag, as shown here:

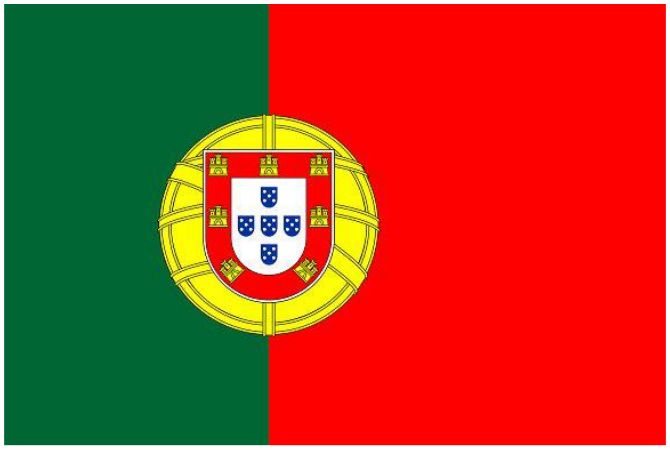
(*Id.*)

The City partnered with a promoter for events on City Hall Plaza, including events approved through the Department of Property Management

application process. (App. 146a–147a.) Flag raisings and other events were featured on the promoter's website, subject to the City's editorial direction. (*Id.*) Commissioner Rooney approved a June 2017 Portuguese Flag Raising Ceremony at City Hall Plaza, involving the raising of the Portuguese flag on the City Hall Flag Poles. (App. 147a–149a.) The promoter's website posted guidance for the flag and ceremony:

> **The dots inside the blue shields represent the five wounds of Christ when crucified. Counting the dots and doubling those five in the center, there are thirty dots that represents the coins Judas received for having betrayed Christ**. . . .
>
> . . . .
>
> Come and join us in honoring the flag of Portugal in what represents the official recognition of the Portuguese community's presence and importance in the State of Massachusetts. Your presence is of key importance to pay this solemn homage to Portugal and the Portuguese emigrant community with grandeur.

(*Id.* (emphasis added).) As described above, the Portuguese flag appears as follows:



(*Id.*)

At the time of Camp Constitution's request in July 2017, the City had no written policies for handling flag raising applications, and **Rooney had never denied a flag raising application**. (App. 149a–150a.) The Department "never really had a lot of discussion prior to [Camp Constitution's] request related to flag raisings in any way." (*Id.*) According to Rooney, "[f]or the most part, [the City] will allow any event" to take place on City Hall Plaza. (App. 149a.)

It was Rooney's usual practice not to see a proposed flag before approving a flag raising event, and Rooney never requested to review or change a flag in connection with approval. (App. 150a.) The City does not require any applicant to give possession or ownership of its flag to the City as a condition for approval. (*Id.*) Rooney has no knowledge of any person believing Boston has

endorsed any organization or subject matter as a result of approving a flag raising event. (*Id.*)

C. The City's Denial of Camp Constitution's Application to Use the City Hall Flag Poles Forum.

Rooney was "concerned about" Camp Constitution's request because he considered it the first "related to a religious flag." (App. 150a–151a.) Rooney "didn't know whether or not it was appropriate to put a religious flag on a public building, so [he] wanted to inquire a little bit more." (*Id.*) After "a couple of weeks" he consulted with the City's law department for guidance "[d]ue to the fact that the flag in question **was described as** a religious flag." (App. 151a (emphasis added).)

In the meantime, Menino updated Shurtleff, "I am just waiting for the approval from my bosses I just sent them another e-mail." (*Id.*) Three weeks after Camp Constitution's request, Shurtleff sent another e-mail inquiry, prompting Menino to e-mail Rooney, "has there been any decision made on Christian flag raising[?]" (*Id.*) Rooney replied, "The Law Department is reviewing our flag raising protocols. Do we have a complete list of organizations that have held flag raisings on the Plaza in recent years?" (*Id.*)

Rooney ultimately decided to deny Camp Constitution's request because "we didn't have a past practice of allowing religious flags, and we weren't going to allow this flag raising." (App. 152a.) On August 25, 2017, Rooney e-mailed Menino,

"Please let them know that the request has been denied. Thanks." (*Id.*) Rooney had no intention of providing an explanation for the denial to Menino or Camp Constitution. (*Id.*) Rooney did not create any record memorializing his reasons for denial. (*Id.*)

On September 5, 2017—more than five weeks after Camp Constitution's request—Menino e-mailed Shurtleff that the request was denied. (*Id.*) Shurtleff requested a reason, prompting Rooney to advise the Boston Mayor's press office and other officials that he would prefer the Law Department, not Menino, to draft a response to Camp Constitution's request for a reason. (App. 152a–153a.)

On September 8, 2017, Rooney e-mailed Shurtleff an explanation for the denial:

> I am writing to you in response to your inquiry as to the reason for denying your request to raise the "Christian Flag". The City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles. This policy and practice is consistent with well-established First Amendment jurisprudence prohibiting a local government from "respecting an establishment of religion." This policy and practice is also consistent with City's legal authority to choose how a limited government resource, like the City Hall flagpoles, is used.

> According to the above policy and practice, the City of Boston has respectfully denied the request of Camp Constitution to fly on a City Hall flagpole the "Christian" flag, as it is identified in the request, which displays a red Latin cross against a blue square bordered on three sides by a white field.
>
> The City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one.

(App. 153–154a.)

Where Rooney referred to Boston's "policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles," he "was referring to past practice" because "up to this point, there had not been any formal written policy regarding flying non-secular flags on the flagpoles." (App. 154a–155a.) By "non-secular" Rooney meant "a religious flag that was promoting a specific religion." (*Id.*) Rooney did not mean he "had determined that the city had declined to fly non-secular or religious flags in the past," but meant that he "had no record of ever having one had been approved." (*Id.*) Rooney did not work from any formal definition of "non-secular" or "religious" when he denied Camp Constitution's request. (App. 155a.)

Rooney admitted that **excluding "religious" flags serves no goal or purpose of the City in allowing flag raising events on the City Hall Flag Poles**, except "concern for the so-called

separation of church and state or the constitution's establishment clause." (App. 157a.) Rooney was concerned Camp Constitution's flag "was a flag that was promoting a specific religion" and "didn't think that it was in the city's best interest to necessarily have that flag flying above City Hall." **His concern was not with the flag itself, but that on the application it was called a "Christian flag." Rooney would not have been concerned if the same flag was called** "the Camp Constitution flag" because then "it would have been the flag of the organization and not a religious symbol." (App. 155a.)

Rooney's concern with allowing the Christian flag was not based on the visual content of the flag ("a red cross on a blue field on a white flag"). If Camp Constitution had not called it the "Christian" flag on the application, Rooney would have treated it no differently from the Bunker Hill flag ("a red cross on a white field on a blue flag") which he had approved. (App. 156a.) Rooney did not consider the Bunker Hill flag a "religious" flag, despite its depiction of a red cross, because "it's to commemorate the Battle of Bunker Hill." (*Id.*) If the Bunker Hill flag had been presented to Rooney as "the Christian flag or a Christian flag, then [Rooney] would . . . have had the same concerns that [he] had about Camp Constitution's flag." (*Id.*)

Rooney would not have been concerned about approving the Portuguese flag raising, had he known about the religious content of its flag, because Portugal is a "sovereign nation." (App. 156a.) Rooney, however, would weigh and think differently

of a request to raise the Vatican flag "because of the fact that although it's a sovereign nation, it's also the Catholic church . . . ."[5] (App. 156a–157a.) Rooney does not know whether the text of the Boston City Seal on the City's flag, translated, "God be with us as he was with our fathers," is a religious statement. (App. 160a.)

On September 13, 2017, Shurtleff submitted to the City a new, written City Hall and Faneuil Hall Event Application, requesting use of City Hall Plaza and the City Hall Flag Poles for the event "Camp Constitution Christian Flag Raising," and proposing dates of October 19, 2017 or October 26, 2017. (App. 157a–158a.) Shurtleff described the event as follows:

> Celebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth. The Christian flag is an important symbol of our country's Judeo-Christian heritage. During the flag raising at the City Hall Plaza, Boston recognizes our Nation's heritage and the civic accomplishments and social contributions of the Christian community to the Commonwealth of Massachusetts, religious tolerance, the

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[5] The City previously had allowed the Vatican flag to be raised over Boston Common, alongside the United States and Massachusetts flags, in connection with the 1979 visit to Boston of Pope John Paul II, four years prior to diplomatic recognition of the Vatican by the United States. (App. 156a–157a.)

> Rule of Law, and the U.S. Constitution, which together gave our Nation an unprecedented history of growth and prosperity. The event program includes a speech by Rev. Steve Craft . . . on the need for racial reconciliation, a speech by Pastor William Levi, formerly of the Sudan, on the blessings of religious freedom in the U.S. and an historical overview of Boston by Hal Shurtleff . . . .

(*Id.*)

On September 14, Camp Constitution's counsel sent a letter to the Boston Mayor, with copies to Rooney and others, enclosing the new Application and requesting approval on or before September 27, 2017. (App. 158a.) The City did not respond to either the new application or counsel's letter. (*Id.*) Only Rooney could have reconsidered Camp Constitution's new request, but Rooney did not respond because the first request "was asked and answered." (*Id.*)

D. The City's Subsequent Written Flag Raising Policy.

In October 2018 the City committed its past policy and practice to a written Flag Raising Policy. (App. 159a.) The new Policy does not require the City to handle requests differently from how they were handled when Camp Constitution submitted its request in July of 2017. (*Id.*) Under the new policy, as in July 2017, the Commissioner of Property Management has final approval authority

for all flag raising requests, "**such decision to be made in the City's sole and complete discretion**." (*Id.* (emphasis added).)

The written Policy incorporates seven Flag Raising Rules. (*Id.*) If an application for a flag raising event satisfies all seven of the Flag Raising Rules, the Flag Raising Policy still reserves to the Commissioner "sole and complete discretion" to deny the application for a reason not reflected in the Flag Raising Rules. (*Id.*) The Flag Raising Policy also reserves to the Commissioner the discretion to approve a flag application even if it does not meet one or more of the Flag Raising Rules. (*Id.*)

The first Rule provides, "At no time will the City of Boston display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." (App. 160a.) Whether a flag is deemed "inappropriate or offensive in nature," supporting "discrimination" or "prejudice," or supporting "religious movements" is **a determination to be made at the Commissioner's discretion, and there are no separate guidelines or criteria for the Commissioner to use to make any such determination**. (*Id.*)

II. PROCEDURAL HISTORY

Camp Constitution commenced this action on July 6, 2018, suing the City for preliminary and permanent injunctive relief, declaratory relief, and damages, on the grounds that the City's denial of Camp Constitution's flag raising request violated

Camp Constitution's right to free speech under the First Amendment, as well as the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[6] (App. 46a–48a.) Camp Constitution also moved for a preliminary injunction, which the district court denied. (App. 103a.) The First Circuit affirmed the denial. *See Shurtleff v. City of Boston*, 928 F.3d 166 (1st Cir. 2019) (App. 60a.)

After discovery the parties filed cross motions for summary judgment. (App. 47a.) Following a hearing the district court denied summary judgment for Camp Constitution and granted summary judgment for the City (App. 41a–59a).

The First Circuit affirmed, holding that notwithstanding the City's express policy designating the City Hall Flag Poles a public forum for private speech to all comers and its practice of never denying any private request to raise a flag during the twelve years prior to the instant denial, the City was justified in denying Camp Constitution's flag under this Court's government speech cases in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). *See Shurtleff v. City of Boston*, 986 F.3d 78 (2021). (App. 1a.) The First Circuit ignored the express public forum policy and the unbroken history of approvals, and instead created a new "three-part

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[6] Camp Constitution also pleaded the City's violations of the cognate provisions of the Massachusetts Constitution.

Summum/Walker test" (App. 16a), thus expanding this Court's government speech cases to swallow up private speech in a public forum.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S FAILURE TO APPLY FORUM ANALYSIS TO THE CITY'S POLICY AND PRACTICE INTENTIONALLY CREATING A DESIGNATED PUBLIC FORUM AT AND ON THE CITY HALL FLAG POLES, THEREBY EXCUSING THE CITY'S VIEWPOINT AND CONTENT-BASED CENSORSHIP IN RELIANCE ON THE ESTABLISHMENT CLAUSE, CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

A. The First Circuit's Novel "*Summum/Walker* Test" Is Not Supported by *Summum* or *Walker* and Conflicts With This Court's Forum Doctrine.

This should be a simple case, but the First Circuit abandoned this Court's forum doctrine, and instead crammed Camp Constitution's Free Speech challenge into a novel and rigid government speech test, relying on *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Canonizing just three of the many factors considered in *Summum* and *Walker*, the First Circuit debuted its very own "three-part *Summum/Walker* test" as

"controlling." *Shurtleff v. City of Boston*, 986 F.3d 78, 88 (2021). This innovation conflicts with this Court's First Amendment forum doctrine decisions in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), and its progenitors.

The First Circuit's government speech finding cannot be correct under this Court's precedents because (1) the City's flag raising application form designates the Flag Poles as a "public forum" for the private speech of "all applicants;" (2) the City never censored a flag from 284 applications over 12 years prior to Camp Constitution's application; (3) the City approved 39 flags (averaging over three per month) in the year prior to Camp Constitution's application; and (4) the raising of other country's flags cannot be the City's speech because it would be a crime under state law for the City to raise another country's flag on City Hall.

1. This Court's precedents require forum analysis when the government excludes protected expression from government property designated a "public forum" for "all applicants."

When the government excludes from its own property private expression subject to the protections of the First Amendment, this Court's precedents require a "forum based approach" for assessing the constitutionality of the speech restriction. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (cleaned up); *see also Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678

(1992) [hereinafter *ISKCON*] ("These cases reflect, either implicitly or explicitly, a 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property."); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.").

When considering a challenge to a speech restriction on government property under the forum doctrine, a court must first decide whether the desired speech is protected by the First Amendment. *Cornelius*, 473 U.S. at 797. Assuming the speech is protected, the court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Then the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

As to "the nature of the forum," the Court's forum doctrine generally recognizes traditional public forums, designated public forums, and nonpublic forums, each with its own "requisite standard":

> In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content

> must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose. In a nonpublic forum, on the other hand—a space that is not by tradition or designation a forum for public communication—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Minn. Voters All., 138 S. Ct. at 1885 (cleaned up).

This Court recognized decades ago that flags are expressive: "The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Thus, under the Court's forum doctrine, Camp Constitution's flag is speech protected by the First Amendment, and the constitutionality of Boston's exclusion of the flag from the City's Flag Poles forum depends on "the nature of the forum"

and whether the City's "justifications for exclusion satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The Flag Poles are a designated public forum, and the City's exclusion of Camp Constitution's flag is unconstitutional under this Court's forum doctrine that was disregarded by the First Circuit.

a. The City Hall Flag Poles are a designated public forum.

Camp Constitution sought the City's approval for a flag raising event at the City Hall Flag Poles pursuant to the City's "public forums" for "all applicants" policy. Under this Court's forum doctrine, determining the constitutionality of the City's exclusion of Camp Constitution from the Flag Poles forum requires proper characterization of the forum based on the access sought by Camp Constitution. *See Cornelius*, 473 U.S. at 801.

As used for displaying the private flags of all comers, the City Hall Flag Poles are a designated public forum. "[A] government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Summum*, 555 U.S. at 469 (cleaned up). Thus, "[a] public forum may be created by government designation of a place or channel of communication for use by the public at large for speech or assembly, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. Courts look to the "policy and practice of the government to ascertain whether it intended to designate a place

not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." *Id.* Under these well-settled principles, the City's express, written policies and documented practices demonstrate that the City intentionally opened a public forum for flag raisings on the City Hall Flag Poles.

The City's official written policies and application forms demonstrate it has intentionally designated several City-owned venues to be public forums for expressive activities and events, including the City Hall Flag Poles. (App. 132a–133a.) The City's printable application guidelines for using the venues—*i.e.,* "the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the **City Hall Flag Poles**"—document that the City "seeks to accommodate **all applicants** seeking to take advantage of the City of Boston's **public forums**." (App. 136a–140a (emphasis added).) Both the City's online and printable applications expressly identify the City Hall Flag Poles as a separate and distinct public forum for events (App. 135a–136a), and the City's website for scheduling flag raising events documents the City's intentionally open policy "to create an environment in the City where everyone feels included" and "to foster diversity and build and strengthen connections among Boston's many communities." (App. 143a.) This explicit identification of the City Hall Flag Poles as one of Boston's "public forums" for "all applicants" demonstrates the City has intentionally opened the Flag Poles for protected private expression through

flag raising events. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("To create a forum of this type, the government must intend to make the property generally available to a class of speakers." (cleaned up)); *ISKCON*, 505 U.S. at 678 ("property that the State has opened for expressive activity by part or all of the public"). Thus, by both name and range of expression permitted, the City has intentionally designated the City Hall Flag Poles a public forum.

In addition to its written policy designating the Flag Poles among its "public forums" for "all applicants," the documented practices of the City pursuant to that policy further demonstrate the City's intent. *See Cornelius*, 473 U.S. at 802. The undisputed factual record shows the City's acceptance of all flag raising applications, consistent with its stated "all applicants" intention: During the twelve years preceding its denial of Camp Constitution's flag raising request, **the City approved 284 flag raising events** at the Flag Poles **with no record of a denial**. (App. 136a–140a, 142a–143a, 149a–150a, 173a–187a.) And in the year immediately preceding Camp Constitution's denial, **the City approved 39 flag raising events**—averaging **more than three per month**. (*Id.*) This history and frequency of flag raising events with no denials (prior to Camp Constitution's request) also demonstrate that the Flag Poles are compatible with expressive activity. *See Cornelius*, 473 U.S. at 802. Thus, the City's express policies and documented practices establish that the City intended to open a designated public forum for flag raisings on the City Hall Flag Poles.

b. The City's exclusion from its public forum of the Camp Constitution flag solely because it was called a "Christian flag" on the application does not satisfy the requisite standard.

The final step of this Court's forum analysis is determining whether the government's justification for exclusion of protected speech satisfies the requisite standard based on the nature of the forum. *See Cornelius*, 473 U.S. at 797. As will be shown below (*infra* Pts. I.B–D), the City's offered justification for exclusion of Camp Constitution from the Flag Poles forum does not satisfy the requisite standard for a designated public forum because this Court's precedents do not allow the City to use the Establishment Clause as a defense to its viewpoint and content-based discrimination against Camp Constitution's "religious" flag.

2. The First Circuit's application of its novel and rigid "three-part *Summum/Walker* test" to Camp Constitution's requested flag raising conflicts with this Court's forum precedents and unconstitutionally expands the government speech doctrine.

The First Circuit's rigid "three-part *Summum/Walker* test" is not faithful to *Summum* or *Walker* and conflicts with this Court's forum doctrine precedents. To be sure, in both *Summum*

and *Walker*, this Court expressly recognized that forum analysis, rather than government speech analysis, applies to nontraditional forums intentionally designated by the government for private expression: "a government entity may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," and "may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 469–70; *see also Walker*, 576 U.S. at 215–16. In *Summum*, however, the Court also reasoned that "**[p]ermanent** monuments displayed on public property typically represent government speech," *id.* at 470 (emphasis added), while contrasting nontraditional forums that were compatible with and intentionally designated for private speech, and therefore subject to forum analysis. *See* 555 U.S. at 478, 480.

The importance of the **permanent** nature of the monuments at issue in *Summum* was again highlighted in *Walker*: "in *Summum*, **we emphasized that monuments were 'permanent,'** and we observed that public parks can accommodate only a limited number of **permanent monuments**." *Walker*, 576 U.S. at 213–14. Indeed, the Court "believed that the speech at issue was **government speech" because** it "found it hard to imagine how a public park could be opened up for the installation of **permanent**

monuments by every person or group." *Id.* (emphasis added).[7]

The *Walker* Court also highlighted some of the other **nonexclusive** considerations deemed relevant to the government speech finding in *Summum*, and in so doing clarified that *Summum* did not provide a formulaic test for government speech. *See Walker*, 576 U.S. at 210 ("In light of **these and a few other relevant considerations**, the Court concluded that the expression at issue was government speech." (emphasis added)), 213 ("That is **not to say that every element** of our discussion in [*Summum*] is relevant here." (emphasis added));

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[7] Although this Court concluded the permanence factor important in *Summum* was not relevant to the Texas specialty license plates under consideration in *Walker*, *see* 576 U.S. at 213–214, it does not follow that the permanence factor is irrelevant to the nature of the Boston Flag Poles forum as posited by the First Circuit. *See Shurtleff II*, 986 F.3d at 90. If *Summum* has any application at all to the instant case, then the lack of permanence of the myriad private flags flown on the City Hall Flag Poles militates against any government speech finding. *Compare United Veterans Memorial & Partiotic Ass'n of the City of Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 475 (S.D.N.Y. 2014) ("United Veterans' flags are displayed for long periods of time (until they become tattered) and then promptly replaced [such that] their presence at the Armory is nearly as constant as that of the park monuments in *Summum*." (emphasis added)), *aff'd*, 615 F. App'x 693 (2d Cir. 2015), *with Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018) ("[D]rawing on the Court's reasoning in *Summum*, which also involved the use of public land—we find it significant that the food vendors participating in the Lunch Program are a merely temporary feature of the landscape, and quite visibly so.").

cf. Matal v. Tam, 137 S. Ct. 1744, 1759 (2017) ("Holding that the monuments in the park represented government speech, we cited **many factors**." (emphasis added)).

Importantly, the *Walker* Court found no intention by Texas to create a public forum in its specialty license plate program because "the State exercises final authority over each specialty license plate **design**," and "**takes ownership** of each specialty plate **design**," and because "license plates have traditionally been used for government speech, are primarily used as a form of government ID, and **bear the State's name**." 576 U.S. at 216 (emphasis added). Likewise, in *Summum*, the government "took ownership of the monument," "[a]ll rights previously possessed by the monument's donor [were] relinquished," and the government maintained the permanent monuments placed in the park. 555 U.S. at 473.

By contrast, Boston does not take ownership and control of any private flag approved for a flag raising, nor did Commissioner Rooney even look at any proposed flag before approving it (or denying it in Camp Constitution's case). (App. 150a, 156a.) Moreover, the City's flag raising policies include a critical component missing from *Summum*'s permanent monument policy and *Walker*'s state license plate policy: an express, written "public forums" designation for "all applicants." (App. 137a.) Boston's express statement of intent combined with an unrebutted record of approving as many flag raisers as apply compel both consideration—using forum analysis—of whether Boston has

intentionally designated the Flag Poles as a public forum for private expression, and the conclusion that it did.[8]

By subjecting Camp Constitution's requested flag raising to its rigid, "three-part *Summum/Walker* test" for government speech in the first instance, the First Circuit's opinion conflicts not only with this Court's forum doctrine precedents (*see supra* Pt. I.A..1), but also with *Summum* and *Walker* because they disclaim any such formulaic application of "the recently minted government speech doctrine," *Summum*, 555 U.S. at 481 (Stevens, J., concurring), and affirm that forum

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[8] The First Circuit's error in disregarding forum analysis was compounded by its fallacious conclusions based on made-up facts. For example, the court imagined that an up-close observer of a flag raising would "see a city employee replace the city flag with a third-party flag." *Shurtleff II*, 986 F.3d at 88. But Commissioner Rooney disclaimed any knowledge of whether a city employee ever raised a private flag. (App. 191a.) The court also imagined that "[a] faraway observer (one without a view of the Plaza)" would necessarily attribute a temporary private flag to the City because it would be flying next to the U.S. and Massachusetts flags. 986 F.3d at 88–89. But City Hall and other buildings surrounding the Plaza are taller than the Flag Poles, so there is no realistic vantage point from which an observer could see the private flag without also seeing the associated flag raising event on the Plaza. (App. 161a.) Finally, it is a crime to "display[] the flag or emblem of a foreign country upon the outside of a . . . city . . . building." Mass. Gen. Laws ch. 264, § 8. No reasonable observer of the regular and frequent occurrence of foreign nations' flags on the Flag Poles would conclude Boston—the Capital City of the Commonwealth—is violating the Commonwealth's criminal law, as opposed to merely accommodating the private speech of the flag raising organizations.

doctrine applies to intentional designations of government property for private speech.[9] To be sure, the First Circuit's opinion expands the government speech doctrine beyond its constitutional bounds. *See Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) ("*Walker* . . . likely marks the outer bounds of the government speech doctrine."). "[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. **If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints**." *Matal*, 137 S. Ct. at 1758 (emphasis added); c*f. Walker*, 576 U.S. at 221 (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing.").

B. The First Circuit's Opinion Conflicts With This Court's First Amendment Precedents Regarding Viewpoint Discrimination.

The final step of this Court's forum analysis is determining whether the government's justification

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[9] The First Circuit ultimately paid lip service to forum analysis, but with circular reasoning, having already committed to its formulaic government speech finding. *See Shurtleff II*, 986 F.3d at 93. ("[A] conclusion that the City has designated the flagpole as a public forum 'is precluded by our government-speech finding.'").

for exclusion of protected speech satisfies the requisite standard based on the nature of the forum. *See Cornelius*, 473 U.S. at 797. The First Circuit's opinion excusing the City's exclusion of Camp Constitution's flag from the Flag Poles forum conflicts with this Court's First Amendment precedents holding viewpoint discrimination in a public forum unconstitutional.

Because the City's explicit policies designate the City Hall Flag Poles a "public forum" for private expression (*supra* Pt. I.A.1.a), the City's restrictions on speech in that forum are subject to the same level of First Amendment scrutiny applicable to traditional public forums. *See Summum*, 555 U.S. at 479. Indeed, in a designated public forum, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All.*, 138 S. Ct. at 1885.

The City's exclusion of Camp Constitution's "religious" flag from the Flag Poles forum is contrary to long-standing precedent that **religion is a viewpoint** on multiple subjects, and that the exclusion of all religious speech on otherwise permissible subjects is unconstitutional viewpoint discrimination. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112, n.4 (2001) ("**Religion is the viewpoint from which ideas are conveyed**. . . . [W]e see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." (emphasis added)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) ("[V]iewpoint discrimination is the proper

way to interpret the University's objections to [religion as a subject matter]."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (holding exclusion of religious speech from forum is viewpoint discrimination); *cf. Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (statement of Gorsuch, J.) ("[O]nce the government allows a subject to be discussed, it cannot silence religious views on that topic.").

Here, the City's reason for denying Camp Constitution's flag raising event was precisely and only because **the City deemed the flag objectionable because it was called a "Christian flag" on the application** (App. 150a–151a, 153a–156a), even though Camp Constitution's purpose—to commemorate the contributions of one of Boston's diverse communities to the City and the Commonwealth—otherwise fit perfectly with the City's express purposes for allowing flag raisings on the City Hall Flag Poles (App. 130a–131a, 143a). **The flag itself was not objectionable to Rooney, but the word "Christian" on the application triggered the denial.** (App. 155a–156a.) **If the flag had not been referred to as "Christian," Rooney would have approved it**. (*Id.*) Given that religion is itself a viewpoint from which other subjects are discussed, *see Good News Club*, 533 U.S. at 112 and n.4, the City's denial of Camp Constitution's application was viewpoint discrimination and unconstitutional in any forum.

C. The First Circuit's Opinion Conflicts With This Court's First Amendment Precedents Requiring Content-Based Speech Restrictions to Satisfy Strict Scrutiny.

Even if the City's exclusion of Camp Constitution's flag from the designated Flag Poles forum was not viewpoint discriminatory (which it was), the City's restriction of Camp Constitution's religious speech was content based. The First Circuit's excusal of the City's content-based discrimination without subjecting it to strict scrutiny conflicts with this Court's First Amendment precedents.

"Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

The City's sole reason for denying Camp Constitution's flag raising was because the City deemed the message communicated by Camp Constitution's flag to be religious. (App. 150a–151a, 153a–156a.) "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulations, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S.

703, 721 (2000). Even if Camp Constitution's request was not denied based on the Christian viewpoint of its flag raising event (which it was; *see supra* Part I.B), it undoubtedly was denied based on the religious "subject matter" of its flag, which is a content-based restriction on speech that is presumptively unconstitutional and subject to strict scrutiny. In his denial, Rooney stated he would only approve "non-religious" flags. (App. 153a–154a.)

It is the City's burden to prove narrow tailoring under strict scrutiny. *See, McCullen v. Coakley*, 573 U.S. 464, 495 (2014); *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). The City cannot because, even if it could articulate a compelling interest for censoring private religious speech (which it cannot), the City's exclusion of private religious speech from its Flag Poles forum otherwise open to "all applicants" would still fail strict scrutiny because the City's policies and actions are not narrowly tailored. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *See Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). A narrowly tailored regulation

of speech is one that achieves the government's interest "without unnecessarily interfering with First Amendment freedoms." *Sable Commc'ns*, 492 U.S. at 126. By prohibiting all "non-secular speech" (App. 153a–156a), the City's policies and practices completely prohibit and unnecessarily interfere with the speech of religious organizations. Such policies are not narrowly tailored and therefore cannot pass strict scrutiny.

D. The First Circuit's Opinion Conflicts With This Court's Precedents Holding That the Establishment Clause Is Not a Defense to Private Speech In a Public Forum.

The City's ostensible interest in avoiding an Establishment Clause violation provides no compelling interest justifying its prohibiting private speech in a public forum otherwise open to all comers. The First Circuit's opinion excusing the City's censorship of Camp Constitution's religious speech on Establishment Clause grounds conflicts with these precedents.

"It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for **sectarian activities**, accompanied by some devotional exercises." *Rosenberger*, 515 U.S. at 842 (emphasis added); *see also Good News Club*, 533 U.S. at 114–15. The same is true of Boston's designated Flag Poles forum that has been made generally available to a wide spectrum of private

organizations expressing private messages associated with their private events. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

Moreover, "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their **neutrality towards religion**." *Rosenberger*, 515 U.S. at 839 (emphasis added). Such a "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, **including religious ones**, are broad and diverse." *Id.* (emphasis added).

The Establishment Clause simply provides no justification for suppressing the religious content of Camp Constitution's speech in a forum that is available to similarly situated private speakers and organizations expressing content from non-religious perspectives. *See id.* (noting this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching governmental programs neutral in design"). The City Hall Flag Poles are available to a broad range of speakers on a variety of topics, as at least 284 different applications were approved without any denial before Camp Constitution's application. (App. 142a–143a, 149a.) Thus, the

City's pretextual interest in avoiding an Establishment Clause violation by granting equal access to Camp Constitution on a neutral basis is not compelling or even legitimate. The First Circuit's opinion acceding to the City's Establishment Clause excuse conflicts with this Court's precedents, *supra*.

II. THE FIRST CIRCUIT'S FAILURE TO APPLY FORUM ANALYSIS TO THE CITY'S POLICY AND PRACTICE INTENTIONALLY CREATING A DESIGNATED PUBLIC FORUM AT THE CITY HALL FLAG POLES, THEREBY EXCUSING THE CITY'S VIEWPOINT AND CONTENT-BASED CENSORSHIP IN RELIANCE ON THE ESTABLISHMENT CLAUSE, CONFLICTS WITH THE FIRST AMENDMENT DECISIONS OF NEARLY EVERY OTHER CIRCUIT.

A. The First Circuit's Opinion Conflicts With the Second, Eighth, and Ninth Circuits Regarding Application of the First Amendment Forum Doctrine.

The First Circuit's pinning its government speech finding on the City's purely perfunctory review of flag raising applications (with no review of the flags themselves) conflicts with the forum doctrine precedents of the Second, Eighth, and Ninth Circuits. Noting that *Matal v. Tam*, 137 S. Ct. 1744 (2017), limited *Summum* and *Walker*, the Second and Ninth Circuits refused to allow the government speech doctrine to swallow up private speech. *See New Hope Family Servs., Inc. v. Poole*,

966 F.3d 145 (2d Cir. 2020) ("[T]he mere fact that government authorizes, approves, or licenses certain conduct does *not* transform the speech engaged therein into government speech."); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) ("[S]peech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some ways allows or facilitates it."); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1104–05 (9th Cir. 2018) ("The District's position would authorize any government to block the expression of views on government property that did not match the government's own favored position . . . . The government speech doctrine has not so swallowed the First Amendment.")

Although preceding *Matal*, the Eighth Circuit correctly distinguished between government and private speech. *See Robb v. Hungerbeeler*, 370 F.3d 735, 744–745 (8th Cir. 2004) (holding adopt-a-highway signs displaying applicant's name not government speech though created and placed by state at applicant's request).

B. The First Circuit's Opinion Conflicts With the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits Regarding Viewpoint and Content-Based Discrimination Against Protected Speech.

The First Circuit's excusal of the City's viewpoint discrimination against Camp

Constitution's religious flag conflicts with the precedents of the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits holding that exclusion of religious speech from a neutral forum is viewpoint discrimination, which is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). *See, e.g.*, *Byrne v. Rutledge*, 623 F.3d 46, 55 (2d Cir. 2010) ("[O]ur task here is greatly simplified by a trilogy of Supreme Court decisions each addressing blanket bans on religious messages and each concluding that such bans constitute impermissible viewpoint discrimination."); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004) (excluding religious perspective from otherwise available forum is unconstitutional viewpoint discrimination); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589, 593-94 (4th Cir. 2004) (same); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (noting religion itself is a viewpoint); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 590 (7th Cir. 1995) ("Any lingering doubts about whether the religious displays prohibited by the Policy are properly characterized as 'viewpoint' rather than 'subject matter' have been dispelled by . . . *Rosenberger* . . . ."); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012) (excluding religious club from facilities use program was unconstitutional viewpoint discrimination); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1051–52

(9th Cir. 2003) (holding religion itself is a viewpoint and discriminating against religious perspective on otherwise permissible subject matter is viewpoint discrimination); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279-80 (10th Cir. 1996) (discrimination against religious group's speech in a government-opened forum is impermissible viewpoint discrimination).

C. The First Circuit's Opinion Conflicts With the Decisions of the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits Holding the Establishment Clause Is No Defense to Viewpoint or Content-Based Discrimination Against Protected Speech.

The First Circuit's acceding to the City's asserted Establish Clause rationale for excluding Camp Constitution's religious flag from the Flag Poles forum conflicts with the decisions of the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits. *See, e.g., Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 284 (4th Cir. 1998) (holding Establishment Clause does not justify exclusion of religious speech from otherwise neutral forum created by government); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992) (holding Establishment Clause "may not be used as a sword to justify repression of religion or its adherents from any aspect of public life"); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 592–93 (7th Cir. 1995) (holding Establishment Clause does not justify exclusion of religious speech

from otherwise neutral forum created by government); *Good News/Good Sports Club v. Sch. Dist. City of Ladue*, 28 F.3d 1501, 1508–10 (8th Cir. 1994) (holding Establishment Clause does not justify religious viewpoint discrimination); *Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1389 (11th Cir. 1993) (holding Establishment Clause does not justify exclusion of religious speech from otherwise neutral forum created by government).

CONCLUSION

The First Circuit's decision disregards this Court's First Amendment forum doctrine and unconstitutionally expands the government speech doctrine, in direct conflict with this Court's precedents and the precedents of nearly every other Circuit. The City's exclusion of Camp Constitution's flag (solely because it was referred to as "Christian" on the application) from its designated Flag Poles forum, which is otherwise open to all comers, violates the First Amendment and is not justified by the Establishment Clause. For all these reasons, the Petition should be granted.

Dated this June 21, 2021.

Respectfully submitted,

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APPENDIX

FIRST CIRCUIT OPINION AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS AND DENIAL OF SUMMARY JUDGMENT FOR PETITIONERS, FILED JANUARY 22, 2021

986 F.3d 78
United States Court of Appeals, First Circuit.

Harold SHURTLEFF and Camp Constitution, a public charitable trust, Plaintiffs, Appellants,
v.
CITY OF BOSTON and Gregory T. Rooney, in his Official Capacity as Commissioner of the City of Boston Property Management Division, Defendants, Appellees.

No. 20-1158
|
January 22, 2021

***81** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. Denise J. Casper, U.S. District Judge]

Attorneys and Law Firms

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Before Lynch, Selya, and Lipez, Circuit Judges.

Opinion

SELYA, Circuit Judge.

***82** This case comes before us for a second time, albeit in a different posture. The issues are much the same, though presented in sharper focus on a better-developed record. As such, they conjure up what might be described, in a turn of phrase popularly attributed to Lawrence "Yogi" Berra, as a sense of "déjà vu all over again."[1]

[1] We say "popularly attributed to" because at least one scholar has declared that "although this [phrase] is commonly cited as a 'Berra-ism,' Yogi Berra denies ever saying it." Ralph Keyes, "Nice Guys Finish Seventh": False Phrases, Spurious Sayings, and Familiar Misquotations 152 (1992).

The case has its genesis in a suit filed by plaintiffs Harold Shurtleff and Camp Constitution in which they complained that the defendants — the City of Boston and Gregory T. Rooney, in his official capacity as Commissioner of Boston's Property Management Department (collectively, the City) — trampled their constitutional rights by refusing to fly a pennant, openly acknowledged by the plaintiffs to be a "Christian Flag," from a flagpole at Boston City Hall. The district court granted summary judgment in favor of the City. See Shurtleff v. City of Bos. (Shurtleff III), No. 18-CV-11417, ——F.Supp.3d ——, ——, 2020 WL 555248, at *6 (D. Mass. Feb. 4, 2020). Concluding, as we do, that the government speech doctrine bars the maintenance of the plaintiffs' free speech claims and that their remaining claims under the Establishment Clause and the Equal Protection Clause lack bite, we affirm.

I. BACKGROUND

We begin by rehearsing the relevant facts (most of which are undisputed, though the inferences from them are not) and the travel of the case. The City owns and manages three flagpoles in an area in front of City Hall referred to as City Hall Plaza. The three flagpoles are each approximately eighty-three feet tall and are prominently located in front of the

entrance to City Hall — the seat of Boston's municipal government. Ordinarily, the City raises the United States flag and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Upon request and after approval, though, the City will from time to ***83** time replace its flag with another flag for a limited period of time.

Such requests are typically made by a third party in connection with an event taking place within the immediate area of the flagpoles. In welcoming these third-party banners, the City's website proclaims that the City seeks to "commemorate flags from many countries and communities at Boston City Hall Plaza during the year" (emphasis in original). The opportunity to display these kinds of flags was created in order to establish "an environment in the City where everyone feels included, ... to raise awareness in Greater Boston and beyond about the many countries and cultures around the world[, and] to foster diversity and build and strengthen connections among Boston's many communities."

In addition to these flag-raisings, the City also allows organizations to hold events in several locations near City Hall. Endeavoring to educate those who may be interested in hosting such an event, the City has published event guidelines on its website. The guidelines make clear that people need the City's permission to hold events at City-owned properties and direct interested parties to an application form.

The application form (which is available either online or as a document) allows applicants to designate the location at which they wish to hold an event, listing six options: Faneuil Hall, Sam Adams Park, City Hall Plaza, the City Hall Lobby, the City Hall Flag Poles, and the North Stage. Although those interested in hosting a flag-raising event must submit an application form, neither the electronic nor the written version of the form mentions the option of raising a flag on any of the City's three flagpoles.

Once the City receives an application, its policy and practice are to perform an initial review. The purpose of this review is in part to ensure that there are no conflicting events occupying the same space, that the application is complete and accurately describes the proposed event, that the event would not endanger the public, and that other administrative requirements have been satisfied.

The obligation to review and act upon applications falls into Rooney's domain. Before a flag-raising event is approved, Rooney must determine that the City's decision to raise a flag is consistent with the City's message, policies, and practices. Each applicant submits a short description of the flag that it wishes to hoist (e.g., "Portuguese Flag"), and it is Rooney's invariable practice to act upon the flag-raising request without seeing the actual flag. The record makes manifest that Rooney has never sought to look at a flag before approving an application. If Rooney concludes that the event meets the City's standards, he then approves the

flag-raising event. And if a flag-raising event is disapproved, the City offers the applicant the opportunity to hold the proposed event, without the flag-raising, either at City Hall Plaza or at some other location.

In a twelve-year period (from June 2005 through June 2017), the City approved 284 flag-raising events that implicated its third flagpole. These events were in connection with ethnic and other cultural celebrations, the arrival of dignitaries from other countries, the commemoration of historic events in other countries, and the celebration of certain causes (such as "gay pride"). The City also has raised on its third flagpole the flags of other countries, including Albania, Brazil, Ethiopia, Italy, Panama, Peru, Portugal, Mexico, as well as China, Cuba, and Turkey. So, too, it has raised the flags of Puerto Rico and private organizations, such as the Chinese Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, ***84** and Boston Pride. Broadly speaking, we group these approvals as approvals for "the flags of countries, civic organizations, or secular causes."

Against this backdrop, we introduce the plaintiffs. Camp Constitution is an all-volunteer association that seeks "to enhance understanding of the country's Judeo-Christian moral heritage." Shurtleff is the founder and director of Camp Constitution. In July of 2017, the plaintiffs emailed Lisa Menino, the City's senior special events official, seeking leave to fly their own flag over City Hall Plaza. In their

words, the proposed event would "raise the Christian Flag" and feature "short speeches by some local clergy focusing on Boston's history."

At the time of this request, the City had no written policy for handling flag-raising applications. What is more, Rooney had never before denied a flag-raising application. On this occasion, though, the plaintiffs' request "concerned" Rooney because he considered it to be the first request he had received related to a religious flag.

Of course, some of the flags that the City had raised contained religious imagery. The Portuguese flag, for instance, contains "dots inside blue shields represent[ing] the five wounds of Christ when crucified" and "thirty dots that represent[ ] [sic] the coins Judas received for having betrayed Christ." As another example, the Turkish flag situates the star and crescent of the Islamic Ottoman Empire in white against a red background. Indeed, the City's own flag includes a Latin inscription, which translates as "God be with us as he was with our fathers." None of the flags that the City had previously approved, however, came with a religious description.

Mulling the plaintiffs' application, Rooney conducted a review of past flag-raising requests and determined that the City had no past practice of flying a religious flag. He proceeded to deny the plaintiffs' flag-raising request. In response to the plaintiffs' inquiry into the reason for the denial, Rooney responded that the City's policy was to refrain respectfully from flying non-secular third-

party flags in accordance with the First Amendment's prohibition of government establishment of religion. Rooney offered to fly some non-religious flag instead. The plaintiffs spurned this offer.

In September of 2017, Shurtleff once again requested permission for a flag-raising event at City Hall Plaza. This time, he submitted a flag-raising application that titled the event as "Camp Constitution Christian Flag Raising." The event, which was intended to "[c]elebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth," would feature three speakers: Reverend Steve Craft (who would speak on the need for racial reconciliation), Pastor William Levi (who would speak on "the blessings of religious freedom in the U.S."), and Shurtleff himself (who would present a Boston-centric historical overview). Believing that its response to the plaintiffs' first flag-raising request was self-explanatory, the City chose not to respond further.

About a year later, the City embodied its past policy and practice in a written Flag Raising Policy. This policy includes seven flag raising rules, the first of which forbids the "display [of] flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements."

On July 6, 2018 — roughly three months before the City adopted its written Flag Raising Policy — the

plaintiffs sued the City in the federal district court, seeking injunctive relief, a declaratory judgment, ***85** and money damages. Three days later, they moved for a preliminary injunction. The district court denied the plaintiffs' motion, see Shurtleff v. City of Bos. (Shurtleff I), 337 F. Supp. 3d 66 (D. Mass. 2018), and we affirmed, see Shurtleff v. City of Bos. (Shurtleff II), 928 F.3d 166 (1st Cir. 2019). Back in the district court, the parties conducted discovery and eventually cross-moved for summary judgment. The district court heard arguments and, in a comprehensive rescript, granted the City's motion and denied the plaintiffs' cross-motion. See Shurtleff III, —— F.Supp. 3d at ——, 2020 WL 555248, at *6. This timely appeal followed.

II. ANALYSIS

The plaintiffs assign error to the district court's grant of summary judgment. Specifically, they challenge the court's holding that the City's display of third-party flags on the City Hall flagpole constitutes government speech, not subject to most First Amendment restrictions. In their view, the City's flagpoles comprise a public forum, thus consigning the City's content-based restriction of plaintiffs' speech to strict scrutiny (which they say the restriction cannot pass). Relatedly, they contend that the City's permitting process for the raising of third-party flags vests in government officials unbridled discretion to approve and deny protected speech and, thus, imposes an unconstitutional prior restraint on speech. Finally, they contend that the City's refusal to fly a religious flag transgresses both the Establishment Clause and the Equal Protection

Clause.

The City urges us to reject each and all of these contentions and simply to affirm the district court's rulings. It is joined by a group of amici, who have filed a helpful brief in support of the judgment below.

We afford de novo review to a district court's entry of summary judgment. See Dávila v. Corporación De P.R. Para La Difusión Pública, 498 F.3d 9, 12 (1st Cir. 2007). In conducting this tamisage, we assess the facts in the light most flattering to the nonmovants (here, the plaintiffs) and draw all reasonable inferences to their behoof. See id. Summary judgment is appropriate only when the record demonstrates that there is no genuine issue as to any material fact and confirms that the movants are entitled to judgment as a matter of law. See Morelli v. Webster, 552 F.3d 12, 18 (1st Cir. 2009). That cross-motions for summary judgment were simultaneously adjudicated by the district court does not alter the applicable standards of review. See Blackie v. Maine, 75 F.3d 716, 720-21 (1st Cir. 1996).

With these parameters in place, we turn to the plaintiffs' asseverational array, taking their arguments sequentially. At the outset, though, we pause to say a few words about the relevance of our earlier opinion (Shurtleff II).

A. Our Earlier Opinion.

We think it useful to center our Shurtleff II opinion within the preliminary injunction framework. That framework anticipates a four-part inquiry, see Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 9 (1st Cir. 2013); Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996), requiring a district court to evaluate "the movant's likelihood of success on the merits; whether and to what extent the movant will suffer irreparable harm in the absence of preliminary injunctive relief; the balance of relative hardships, that is, the hardship to the nonmovant if enjoined as opposed to the hardship to the movant if no injunction issues; and the effect, if any, that either a preliminary injunction or the absence of one will have on the public interest," Ryan v. U.S. Immig. & Customs Enf't, 974 F.3d 9, 18 (1st Cir. 2020). ***86** Among these four factors, "[t]he movant's likelihood of success on the merits weighs most heavily in the preliminary injunction calculus." Id. As we have explained, "[i]f the movant 'cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.' " Id. (quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)).

In Shurtleff I, the district court denied the plaintiffs' threshold motion for a preliminary injunction. See 337 F. Supp. 3d at 79. The court determined, among other things, that the plaintiffs had not shown a likelihood of succeeding on the merits of their claims. See id. at 78. On appeal, we affirmed this determination, concluding that the district court's appraisal was not an abuse of discretion. See

Shurtleff II, 928 F.3d at 171.

The fact that Shurtleff II upheld the district court's determination that the plaintiffs were unlikely to prevail on the same claims that they now pursue is not determinative of either the issues that were before the district court in Shurtleff III or the issues that confront us here. There is, after all, a salient distinction between a decision granting or denying a preliminary injunction and a final decision on the merits (such as the entry of summary judgment). At the preliminary injunction stage, "an inquiring court need not conclusively determine the merits of the movant's claim; it is enough for the court simply to evaluate the likelihood vel non that the movant ultimately will prevail on the merits." Ryan, 974 F.3d at 18.

Here, however, the appealed decision is one on the merits. In Shurtleff III, the district court had to determine whether the City had shown that there were no genuine issues of material fact and, if so, that it was entitled to judgment as a matter of law. See Morelli, 552 F.3d at 18. Moreover, the court had to make this determination on a record that was considerably better developed than the record available to it at the preliminary injunction stage. See Univ. of Tex. v. Camenisch, 451 U.S. 390, 395-96, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Thus, our decision in Shurtleff II, which was at most a validation of the district court's prediction of probable outcomes, see Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 238 (1st Cir. 1986), could inform the district court's subsequent summary

judgment decision but could not control it, see Univ. of Tex., 451 U.S. at 395, 101 S.Ct. 1830.

Shurtleff II relates to the current appeal in the same way. That decision, therefore, does not determine the outcome of this merits appeal. See id. We proceed accordingly.

B. The Free Speech Claims.

The plaintiffs' most loudly bruited argument is that the Free Speech Clause of the First Amendment does not permit the City to display a plethora of third-party flags in front of City Hall while refusing to display the Christian Flag proffered by the plaintiffs. The district court determined that this group of claims was foreclosed by the government speech doctrine, see Shurtleff III, —— F.Supp.3d at ——, 2020 WL 555248, at *5, and so do we.

The proposition that the plaintiffs' free speech claims rise or fall on the classification of the challenged speech is uncontroversial. Even though the First Amendment restricts government regulation of private speech in government-designated public forums, such restrictions do not apply to government speech. See Pleasant Grove City v. Summum, 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) ("The Free Speech Clause restricts government regulation of private speech; it ***87** does not regulate government speech."); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015) ("[When] the State is speaking on its own

behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."). Here, the classification of the speech in question is pivotal — but before attempting to resolve this classification inquiry, we map the relevant contours of the government speech doctrine.

Two cases chiefly inform the configuration of this map. In Summum, the Supreme Court considered whether "the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected." 555 U.S. at 464, 129 S.Ct. 1125. The respondent, a religious organization, sought leave from the city to erect a monument that would contain "the Seven Aphorisms of SUMMUM," which the respondent said would be similar "in size and nature to the Ten Commandments monument" then in place at the city park. Id. at 465, 129 S.Ct. 1125. The city denied the respondent's request, and the respondent sued (alleging an abridgment of the right to free speech). See id. at 465-66, 129 S.Ct. 1125. The Court upheld the city's decision, ruling that because the display of "a permanent monument in a public park ... is best viewed as a form of government speech," such a display is "not subject to scrutiny under the Free Speech Clause." Id. at 464, 129 S.Ct. 1125.

In determining that the placement of such a monument in a city-owned park constituted government speech, the Summum Court relied

primarily on three factors. First, the Court focused on the history of governmental use of monuments, explaining that "[g]overnments have long used monuments to speak to the public" and that "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." Id. at 470, 129 S.Ct. 1125. Second, the Court considered whether the message conveyed by the monuments would be ascribed to the government. Id. at 471, 129 S.Ct. 1125. The Court concluded that, in the city-park context, "there is little chance" that observers will fail to identify the government as the speaker. Id. Third, and finally, the Court considered the fact that the municipality "effectively controlled" the messages sent by the monuments because it exercised "final approval authority over their selection." Id. at 473, 129 S.Ct. 1125. Giving weight to these factors, the Court determined that the erection of privately donated monuments in a city park constituted government speech. See id. at 472-73, 129 S.Ct. 1125.

A few years later, the Court revisited the government speech doctrine. In Walker, the issue was whether the rejection of a "specialty license plate design featuring a Confederate battle flag" by the Texas Department of Motor Vehicles "violated the Constitution's free speech guarantees." 576 U.S. at 203-04, 135 S.Ct. 2239. Concluding that specialty license plates convey government speech, the Court held that Texas was "entitled to refuse to issue plates" that featured the proffered design. Id. at 219-20, 135 S.Ct. 2239. In reaching this conclusion, the

Court again employed the three-factor test developed in Summum.

The Walker Court began by examining the history of the use of the medium by the government, then inquired into how closely the public identified the medium with the government, and went on to assay the degree of control the government ***88** maintained over the message conveyed. See id. at 210-13, 135 S.Ct. 2239. In traveling down this path, the Court first found that license plates "long have communicated messages from the States." Id. at 211, 135 S.Ct. 2239. Next, it found that the public reasonably interprets license plates as conveying a message on the state's behalf both because the plates bear "the name 'TEXAS' in large letters" and because the state mandates vehicle owners to display the plate, owns all license plate designs, and dictates the manner in which vehicle owners may dispose of the plates. Id. at 212, 135 S.Ct. 2239. Finally, the Court found that the state "effectively controlled" the messages conveyed on the license plates because it retained "final approval authority." Id. at 213, 135 S.Ct. 2239. These three factors, taken together, led inexorably to the conclusion that the challenged speech constituted government speech. See id.

The three-part Summum/Walker test is controlling here. Mindful that the Court has indicated that Walker "likely marks the outer bounds of the government-speech doctrine," Matal v. Tam, ——U.S. ——, 137 S. Ct. 1744, 1760, 198 L.Ed.2d 366 (2017), we turn to whether the speech at issue falls

within those bounds.

We start by looking at the historical use of flags by the government. The parties do not gainsay that governments have used flags throughout history to communicate messages and ideas. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."); Griffin v. Sec'y of Veterans Affs., 288 F.3d 1309, 1324 (Fed. Cir. 2002) ("We have no doubt that the government engages in speech when it flies its own flags over a national cemetery, and that its choice of which flags to fly may favor one viewpoint over another."). Flags themselves have the capacity to communicate messages pertaining to, say, a government's identity, values, or military strength. See Shurtleff II, 928 F.3d at 173 n.4. Cf. Summum, 555 U.S. at 470, 129 S.Ct. 1125 ("Governments have long used monuments ... to remind their subjects of their authority and power[,] ... to commemorate military victories and sacrifices and other events of civic importance [or] to convey some thought or instill some feeling in those who see the structure."). That a government flies a flag as a "symbolic act" and signal of a greater message to the public is indisputable. See Shurtleff II, 928 F.3d at 173.

With respect to the issue of whether an observer would attribute the message of a third-party flag on the City's third flagpole to the City, we found it likely the last time around that such an attribution would take place. See id. The record has since evolved, and

these evolutionary changes bolster our earlier conclusion. As we previously noted, an observer would arrive in front of City Hall, "the entrance to Boston's seat of government." Id. at 174. She would then see a city employee replace the city flag with a third-party flag and turn the crank until the third-party flag joins the United States flag and the Massachusetts flag, both "powerful governmental symbols," in the sky (eighty-three feet above the ground). Id. A faraway observer (one without a view of the Plaza) would see those three flags waiving in unison, side-by-side, from matching flagpoles.

That the third-party flag is part of a broader display cannot be understated. As the Summum Court explained, the manner in which speech is presented, including the incorporation of other monuments in the vicinity, changes the message ***89** communicated. See 555 U.S. at 477, 129 S.Ct. 1125. Here, the three flags are meant to be — and in fact are — viewed together. The sky-high City Hall display of three flags flying in close proximity communicates the symbolic unity of the three flags. It therefore strains credulity to believe that an observer would partition such a coordinated three-flag display (or a four-flag display if one counts the POW/MIA flag) into a series of separate yet simultaneous messages (two that the government endorses and another as to which the government disclaims any relation). Cf. Summum, 555 U.S. at 471, 129 S.Ct. 1125 ("It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be

associated."). Although the plaintiffs might perhaps make the case that a lone Christian Flag, nowhere near City Hall, would be seen as devoid of any connection to a government entity, a City Hall display that places such a flag next to the flag of the United States and the flag of the Commonwealth of Massachusetts communicates a far different message to an observer: that the City flies all three flags.

The plaintiffs demur, insisting that an observer, in these circumstances, would not interpret a third-party flag as a message from the City. This demurrer is premised on the notion that the question of whether expression is likely to be viewed as government speech must be answered from the viewpoint of a "reasonable and informed" observer. Building to a crescendo, the plaintiffs posit that a reasonable and informed observer not only would see the flag, but also would take note of the intricacies of the administrative process leading up to its display. Stripped of rhetorical flourishes, the plaintiffs ask us to consider the perspective of an observer who — in their words — knows:

(1) that the City's open invitation policy and practice "seeks to accommodate all applications seeking to take advantage of the City of Boston's public forums" ...; (2) that the City permits private organizations temporarily to raise their flags ... as a "substitute" for the government's flag; (3) that the City has approved at least 284 flag raising events ...; (4) that during the year preceding Camp Constitution's application the City approved an average of over three flag raisings per month; (5) that prior to Camp

Constitution's application, flag raising denials were exceedingly rare, and that Rooney had never denied a flag raising request; (6) that the City will allow essentially any event to take place on City Hall Plaza; and (7) that the City does not even review the content of the substitute flags ... (emphasis in original).

Relatedly, the plaintiffs insist that the messages of the third-party flags cannot be attributed to the City because "Rooney swore he had no knowledge of anyone's ever believing the City has endorsed or adopted the message of a private organization that was allowed access to the flag raising forum." An observer armed with this information, the plaintiffs say, would not attribute the third-party-flag speech to the City.

The plaintiffs' conception of a "reasonable and informed" observer is not plucked from thin air. Justice Souter, concurring in Summum, advocated for a standard based on the reaction of a "reasonable and fully informed observer." 555 U.S. at 487, 129 S.Ct. 1125 (Souter, J., concurring). The Court did not explicitly adopt this standard, but has nonetheless focused on the physical attributes of the speech and general information about the locus at which the speech takes place. In Summum, for example, the Court considered what "persons ***90** who observe" such monuments see, id. at 471, 129 S.Ct. 1125, and added that most people know that parks are government property, id. at 472, 129 S.Ct. 1125 ("Public parks are often closely identified in the public mind with the government unit that owns the land."). So, too, the Walker Court considered the

physical attributes of the speech visible to "persons who observe" license plates, 576 U.S. at 212, 135 S.Ct. 2239 ("The governmental nature of the plates is clear from their faces ...."), as well as widely available information about license plates, id. ("[T]he State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State .... Texas also owns the designs on its license plates .... And Texas dictates the manner in which drivers may dispose of unused plates."). The City's treatment of third-party flags satisfies the standard that the Supreme Court has set for attribution: an observer not only would see the third-party flag flying with two government flags in front of a building labeled "Boston City Hall" but also would reason that the building is a government building and that the imposing flagpoles located on that property are owned and dressed by the City.[2]

[2] We add, moreover, that even if we were prepared to adopt a "reasonable and informed observer" standard, such a standard would be satisfied here. See Shurtleff II, 928 F.3d at 173 n.5. It is the manner and circumstances in which a third-party flag is displayed, together with the logical inferences that a reasonable and informed observer would likely draw based on available information, that lead to a conclusion that the third-party-flag speech can be attributed to the government.

Relatedly, Justice Souter's concurrence in Summum warned primarily against the deployment of categorical rules in determining what constitutes government speech. Summum, 555 U.S. at 487, 129 S.Ct. 1125 (Souter, J., concurring). Contrary to the plaintiffs' formulation of the "reasonable and informed observer" standard, neither Justice Souter's concurrence nor any other cited opinion has suggested that such an observer would necessarily know things like the City's regulations for flag-raising or

> the decisionmaking trends of a specific government employee. Absent any vestige of precedential support, we decline the plaintiffs' invitation to adopt and apply a newly minted standard.

The plaintiffs have another string to their bow. They argue that the Summum/Walker framework is inapplicable because the third-party flags that the City flies lack the permanence of the monuments in Summum. We rejected this same argument in Shurtleff II, 928 F.3d at 175, and the plaintiffs have advanced no compelling reason for us to revisit the matter. To our way of thinking, the decisive datum is that the Walker Court explicitly disavowed any suggestion that permanence is a prerequisite for finding government speech. See 576 U.S. at 213-14, 135 S.Ct. 2239.

We turn next to the question of whether the City maintains control over the messages conveyed by the third-party flags. The City has instituted procedures to ensure both that it is aware of all flags flown and that such flags display approvable messages. It is undisputed that "[i]nterested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole," and that the flag-raising guidelines expressly require the City's permission to fly a third-party flag. Shurtleff II, 928 F.3d at 174. And in order for a flag-raising request to secure approval, Rooney must review the request to determine whether the proposed flag-raising is consistent with the City's message, policies, and practices. Cf. Summum, 555 U.S. at 472, 129 S.Ct. 1125 (finding government

speech when "[g]overnment decisionmakers select the monuments that portray what they view as appropriate ***91** for the place in question, taking into account such content-based factors as esthetics, history, and local culture"); Walker, 576 U.S. at 213, 135 S.Ct. 2239 (finding control when "[t]he Board must approve every specialty plate design proposal before the design can appear on a Texas plate").

What is more, the City limits physical access to the flagpole: the flagpole is restricted government property, and the City restricts access to it by providing only parties whose requests are approved with a hand crank. All in all, the decision to fly a flag falls squarely on the City, and not on any other entity or person. This final approval authority means that when a third-party flag flies over City Hall, it flies only because the City chose to fly it. And in reserving this final approval authority, the City "has 'effectively controlled' the messages conveyed" in the flag display. Id. (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005)).

The plaintiffs argue that the type of government practices that led the Court in Summum and Walker to find government control are not present here. They note, for example, that the Summum Court observed that the government "took ownership of [the] monument" and that "[a]ll rights previously possessed by the monument's donor [were] relinquished." 555 U.S. at 473-74, 129 S.Ct. 1125. They also note that, in Walker, the state owned the designs that were on all specialty license plates,

issued all state plates, and dictated how a driver may dispose of a plate. 576 U.S. at 212, 135 S.Ct. 2239. Here, by contrast, the City does not require a private organization that seeks to raise a flag to surrender ownership of that flag, nor does it require that a flag bear any particular design or logo.

This argument lacks force. The government's ownership of a monument or a design are relevant to the "attribution" prong of the Summum/Walker test — not to the "control" prong. See Walker, 576 U.S. at 212, 135 S.Ct. 2239; Summum, 555 U.S. at 473-74, 129 S.Ct. 1125. The latter prong instead turns on whether the government "effectively control[s]" the message conveyed through selection. See Summum, 555 U.S. at 473, 129 S.Ct. 1125 (quoting Johanns, 544 U.S. at 560-61, 125 S.Ct. 2055). The City's final approval authority over all third-party flags evinces choice and selection and, thus, suffices to show effective control.

Struggling to undermine the finding of control, the plaintiffs highlight three pieces of evidence uncovered during pretrial discovery (and not available at the preliminary injunction stage): first, until the plaintiffs came along, the City had not previously denied a flag-raising request; second, Rooney's customary practice was not to ask to see a proposed flag before approving such a request; and third, although the preliminary injunction record previously noted only fifteen instances of flag-raisings, the expanded record reveals that the City had approved 284 requests. The plaintiffs submit that these freshly unearthed facts demonstrate that

the City did not exercise meaningful control over the message conveyed by third-party flags. We do not agree.

We find the rate of rejection unpersuasive because the exercise of the authority to reject is necessarily case-specific and limited by the kinds of requests the City receives. Since the City had never rejected a request, the flag-raisings in the record are, in effect, a record of the requests received. Every request has been for the flag of a country, civic organization, or secular cause. That potential applicants have successfully self-selected and offered ***92** a narrow set of acceptable secular designs cannot be evidence that the City is open to fly any flag.

The limited kinds of unique flags and the repeated requests to fly the same flags also help to explain Rooney's practice. Some of the flags were no doubt familiar to him and, at any rate, a request to fly a flag includes a short description of the flag. Because Rooney recognizes the names of sovereign nations, because the City had seen most, if not all, of these flags in previous years, and because in twelve years no person had requested to fly anything that was not the flag of a country, civic organization, or secular cause, a short description of each proposed flag was sufficient for Rooney's purposes. But once Rooney received a request for a flag he did not recognize as falling within an acceptable secular category — the Christian Flag — he demanded that he see it.

The greater number of flag-raisings is likewise insufficient to ground a finding that the City does

not control the flagpole. The Walker Court was clear that the number of flags — or messages — is not dispositive. 576 U.S. at 214, 135 S.Ct. 2239. Here, the Walker's Court logic applies because the number of flags approved by the City is not evidence of universal access to the flagpole. After all, the group of third-party flags raised over City Hall during the twelve-year period is not a random assortment. Each flag represents a country, civic organization, or secular cause. Instead of evincing a lack of control, the greater number of flag-raisings reveals a pattern that supports the City's claim that it approves only flags that it deems "consistent with the City's messages, policies, and practices."

In this context, the Supreme Court has not laid out an elaborate protocol for finding effective control. Broadly speaking, it is the City's "select[ion] [of] those [flags] that it wants to display for the purpose of presenting the image of the City that it wishes to project" that establishes City control over the message conveyed. Summum, 555 U.S. at 473, 129 S.Ct. 1125. In the case at hand, Rooney's approval practices have not been shown to be a rubber stamp. There is nothing remarkable about the fact that some flag descriptions may trigger further review, while others do not. Wherever the line falls, that a line exists is evidence of "selective receptivity." See id. at 471, 129 S.Ct. 1125. That selectivity exists here, and it is a selectivity born out of a concern for the City's image. The record, taken as a whole, plainly shows a city conscious of the message that it flies on the third flagpole and an accompanying selectivity to tailor that message to the City's

desired image. See id. Accordingly, each of the three Summum/Walker factors supports the conclusion that the City engages in government speech when it decides which flags to display in front of City Hall.

The plaintiffs demur. They deride this classification of the City's speech, arguing vehemently that the City does not engage in expressive activity through these third-party flags because it has designated the third flagpole as a forum for private speech. In support, they offer two arguments. First, the plaintiffs say that the City explicitly opened the flagpole to private expression. Specifically, they point to the third page of the City's paper event application form, which states that the City "seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums." The plaintiffs suggest that the phrases "all applicants" and "public forums" transmogrify the third flagpole into a government-designated public forum. Second, and relatedly, the plaintiffs argue that the City implicitly ***93** opened the flagpole for public discourse because the record now shows that the City had granted flag-raising permission 284 times without ever denying an earlier request.

These two arguments coalesce into a single theme — but it is a theme that gains the plaintiffs no traction. We previously rejected the first of these arguments because a conclusion that the City has designated the flagpole as a public forum "is precluded by our government-speech finding." Shurtleff II, 928 F.3d at 175. As we explain below, that rationale still withstands scrutiny — and even under traditional

public-forum analysis, the plaintiffs' asseverational array lacks force.

The government creates a public forum "only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Def. & Edu. Fund, Inc., 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Government inaction or permission for limited discourse cannot establish a public-forum designation. Id. To determine if the City has converted the flagpole into a public forum, we look to the City's "policy and practice" and also may consider "the nature of the [flagpole] and its compatibility with expressive activity." Id. "We will not find that a public forum has been created in the face of clear evidence of a contrary intent," nor will we make such a finding "when the nature of the property is inconsistent with expressive activity." Id. at 804, 105 S.Ct. 3439.

At the preliminary injunction stage, we rejected the plaintiffs' argument that the City's "public forum[ ]" incantation rendered the flagpole a public forum because the record contained clear evidence that the City did not intend to open the flagpole to public discourse. Shurtleff II, 928 F.3d at 176. On the enlarged record now before us — which shows that the City over time has approved 284 requests and has never denied any request other than the plaintiffs' request — our conclusion remains the same.

The record is pellucid that the City is not receptive to any and all proposed flag designs. As we

previously indicated, the City controls which third-party flags are flown from the third flagpole. A flag-raising is approved only after Rooney "screen[s]" a proposed flag for "consisten[cy] with the City's message, policies, and practices" and provides his final approval. Id.; cf. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 47 (2001) (finding that school's mail system had not been designated as a public forum when school principal had to grant permission to access system). Furthermore, all 284 flags previously flown were flags of countries, civic organizations, or secular causes. That the City had not rejected prior requests is insufficient to conclude that the City accepts any and all flags because the record shows that the City had criteria for approval that limited flagpole access and that all flags flown satisfied those criteria. Cf. Cornelius, 473 U.S. at 804-05, 105 S.Ct. 3439 (declining to find designated public forum notwithstanding lack of evidence showing how many organizations had been denied permission because admission criteria evidenced selective access). Here, the City's permission procedures evince selective access to the third flagpole, and "[t]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.' " Ark. Edu. Television Comm'n v. Forbes, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). The City's restrictions demonstrate an intent antithetic to the designation of a public forum, and those restrictions ***94** adequately support the conclusion that the City's flagpole is not a public forum. See Cornelius,

473 U.S. at 803, 105 S.Ct. 3439.

That ends this aspect of the matter. Because the City engages in government speech when it raises a third-party flag on the third flagpole at City Hall, that speech is not circumscribed by the Free Speech Clause. See Walker, 576 U.S. at 215, 135 S.Ct. 2239; Summum, 555 U.S. at 467, 129 S.Ct. 1125. The City is therefore "entitled" to "select the views that it wants to express." Summum, 555 U.S. at 467-68, 129 S.Ct. 1125 (internal citations omitted). This entitlement includes both the right to decide not to speak at all and the right to disassociate itself from speech of which it disapproves. See Mech v. Sch. Bd. of Palm Beach Cnty., 806 F.3d 1070, 1074 (11th Cir. 2015); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000).

Here, the City exercised those rights by choosing not to fly the plaintiffs' third-party flag. In the City's view, this choice allows it more appropriately to celebrate the diversity and varied communities within Boston. Should the citizenry object to the City's secular-flag policy or to its ideas about diversity, the voters may elect new officials who share their concerns. See Summum, 555 U.S. at 468-69, 129 S.Ct. 1125; Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); Walker, 576 U.S. 200, 207, 135 S.Ct. 2239. After all, it is the electorate and the political process that constrains the City's speech, not the Free Speech Clause. See Summum, 555 U.S. at 468-69, 129 S.Ct. 1125. Consequently, we uphold the district court's entry of

summary judgment in favor of the City on all of the plaintiffs' free speech claims.[3] See Shurtleff III, ––– F.Supp.3d at ––––, 2020 WL 555248, at *6.

[3] This ruling extends, of course, to the plaintiffs' "unbridled discretion" claim. Both the plaintiffs' articulation of that claim and the authority that they present in support of it presuppose the existence of a public forum. Our conclusion that the flagpole is not a public forum therefore defenestrates the plaintiffs' claim. See Widmar v. Vincent, 454 U.S. 263, 267-68, 267 n.5, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (noting that university's constitutional obligation to justify prior restraint on speech arises from its designation of its campus as public forum and would not exist otherwise).

C. The Establishment Clause Claim.

The fact that the City is engaging in government speech does not relieve it from the obligation to comport with the Establishment Clause. Summum, 555 U.S. at 468, 129 S.Ct. 1125. The plaintiffs assert that the City has failed to satisfy this obligation for two reasons. First, they assert that the City discriminated between religion and nonreligion by excluding their proffered flag while continuing to fly non-religious flags. Second, they assert that the City discriminated between religions by excluding their Christian Flag while flying flags that contain other religious imagery. As examples, the plaintiffs cite the City's own flag, the Turkish flag, the Portuguese flag, and the Bunker Hill flag. The City's conduct in this regard, the plaintiffs say, is not only discriminatory but also demonstrates hostility toward religion.

The "touchstone" for Establishment Clause claims "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' " McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)). The government does not act neutrally when its "ostensible object ***95** is to take sides." Id. Accordingly, the government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." Masterpiece Cakeshop Ltd. v. Col. Civ. Rights Comm'n, —— U.S. ——, 138 S. Ct. 1719, 1731, 201 L.Ed.2d 35 (2018).

Starting from this baseline, we turn first to the allegations of discrimination between religion and nonreligion. At the outset, we take note that the plaintiffs' Establishment Clause claim is scantily developed: they have neither identified any evidence supporting a claim of hostility nor advanced any serious legal argument for such a claim. The plaintiffs merely recite the general neutrality obligation that the Establishment Clause imposes upon the City, failing to articulate any reason why this obligation requires the City to display their religious flag.[4]

[4] The plaintiffs' sparse treatment of their Establishment Clause claim suggests that this case, at its core, is not an Establishment Clause case. This suggestion is bolstered by the fact that the type of hostility argument conceptualized by the plaintiffs appears to draw its essence from Supreme

> Court decisions involving the Free Exercise Clause and applying the strict-scrutiny standard. See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer, —— U.S. ——–, 137 S. Ct. 2012, 198 L.Ed.2d 551 (2017) (holding that exclusion of church from otherwise available public program on account of religious status violates Free Exercise Clause despite government's establishment concerns); Espinoza v. Montana Dep't of Revenue, —— U.S. ——, 140 S. Ct. 2246, 207 L.Ed.2d 679 (2020) (same where government excluded school based on religious character of the school). In the case at hand, the plaintiffs do not advance a cognizable free exercise claim but, rather, seek the application of a concept of hostility to religion not typically applied to Establishment Clause claims like this one. Seen in this light, the plaintiffs' theory fits awkwardly with precedent — an awkwardness that greatly diminishes the force of their claim.

The exclusion of religious entities from a public program, without more, does not violate the Establishment Clause. See Carson ex rel. O.C. v. Makin, 979 F.3d 21, 49 (1st Cir. 2020). Nor is proof of such exclusion evidence of hostility towards religion. See id. Here, moreover, the record does not give rise to any suggestion that the City created the flag-raising program with the goal of inhibiting religion. Cf. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (finding governmental program to be "neutral toward religion" when government did not "create[ ] it to advance religion or adopt[ ] some ingenious device with the purpose of aiding a religious cause"); McCreary, 545 U.S. at 860, 125 S.Ct. 2722 (requiring proof of government "purpose" to favor one side over the other). In fact, the City went the extra mile: to help avoid any such

impression, it offered the plaintiffs the option of hosting an event alongside the flagpoles so as to permit the plaintiffs to continue to practice and share their religion (just as they would had the City granted their flag-raising request). Under these circumstances, the City's conduct simply cannot be construed to suggest the disparagement of the plaintiffs' religion. Cf. Masterpiece Cakeshop, 138 S. Ct. at 1729 (finding hostility toward religion when government "disparage[d]" plaintiff's religion "by describing it as despicable," "characterizing it as merely rhetorical," and comparing it "to defenses of slavery and the Holocaust").

We add, moreover, that while the Establishment Clause may not require a secular-flag policy, the City "may act upon [its] legitimate concerns about excessive entanglement with religion" in administering its flag-raising program. Eulitt ex rel. Eulitt v. Maine, Dep't of Educ., 386 F.3d 344, 355 (1st Cir. 2004); see also Carson ex rel. O.C., 979 F.3d at 35. The City has ***96** presented just such a set of concerns in this case and, thus, has made a valid choice to remain secular. Shurtleff himself described the Christian flag as "an important symbol of our country's Judeo-Christian heritage." Should the City honor the plaintiffs' request, members of the audience would watch the Christian Flag join the flags of the United States and Massachusetts in front of the entrance of City Hall. Such a display could be deemed to constitute a religious statement on the City's part. Cf. Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) (noting that placement of religious display at city hall

heightens Establishment Clause concerns because "every display ... is implicitly marked with the stamp of government approval"). And such a perception would underscore the realistic nature of the City's belief that the flying of a flag would be an endorsement of the flag's message. See Widmar v. Vincent, 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (evaluating whether government policy confers "any imprimatur of state approval on religious sects or practices").

Our government-speech finding bolsters the conclusion that the City would be perceived to endorse the messages conveyed by the flags that it flies. When a forum is open to all, it is doubtful that an observer "could draw any reasonable inference of [government] support" for a particular religion from religious speech alone. Id. at 274, 274 n.14, 102 S.Ct. 269. In such a situation, the City would not be seen as supporting religious goals. See id. Here, however, the City speaks for itself, one third-party flag at a time. Because an observer would attribute the display's message to the City, see supra Part II(B), the powerful display of a single religion's flag (in this case, an "important symbol" of the plaintiffs' religion) could signal the City's embrace of that religion.

To complete the picture, it is worth noting that the Supreme Court has explicitly distinguished the religious character of long-standing religious monuments, symbols, and practices from that of newly erected or adopted ones. See Am. Legion v. Am. Humanist Assoc., —— U.S. ——, 139 S. Ct.

2067, 2085, 204 L.Ed.2d 452 (2019). In relevant part, the American Legion Court reasoned that, with the passage of time, "religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity," such that the community "may come to value them without necessarily embracing their religious roots." Id. at 2084. In other words, a display of a religious symbol, over time, can "t[ake] on an added secular meaning." Id. at 2089. Long-standing monuments therefore enjoy "a strong presumption of constitutionality." Id. at 2085.

This presumption does not apply, though, to the plaintiffs' proposed religious-flag display. The City has never before displayed such a flag and, as such, this pioneering elevation of an "important symbol" of the Christian heritage would come without the secular context or importance that the passage of time may have afforded other displays. The raising of the Christian Flag thus would threaten to communicate and endorse a purely religious message on behalf of the City. Where that endorsement is as widely visible and accessible as it is here, and where the City could run the risk of repeatedly coordinating the use of government property with hierarchs of all religions, the City's establishment concerns are legitimate. See Lemon v. Kurtzman, 403 U.S. 602, 615, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Accordingly, we conclude that the City's choice to refrain from endorsing a religion through the raising of a religious ***97** flag comports with the City's constitutional obligations.

This leaves the plaintiffs' claim that the City's raising of certain flags that incorporate religious imagery while excluding the plaintiffs' Christian Flag constitutes an endorsement of certain religions over others and, thus, works a violation of the Establishment Clause. "[A] flag that references religion by using religious symbols in part of its field is not itself a religious flag." Shurtleff II, 928 F.3d at 177. As the plaintiffs repeatedly emphasize, Rooney does not even look at the flag designs before granting most approvals. And when he reviewed what an applicant described as the "Portuguese Flag," Rooney approved it because it stands for Portugal, the country, and not because it contained certain religious symbols. For aught that appears, Rooney's decision to fly those country/entity flags that include religious imagery was one without a religious dimension. In a logical universe, then, the fact that Rooney elected to let the Flag of Portugal fly is manifestly insufficient to establish that the City is hostile to the plaintiffs' religion.[5]

[5] For substantially the same reasons, Rooney's decision to allow the hoisting of other flags incidentally containing religious imagery (such as the Turkish flag, the Bunker Hill flag, and the City's own flag) do not evince hostility toward religion.

The short of it is that neutrality toward religion does not obligate the City to fly the Christian Flag on its third flagpole. The City remains neutral where, as here, it wholly refrains from passing judgment on religion. See McCreary, 545 U.S. at 876, 125 S.Ct. 2722. Consequently, we hold that no violation of the

Establishment Clause occurred when the City elected not to fly the plaintiffs' Christian Flag.

D. The Fourteenth Amendment Claim.

There is one last stop on our itinerary. The plaintiffs submit that the City's conduct amounts to content-based discrimination against their religious speech and, thus, violates the Equal Protection Clause. The City counters that, because the flagpole is not a public forum and because the plaintiffs' First Amendment claims are futile, their equal protection claim fails as a matter of law.

We pause to brush aside a procedural gambit. The plaintiffs suggest that the City has waived any counter-argument to their equal protection claim. This is magical thinking: the City advanced the very same argument upon which it now relies at summary judgment. No more was exigible to preserve the argument for appellate review. See United States v. Lilly, 13 F.3d 15, 18 (1st Cir. 1994).

Turning to the merits of the claim, we start with the familiar proposition that the Equal Protection Clause demands that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To establish an equal protection claim, a plaintiff must show that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to

inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Davis v. Coakley, 802 F.3d 128, 132-33 (1st Cir. 2015).

What we previously have said — that the City has been engaged in government speech not evocative of First Amendment protections and that the flagpole is not a public forum, see supra Part II (B) — sounds the death knell for the plaintiffs' equal protection claim. The distinguishing feature of the speech cases in which the Supreme Court has found violations ***98** of the Equal Protection Clause is the existence of a public forum. See Perry Educ. Ass'n, 460 U.S. at 55, 103 S.Ct. 948; see, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Carey v. Brown, 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Conversely, the Court has made nose-on-the-face plain that "on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." Perry Educ. Ass'n, 460 U.S. at 55, 103 S.Ct. 948. In the absence of a public forum — and we have found none here — the City's practice need only pass rational basis review. See id. Put another way, the practice need only bear a rational relationship to some legitimate governmental purpose. See id. Here, such a purpose is evident in the celebration of Boston's varied and diverse communities. Consequently, the plaintiffs' equal protection claim fails.

III. CONCLUSION

We need go no further. Like the district court, see Shurtleff III, —— F.Supp.3d at ——, 2020 WL 555248, at *6, we have taken the measure of the plaintiffs' claims and found them wanting. Hence, the judgment of the district court is

Affirmed.

All Citations

986 F.3d 78

DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENTS AND DENYING SUMMARY JUDGMENT FOR PETITIONERS, FILED FEBRUARY 4, 2020

2020 WL 555248
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Harold SHURTLEFF et al., Plaintiffs,
v.
CITY OF BOSTON et al., Defendants.

Case No. 18-cv-11417-DJC
|
Filed February 4, 2020

Attorneys and Law Firms

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MEMORANDUM AND ORDER

CASPER, United States District Judge

I. Introduction

***1** Plaintiffs Harold Shurtleff and Camp

Constitution (collectively, "Plaintiffs") filed this lawsuit against Defendants, the City of Boston and Gregory T. Rooney, in his official capacity as Commissioner of the City of Boston Property Management Department (collectively, "Defendants" or "the City"), seeking to enjoin the City from denying permission to the Plaintiffs to display "the Christian flag" on a City Hall flagpole in conjunction with their Constitution Day and Citizenship Day event. D. 1. Plaintiffs and Defendants have now both moved for summary judgment. D. 55; D. 59. For the reasons discussed below, the Court ALLOWS Defendants' motion for summary judgment, D. 59, and DENIES Plaintiffs' motion for summary judgment, D. 55.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant "bears the burden of demonstrating the absence of a genuine issue of material fact." Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor," Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.' " Id. (alteration in original) (quoting Anderson, 477 U.S. at 249, 106 S.Ct. 2505). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009). On cross-motions for summary judgment, the standards of Rule 56 remain the same and require the courts "to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Grp., Inc. v. Ferré Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

III. Factual Background

The following facts are drawn from the parties' joint statement of undisputed facts, D. 60. Plaintiff Harold Shurtleff is a resident of Massachusetts and the Director and co-founder of Plaintiff Camp Constitution, which is a public charitable trust registered in New Hampshire. D. 60 at ¶¶ 1-2. Defendant Gregory Rooney has been the Commissioner of the City of Boston Property Management Department since August 1, 2016. Id. at ¶ 6. Defendant City of Boston is a public body corporate and politic, established, organized, and authorized under and pursuant to the laws of Massachusetts. Id. at ¶ 5.

***2** This lawsuit arises out of an application by Plaintiffs to Defendants to have the City raise the Christian flag on one of Boston City Hall's three flag poles at City Hall Plaza to commemorate the contributions of the Christian community to the City and the Commonwealth, religious tolerance, the rule of law and the U.S. Constitution. Id. at ¶ 7. Plaintiffs made the application on July 18, 2017 and the City denied the application on September 5, 2017. Id. at ¶¶ 8, 48.

The City owns and manages three flagpoles located in front of the entrance to City Hall, in an area called City Hall Plaza. Id. at ¶ 20. One pole regularly displays the flags of the United States and the National League of Families of Prisoners of War/Missing in Action ("POW/MIA") flag. Id. at ¶¶ 22. A second pole flies the flag of the Commonwealth of Massachusetts. Id. The third pole usually flies the City of Boston flag, but at times the City raises other flags instead of the City of Boston flag, usually after application by a third party. Id. at ¶¶ 22-23. Examples of other flags that have been raised on the third flagpole are country flags, e.g., the flags of Brazil, Ethiopia, Portugal, the People's Republic of China and Cuba, and the flags of private organizations, including the Juneteenth flag recognizing the end of slavery, the LGBT rainbow pride flag, the pink transgender rights flag, and the Bunker Hill Association flag. Id. at ¶ 25. The flag of Portugal contains "dots inside the blue shields represent[ing] the five wounds of Christ when crucified" and "thirty dots that represents [sic] the

coins Judas received for having betrayed Christ." Id. at ¶ 34. The City of Boston flag includes the Boston seal's Latin inscription, which translates to "God be with us as he was with our fathers." Id. at ¶ 29.

At the time of Plaintiffs' flag request, the City had no written policies specifically addressing flag raising applications. Id. at ¶ 37. From June 2005 through June 2017, the City approved 284 flag raising events, including 39 event approvals in the year directly preceding Shurtleff's request. Id. at ¶ 25. These flag raisings have denoted country or cultural celebrations, arrival of dignitaries, commemoration of historic events and causes (e.g., Juneteenth observation, gay pride). Id.; D. 58-17.

Defendant Rooney had never denied a flag raising request prior to Shurtleff's request. Id. at ¶ 35. Rooney had also never requested to see a proposed flag prior to approval of a flag raising request. Id. at ¶ 38. Rooney considered Plaintiffs' request to be the first he had received related to a religious flag. Id. at ¶ 41. Rooney conducted a review of past flag raising requests and determined that the City had no past practice of flying a religious flag. Id. at ¶ 45. Following the denial of the request, Plaintiffs requested an official reason for the denial. Id. at ¶ 48. Rooney responded that the City's policy was to refrain respectfully from flying non-secular flags on the poles in accordance with the First Amendment's prohibition of government establishment of religion and in keeping with the City's authority to decide how it uses limited government resources. Id. at ¶ 51. On September 13, 2017, Plaintiffs renewed their

flag raising request. Id. at ¶ 59. The City did not respond to the second request. Id. at ¶ 61.

In October 2018, after the denial at issue in this case, the City promulgated a written Flag Raising Policy that codified past policy and practice and did not change how flag requests would be handled by the City. Id. at ¶¶ 62-63. The written policy includes seven "Flag Raising Rules," the first of which is "[a]t no time will the City of Boston display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." Id. at ¶¶ 64-65. Under the policy, the City has final approval authority for all flag raising requests. The City's flag raising website reflects the purpose of the City's sole and complete discretion regarding the approval of any flag raisings: "[w]e want to create an environment in the City where everyone feels included, and is treated with respect"; "[w]e also want to raise awareness in Greater Boston and beyond about the many countries and cultures around the world" and "[o]ur goal is to foster diversity and build and strengthen connections among Boston's many communities." D. 60 at ¶ 63; D. 58-32 at 1. Since the adoption of the written policy, the City has denied another flag raising application, which was for a "Straight Pride" flag. D. 60 at ¶ 67.

IV. Procedural History

***3** On July 6, 2018, Plaintiffs filed the present complaint seeking injunctive relief, declaratory relief and damages against Defendants. D. 1. Plaintiffs moved for a preliminary injunction, D. 7,

which the Court denied on August 29, 2018, D. 19. Plaintiffs appealed the Court's decision. D. 23. The Court denied Plaintiffs' motion to stay these proceedings during the pendency of the appeal. D. 34. On November 30, 2018, Defendants moved for judgment on the pleadings. D. 39. The Court denied Defendants' motion for judgment on the pleadings on May 3, 2019. D. 48. On June 27, 2019, the First Circuit affirmed the Court's decision on the preliminary injunction. D. 54. In the interim, the parties have conducted discovery and now have filed cross motions for summary judgment. D. 55; D. 59. The Court heard the parties on the pending motions for summary judgment and took the matters under advisement. D. 69.

V. Discussion

Plaintiffs and Defendants both seek summary judgment on all of Plaintiffs' claims: 1) a violation of the First Amendment free speech clause; 2) a violation of the First Amendment establishment clause; 3) a violation of the Fourteenth Amendment equal protection clause; 4) a violation of the freedom of speech clause of Article 16 of the Massachusetts Declaration of Rights; 5) a violation of the non-establishment of religion clauses of Articles 2 and 3 of the Massachusetts Declaration of Rights; and 6) a violation of equal protection under Articles 1 and 3 of the Massachusetts Declaration of Rights. As the Court noted in resolving the motion for judgment on the pleadings, D. 48 at 5-6, since the standard for the claims arising under Massachusetts Declaration of Rights is the same as applies under the U.S. Constitution, the Court focuses on the federal law

here in resolving Plaintiffs' claims. See, e.g., Commonwealth v. Barnes, 461 Mass. 644, 650, 963 N.E.2d 1156 (2012) (classifying the free speech provisions of Article 16 of the Massachusetts Declaration of Rights as a "cognate provision" of the First Amendment); Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 243, 850 N.E.2d 533 (2006) (noting that "[t]he standard for equal protection analysis under [Massachusetts'] Declaration of Rights is the same as under the Federal Constitution"); Opinion of the Justices to the House of Representatives, 423 Mass. 1244, 1247, 673 N.E.2d 36 (1996) (explaining that the court's analysis under Article 2 of the Massachusetts Declaration of Rights was "based on the same standards applied under the establishment clause of the First Amendment").

At the hearing on the motions for summary judgment, much of the parties' arguments focused on what has changed in the record since the rulings on the preliminary injunction, motion for judgment on the pleadings and the interlocutory appeal before the First Circuit: 1) over the course of the twelve years preceding the denial of Camp Constitution's application, the City approved 284 flag raising events; 2) there is no record of any denials prior to Camp Constitution's application; and 3) the City's website now expressly states the particular purposes that the City seeks to further through the flag raising program.

A. The City's Flag Display Constitutes Government Speech

The parties' central disagreement remains whether

the display of third-party flags on the pole in question constitutes government speech. The outcome of this question is crucial "[b]ecause [when] the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." Walker v. Tex. Div., Sons of Confederate Veterans, Inc., —— U.S. ——, 135 S. Ct. 2239, 2250, 192 L.Ed.2d 274 (2015).

As the Court noted in its prior opinion, D. 48 at 7, there are two leading Supreme Court cases that inform whether the City's display of flags on the City flagpole constitutes government speech. In the first case, Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), members of a religious organization called Summum sued the city of Pleasant Grove under the free speech clause of the First Amendment for the city's failure to include Summum's proposed monument in a public park. Summum, 555 U.S. at 464, 129 S.Ct. 1125. Other privately donated monuments in the park had included a monument of the Ten Commandments. Id. at 465, 129 S.Ct. 1125. Summum's proposed monument was "the Seven Aphorisms of SUMMUM" and would "be similar in size and nature to the Ten Commandments monument." Id. The city rejected Summum's proposal pursuant to an unwritten rule "limit[ing] monuments in the Park to those that 'either (1) directly relate[d] to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community.' " Id. The Supreme Court unanimously concluded that the

city's rejection of Summum's proposal constituted government speech and that the "Free Speech Clause ... does not regulate government speech." Id. at 467, 129 S.Ct. 1125.

***4** The Supreme Court looked at the issue again in Walker. Walker concerned the Texas Department of Motor Vehicle Board's rejection of a proposal by the Sons of Confederate Veterans for a Confederate flag license plate. Walker, 135 S. Ct. at 2243-44. After public comment, the Board voted unanimously to reject the proposed plate because "many members of the general public [found] the design offensive," "such comments [were] reasonable" and "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." Id. (internal quotation mark omitted). The Court held that the Texas license plates, like the monuments in Summum, constituted government speech and thus were not subject to the free speech clause's strictures. Id. at 2246. The Court focused on three primary factors: 1) the history of the speech at issue; 2) a reasonable observer's perception of the speaker and 3) the state's control over the speech. Id. at 2248-50. Following Summum, the Court concluded that 1) license plates "long have communicated messages from the States;" 2) license plates "are often closely identified in the public mind with the [State]" and reasonable observers "interpret them as conveying some message on the [State's] behalf" and 3) the state had "effectively controlled" the content of the license plates by exercising approval authority over

each request. Id. at 2247-49 (first alteration in original) (citations omitted).

The First Circuit, in affirming the denial of Plaintiff's motion for preliminary injunction, concluded that "[t]he Summum/Walker three-part test controls here and each of its factors strongly favors a finding that the City engages in government speech when it decides which flags to display in place of the City flag on the City Hall flagpole" and "[t]his case lies well within the established bounds of the government speech doctrine." Shurtleff v. City of Boston, 928 F.3d 166, 172 (1st Cir. 2019). Now, on a fully developed record, post-discovery, this remains true as a consideration of the Summum/Walker factors on the present record show.

First, the use of flags to communicate messages throughout history and into the present day is beyond dispute. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (noting that "[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind" and "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner"); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (noting that "[w]e have no doubt that the government engages in speech when it flies its own flags over a national cemetery"). That is, "flags themselves communicate a message," Shurtleff, 928 F.3d at 173 n.4. This has been

historically true as to governments using flags to communicate messages, id. (citing examples), and as evidenced here as to the City. See D. 60 at ¶¶ 27, 62-65. "Shurtleff's proposed flag is no different" in conveying a message, Shurtleff, 928 F.3d at 173 n.4, as it was described by the applicant as "the Christian flag." D. 60 at ¶ 8. On the present record, it remains the case that "the City recognizes flag flying as a symbolic act and that it uses flags – in particular those raised on the City Hall pole – to speak to the public." Shurtleff, 928 F.3d at 173.

As to the second factor, this Court also concludes that a flag waving on the City Hall flagpole would be attributed to the City as the speaker. It is not only that the flagpole on which Shurtleff's Christian flag would be flying is on the steps of City Hall, but also that this "third-party flag would keep company with the United States flag and the flag of the Commonwealth of Massachusetts, two powerful governmental symbols." Shurtleff, 928 F.3d at 174. That a keen observer might also observe that this third-party flag was flying on the pole ordinarily reserved for the flag of the City of Boston for a time would be even greater cause to attribute such speech to the City. By any measure of identity of the speech being that of the City or, alternatively, by any reasonable observer standard, see Shurtleff, 928 F.3d at 173 & n.5, the Christian flag waving on the City's flagpole would be readily attributed to the City. See Summum, 555 U.S. at 471, 129 S.Ct. 1125.

***5** Contrary to Plaintiffs' suggestion otherwise, the fuller record as to the third prong—whether the City

maintains control over the speech—strengthens the factual foundation for concluding that this last prong of the government speech test is satisfied. Plaintiff points to the total number of 284 flag-raising at City Hall Plaza to contend that this shows lack of governmental control over the City Hall flagpole. D. 61 at 16. Such argument ignores at least two important points. First, it ignores the context, that of these 284 flag-raising, they represented celebrations of a dozen or so different countries (including but not limited to Albania, Brazil, Italy, Mexico, China, Cuba, Turkey) and only a handful of civic organizations (e.g., Chinese Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, Boston Pride), some of which had multiple flag raisings during this period. D. 64 at 5; D. 60 at ¶¶ 25, 30-31. Second, also as to context, such flag raisings occurred over a twelve-year period, only approximately fifteen percent of the time, D. 64 at 5; see D. 60 at ¶¶ 25, 29, hardly a significant occasions in comparison to all of the other times when the usual flag, that of the City, flies of the flagpole. That is, it remains correct that "the flagpole at issue is only rarely occupied by a third-party flag." Shurtleff, 928 F.3d at 174. To the extent that even small number of countries and entities may have different messages that the City wants to convey, does not mean that the messages are not the City's own, Walker, 135 S. Ct. at 2252, particularly since the City has conveyed several interests in considering flags to be flown on its flagpole. D. 60 at ¶ 27 (commemorating flags "from many countries and communities," wanting to create an inclusive environment, raise cultural awareness

and "foster diversity and build and strengthen connections among Boston's many communities"). Third, both the City's practice and policy at the time of the denial of Shurtleff's 2017 flag request and the City's subsequently adopted written policy make clear that that the City controls which third-party flags are raised in place of the City flag and such decision is "in the City's sole and complete discretion." D. 60 at ¶¶ 62, 63. That is, the City exercises final approval authority and remains the gatekeeper of the speech that is displayed on the flagpoles that it owns and controls on the very doorstep of City Hall.[1]

[1] The lack of permanence of the City allowing different flags to be displayed on its flagpole does not undercut the conclusion that flags on the City flagpole are government speech. As the First Circuit concluded that although permanence may be relevant to finding of a government speech, it is not a necessary element of government speech. Shurtleff, 928 F.3d at 175 (contrasting Summum and Walker in this respect); see D. 64 at 2-3 and cases cited.

All three Summum/Walkers factors, therefore, show that the flag display is government speech and not subject to First Amendment restrictions.[2]

[2] Since the Court has concluded that the display of flags outside City Hall is government speech, "the First Amendment strictures that attend the various types of government-established forums do not apply," Walker, 135 S. Ct. at 2250, and the Court need not address the alternative arguments about government-established forums. See Shurtleff, 928 F.3d at 175 (noting that success on a "public forum" argument "is precluded by our

government-speech finding").

B. The Record Does Not Support Finding the City Has Shown a Preference for Non-Religion Over Religion

Plaintiffs also argue that the City's policy violates the First Amendment's Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment.

1. The City Has Not Violated the Establishment Clause

Even as the Court has concluded that the speech at issue is government speech, as discussed above, government speech must comply with the Establishment Clause and cannot, as Plaintiffs allege, be overtly hostile to religion. Summum, 555 U.S. at 468, 129 S.Ct. 1125. The test for considering Plaintiffs' Establishment Clause claim against the City is the Lemon test: 1) whether the City's conduct "ha[s] a secular legislative purpose," 2) the "principal or primary effect [of that conduct] must be one that neither advances nor inhibits religion" and 3) the City's actions "must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (internal quotations omitted).

Like government speech, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.' " Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576, 134 S.Ct. 1811,

188 L.Ed.2d 835 (2014) (citation omitted); see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (reviewing a challenged policy's history to determine its purpose). Analysis of the Establishment Clause is also "a delicate and fact-sensitive one." Lee v. Weisman, 505 U.S. 577, 597, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); see Town of Greece, 572 U.S. at 587, 134 S.Ct. 1811 (noting that analysis of prayer at town board meetings under the Establishment Clause is "fact-sensitive" and that the Court "considers both the setting in which the prayer arises and the audience to whom it is directed").

Applying the first prong of the Lemon test, the City's flag raising rules and regulations further a secular legislative purpose, as discussed above, of encouraging inclusion and diversity within the City. D. 60 at ¶¶ 27, 62-65. The second prong, that the City's regulation's "principal or primary effect must be one that neither advances nor inhibits religion," on which Shurtleff focuses as he alleges hostility and discrimination towards religion as evidenced by the denial of the Camp Constitution application. See D. 61 at 37. In support of this argument, Shurtleff point to the fact that other flags with religious imagery or symbols have flown on Boston flagpoles. Id. at 41. All of these flags, although they contained religious imagery, are secular flags of sovereign nations. See American Legion v. American Humanist Ass'n, —— U.S. ——, 139 S. Ct. 2067, 2075, 204 L.Ed.2d 452 (2019); Shurtleff, 928 F.3d at 177 (noting that "a flag that references religion by using religious symbols in part of its field is not itself a religious flag").

Permitting such flags to be flown also allowed for the City's purpose of "commemorate[ing] flags from many countries and communities" and is not similar to the Christian flag proposed to be flown by Shurtleff, which was a religious flag. D. 60 at ¶ 58. Such a flag is even different than the flag of the Vatican (which, the present record reflects has not been flown on the City Hall flagpole, D. 64 at 15 n.1), which while containing religious imagery and symbolism, also is the flag of a sovereign state. The Court is not convinced that flags of countries or secular organizations and entities that contain religious references or imagery are the same as the Christian flag that Shurtleff sought to fly from the City's flagpole, which nobody disputes is a non-secular flag. That is, the denial of Camp Constitution's application to fly the Christian flag on City Hall Plaza is not a departure from the City's usual practice, rather the application of its practice and policy, given that it, unlike any other application, sought to fly a religious flag. D. 60 at ¶ 41. The City's desire not to have its speech coopted to promote a religious message cannot be seen as an improper inhibition of religion, when its primary reason for denying the application was to avoid the risk of violating the Establishment Clause by appearing to make "a government effort to favor a particular religious sect," Van Orden v. Perry, 545 U.S. 677, 702, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (Breyer, J., concurring); D. 60 at ¶ 58. It remains the case, now on a developed record, that "Shurtleff has not established that the City's policy and practice shows a preference for one religion or religious denomination over another." Shurtleff, 928

F.3d at 177. Nor does it reflect a preference for "non-religion" over religion. See Shurtleff, 928 F.3d at 177 (noting that "the 'secular' flags – really, flags of secular organizations or cause – the City has allowed to fly instead of the City flag do not show that the City has espoused a preference for non-religion over religion"). Lastly, as to the third prong, there is no allegation of excessive entanglement with religion brought about by the City's policies and practices here, a point that cannot be forcefully made on this record. Accordingly, there has been no showing that City's declination of Shurtleff's request violated the Establishment Clause.

2. The City Has Not Violated the Equal Protection Clause

***6** The Equal Protection Clause requires that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To establish an Equal Protection claim, Plaintiffs must show that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Davis v. Coakley, 802 F.3d 128, 132-33 (1st Cir. 2015) (citation omitted).

As discussed above, Rooney had never considered a religious flag prior to Plaintiffs' application. D. 60 at ¶ 41. Rooney also does not recognize any "goal or

purpose of the City ... by excluding religious flags, except 'concern for the so-called separation of church and state or the constitution's establishment clause.' " D. 60 at ¶ 58. There are no additional facts in the record that would suggest any improper preference for non-religion over religion or selective treatment of any person or group based on religion. The City did not alter its procedures for review of flag applications because of Camp Constitution's request, instead Camp Constitution's request presented a novel issue for the City's consideration, which the City considered consistent with its practice and policy. D. 60 at ¶¶ 52, 54, 58. The record does not support a claim of an Equal Protection violation here.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion for summary judgment, D. 59, and DENIES Plaintiffs' motion for summary judgment, D. 55. Judgment is entered in favor of Defendants.

So Ordered.

All Citations

--- F.Supp.3d ----, 2020 WL 555248

FIRST CIRCUIT OPINION AFFIRMING DENIAL OF PRELIMINARY INJUNCTION, FILED JUNE 27, 2019

928 F.3d 166
United States Court of Appeals, First Circuit.

Harold SHURTLEFF, and Camp Constitution, a public charitable trust, Plaintiffs, Appellants,
v.
CITY OF BOSTON, and Gregory T. Rooney, in his official capacity as Commissioner of the City of Boston Property Management Division, Defendants, Appellees.

No. 18-1898
|
June 27, 2019

***168** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Denise J. Casper, U.S. District Judge]

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Before Torruella, Selya, and Lynch, Circuit Judges.

Opinion

TORRUELLA, Circuit Judge.

This appeal arises from the denial of a preliminary injunction that would have required the City of Boston ("City") to temporarily raise a "Christian flag" on a government-owned flagpole in front of its City Hall. Plaintiff-appellant Harold Shurtleff is the director of Camp Constitution, a volunteer association (and also a plaintiff-appellant here) established in 2009 to "enhance understanding of the country's Judeo-Christian moral heritage, the American heritage of courage and ingenuity, [and] the genius of the United States Constitution," among other things. To commemorate Constitution and Citizenship Day in September 2017, Shurtleff, in his role as director of Camp Constitution, organized an event to be held at the plaza in front of

City Hall. Shurtleff alleges he intended this event to be a celebration of the Christian community's civic and social contributions to the City and the Commonwealth of Massachusetts, as well as of Christian support for religious tolerance, the rule of law, and the United States Constitution. Shurtleff sought a permit from the City to raise ***169** a Christian flag[1] on one of the City Hall Plaza flagpoles during the proposed celebration. That flag would have been raised next to poles flying the United States and Massachusetts flags and in place of the City of Boston flag, normally flown there.

[1] The parties refer to this flag as "the Christian flag." We use the term "a Christian flag" throughout. In doing so, we do not suggest that all Christian denominations accept that flag as the flag of Christianity. There is no evidence of that before us.

The City denied Shurtleff's flag-raising request, but otherwise allowed him and Camp Constitution to host their event at City Hall Plaza. Shurtleff and Camp Constitution filed suit almost a year later, raising Free Speech, Establishment Clause, and Equal Protection claims, and seeking a preliminary injunction to prevent the City from denying them a permit to raise the flag. The district court denied the injunction and we now affirm.

I.

City Hall Plaza is at the entrance of Boston's City Hall. A trio of eighty-three-foot tall poles that the City owns and controls stands in the Plaza. Two of

the poles usually fly the United States and Massachusetts flags. At issue here is the third pole, which displays the City's flag except when temporarily replaced by another flag upon the request of a third-party person or organization. Requests to replace the City's flag with another flag are often accompanied by a proposed third-party event to take place at a City-owned venue, such as the Plaza. In the past, the pole in dispute has displayed country flags (according to the complaint, those of Albania, Brazil, Cuba, Ethiopia, Italy, Mexico, Panama, the People's Republic of China, Peru, Portugal, and also that of the territory of Puerto Rico) as well as the flag of the Chinese Progressive Association, the LGBT rainbow flag, the transgender rights flag, the Juneteenth flag commemorating the end of slavery, and that of the Bunker Hill Association.

Some of these third-party flags contain what Shurtleff alleges is religious symbolism. For instance, the Portuguese flag contains "dots inside the blue shields represent[ing] the five wounds of Christ when crucified" and "thirty dots that represents [sic] the coins Judas received for having betrayed Christ." The Bunker Hill Flag contains a red St. George's cross. And the City flag itself includes the Boston seal's Latin inscription, which translates to "God be with us as he was with our fathers." But nothing in the record indicates that the City has ever allowed the flag of any religion to be raised on the flagpole at issue.[2]

[2] Shurtleff avers that, in 2012, he applied for and received a

> permit to display a flag on the pole at issue here. He does not specify, however, the type of flag that the City allowed him to raise.

Interested parties must apply to the City for a permit before they can hold an event and/or raise a flag at the Plaza. The City has published guidelines for permit applicants on its website. According to the guidelines, permits may be denied for several reasons, including that the applicant plans to host illegal activities on City property or if the proposed event poses a danger to public health and safety. Applications may also be denied if they do not comply with other relevant permit requirements, ordinances, or regulations. The Office of Property and Construction Management leads the application review process and is charged with ensuring that all applications meet City guidelines. And the Commissioner of Property Management himself reviews flag-raising applications for the City Hall Plaza poles to ensure that ***170** they are "consistent with the City's message, policies, and practices." There is no written policy regarding which flags may be raised on the City Hall poles.

On July 28, 2017, Shurtleff emailed the City requesting a permit to "raise the Christian Flag on City Hall Plaza." Shurtleff proposed several dates in September 2017 for the flag raising and explained that Camp Constitution would sponsor the event, which was also to include "short speeches by some local clergy focusing on Boston's history." Shurtleff's email to the City also included a photo of a Christian

flag to be raised, which has a white field and a red Latin cross inside a blue canton. On September 5, 2017, Shurtleff received an email response from the City denying his request to raise the flag. The City's response did not offer a reason for the denial.

Unsatisfied, Shurtleff emailed the City the next day to inquire about the "official reason" for denying his application. Two days later, on September 8, Shurtleff received an email from Gregory T. Rooney, the City's Commissioner of Property Management, explaining that his request was denied because "[t]he City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." Rooney's email explained that such a "policy and practice is consistent with [both] well-established First Amendment jurisprudence ... [and] with [the] City's legal authority to choose how a limited government resource, like the City Hall flagpoles, is used." Before signing off, Rooney informed Shurtleff that the "City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one." Shurtleff's plan to host an event at City Hall Plaza, however, was allowed to go forward.

Around September 13, 2017, Shurtleff submitted a renewed event and flag-raising application to the City, asking to use City Hall Plaza and its flagpoles for the "Camp Constitution Christian Flag Raising." Shurtleff's event description explained that the "Christian flag is an important symbol of our country's Judeo-Christian heritage" and that the aim of the flag raising was to celebrate "our Nation's

heritage and the civic accomplishments and social contributions of the Christian community to the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution." On September 14, Shurtleff's counsel sent a letter to Boston Mayor Martin Walsh -- with copy to other City officials -- that enclosed Shurtleff's September 13 application to celebrate a "Christian Flag Raising." This letter requested that the City approve Shurtleff's flag-raising application on or before September 27, 2017. The City neither issued a permit nor replied in reaction to Shurtleff's September 13 and 27 communications. Since then, Shurtleff has not applied to hold any events on City grounds, with or without a flag.

Shurtleff and Camp Constitution filed suit on July 6, 2018, seeking injunctive relief, declaratory relief, and damages against the City and Rooney in his official capacity as Commissioner of the City's Property Management Division. Appellants aver, inter alia, that the City "violated [their] First Amendment right to Freedom of Speech by preventing [them] from displaying the Christian flag as part of a celebration of the Christian community and America's Judeo-Christian heritage to be held at [the City's] designated public fora at City Hall Plaza and [its] flagpoles." Shurtleff and Camp Constitution moved for a preliminary injunction on July 9, 2018. The district court heard argument on August 9, 2018, and issued an opinion denying their request on August 29, 2018. ***171** Shurtleff v. City of Bos., 337 F. Supp. 3d 66, 79 (D. Mass. 2018). Among other things, the court held that the preliminary

injunction could not proceed because the "City's selection and presentation of flags on the City flagpole constitute government speech," id. at 73, and government speech escapes scrutiny under the Free Speech Clause.

II.

Before it grants a preliminary injunction, a district court is required to consider (1) the movant's likelihood of success on the merits; (2) the likelihood of the movant suffering irreparable harm; (3) the balance of equities; and (4) whether granting the injunction is in the public interest. Díaz-Carrasquillo v. García-Padilla, 750 F.3d 7, 10 (1st Cir. 2014). And when faced with an interlocutory appeal, as we are in this case, we review the district court's decision to deny a preliminary injunction for abuse of discretion but review its findings of fact for clear error and its conclusions of law de novo. Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 578 (1st Cir. 2015). Because Shurtleff and Camp Constitution did not " 'establish a strong likelihood that they will ultimately prevail' on the merits of their First Amendment claim[s]," we affirm the district court's denial of their request for a preliminary injunction.[3] Id.(quoting Sindicato Puertorriqueño de Trabajadores, SEIU Local 1996 v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012)).

[3] Since the "sine qua non of th[e] four-part inquiry is likelihood of success on the merits," New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002), and appellants failed to meet that burden, we do not

address the final three factors of the inquiry for preliminary injunctive relief. See Am. Freedom Def. Initiative, 781 F.3d at 578 n.4 (following this approach).

III.

The centerpiece of Shurtleff's argument on appeal is that the City's choice of which flags to raise temporarily in place of the usual Boston flag on the City Hall Plaza flagpole at issue does not constitute government speech and that the flagpole is instead a designated public forum. We tackle first his challenge to the district court's finding of government speech.

A.

Shurtleff argues that neither Walker v. Texas Division, Sons of Confederate Veterans, Inc., ––– U.S. ––––, 135 S. Ct. 2239, 192 L.Ed.2d 274 (2015), nor Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) -- the pair of recent cases the district court relied on to conclude that the City's choice of which flags to fly on the flagpole at issue is government speech -- supports a government speech label for a third-party group's temporary display of a flag owned by the group. Shurtleff explains that Summum resolved that the placement of "permanent" monuments in a public park was a form of government speech, which is inapposite to "temporarily" raising flags on a city-owned pole. Further, Shurtleff argues that Walker reaffirmed the relevance of permanence for finding

government speech. Shurtleff also maintains that the government "ownership" and "control" elements that the Court identified in Walker and Summum as creating government speech are not present for occasionally displayed third-party flags on the City Hall flagpole. We disagree with each of Shurtleff's points, but before responding we find it helpful to revisit in some detail the contours that the Supreme Court has established for the government speech doctrine.

***172** In Summum, the Court considered "whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected." 555 U.S. at 464, 129 S.Ct. 1125. The Free Speech Clause did not mandate that result, the Court concluded, because "the display of a permanent monument in a public park is not a form of expression to which forum analysis applies" since it is "best viewed as a form of government speech." Id. The Court reached that conclusion after making three observations. First, that "[g]overnments have long used monuments to speak to the public." Id. at 470, 129 S.Ct. 1125. Second, that "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land," which is the reason why "there is little chance that observers will fail to appreciate the identity of the speaker" as the government when they see a monument at a public park. Id. at 471-72, 129 S.Ct. 1125. And third, that the government "has 'effectively controlled' the messages sent by the monuments in the Park by

exercising 'final approval authority' over their selection." Id. at 473, 129 S.Ct. 1125 (citing Johanns v. Livestock Marketing Assn., 544 U.S. 550, 560-61, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005)).

The Court reaffirmed the Summum framework six years later in Walker. That case originated after a nonprofit organization applied to the Texas Department of Motor Vehicles Board for a specialty license plate featuring the Confederate flag. The Board rejected the application, 135 S. Ct. at 2244, and members of the nonprofit filed suit alleging that the rejection violated their free speech rights. Not so, said the Court, holding that "Texas's specialty license plate designs constitute government speech," for which the Board was entitled to refuse issuing license plates that feature the Confederate flag. Id. at 2253. The Court pinpointed three factors as relevant to identifying government speech in light of Summum: (1) whether the government has traditionally used the message or conduct at issue to speak to the public; (2) whether persons would interpret the speech as conveying some message on the government's behalf; and (3) whether the government maintains control over the selection of the message. See id. at 2247. Applying these factors, the Court concluded that the license plates are government speech because (1) "they long have communicated messages from the States," id. at 2248; (2) they "are often closely identified in the public mind with the [State]," id. (citing Summum, 555 U.S. at 472, 129 S.Ct. 1125); and (3) "Texas maintains direct control over the messages conveyed on its specialty plates," id. at 2249. The Court later

remarked that Walker "likely marks the outer bounds of the government-speech doctrine." Matal v. Tam, —— U.S. ——, 137 S. Ct. 1744, 1760, 198 L.Ed.2d 366 (2017).

The Summum/Walker three-part test controls here and each of its factors strongly favors a finding that the City engages in government speech when it decides which flags to display in place of the City flag on the City Hall flagpole. This case lies well within the established bounds of the government speech doctrine.

First, the government has long used flags to communicate messages. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner ...."); ***173** Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002) ("We have no doubt that the government engages in speech when it flies its own flags over a national cemetery, and that its choice of which flags to fly may favor one viewpoint over another."). For instance, "Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials 'as a mark of respect to their memory.' " Texas v. Johnson, 491 U.S. 397, 427, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (Rehnquist, C.J., dissenting) (quoting 36 U.S.C. § 175(m) (current version at 4 U.S.C. § 7(m))).

And when a visiting dignitary comes to Washington for a state or official visit, Blair House (the President's guest house) flies the flag of the dignitary's country. Mary Mel French, United States Protocol 298 (2010).[4]

[4] Of course, flags themselves communicate a message. In a 1944 Presidential Proclamation, President Franklin Roosevelt stated, "The flag of the United States of America is universally representative of the principles of justice, liberty, and democracy enjoyed by the people of the United States." Proclamation No. 2605, 9 Fed. Reg. 1957 (Feb. 22, 1944). Congress has provided that the American "flag represents a living country and is itself considered a living thing." 4 U.S.C. § 8(j). When United States Marines reached the top of Mount Suribachi at Iwo Jima, "they raised a piece of pipe upright and from one end fluttered a flag." Johnson, 491 U.S. at 425-26, 109 S.Ct. 2533 (Rehnquist, C.J., dissenting). And troops marked their successful landing at Inchon during the Korean war with the raising of an American flag. Id. at 426, 109 S.Ct. 2533. Shurtleff's proposed flag is no different: it was designed to incorporate certain Christian symbolism, including the Latin cross. See Trunk v. City of San Diego, 629 F.3d 1099, 1110 (9th Cir. 2011) (recognizing the Latin cross as "the preeminent symbol of Christianity"); cf. Barnette, 319 U.S. at 632, 63 S.Ct. 1178 ("[T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment."); Salazar v. Buono, 559 U.S. 700, 747, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010) (Stevens, J., dissenting) ("We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning.").

The City partakes of similar practices and has historically used the City Hall Plaza pole at issue here to convey a message when the City flag is

replaced with another flag. For instance, the City flew the flag of Portugal on that pole to recognize "the Portuguese community's presence and importance in the State of Massachusetts." The City also sometimes displays its municipal flag to signify that its mayor is present at a given event. It therefore follows that the City recognizes flag flying as a symbolic act and that it uses flags -- in particular those raised on the City Hall Plaza pole -- to speak to the public.

Next, we examine whether an observer would identify the City as the "speaker" when she sees a third-party flag, like a Christian flag, raised in front of City Hall and flying alongside the United States and Massachusetts flags. See Walker, 135 S. Ct. at 2249; Summum, 555 U.S. at 471, 129 S.Ct. 1125.[5] We have little doubt that the third-party flag's message would be attributed to the City.

[5] In his Summum concurrence, Justice Souter proposed using a "reasonable person" test to analyze the attribution prong. See Summum, 555 U.S. at 487, 129 S.Ct. 1125 (Souter, J., concurring) ("[T]o say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."). If the Court adopts this standard in a future case, it would be easily met here.

If the observer arrived in time, she could well see a City employee lower the Boston flag and replace it with a third ***174** party's flag. The replacement flag

would fly eighty-three feet into the sky only steps away from the entrance to Boston's seat of government, City Hall. That height would make the flag visible from far away, even from places that have no view of what is happening on the plaza below. And the third-party flag would keep company with the United States flag and the flag of the Commonwealth of Massachusetts, two powerful governmental symbols. "In this context, there is little chance that observers will fail to appreciate the identity of the speaker" as being the City. Summum, 555 U.S. at 471, 129 S.Ct. 1125.

Lastly, we assess if the City maintains control over the selection of the messages it conveys on its City Hall flagpole. See Walker, 135 S. Ct. at 2247. Shurtleff argues that, to find government speech, Summum and Walker require the government to take physical control over previously private expression, control every aspect of its design and maintenance, and require relinquishment of private ownership rights. We reject the argument as a misreading of those cases. See Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 331 (1st Cir. 2009) (finding that links placed on a government website were government speech and emphasizing that the town "controlled the content of [the] message by exercising final approval authority over the [ ] selection of the hyperlinks on the website"); cf. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 82 (1st Cir. 2004) (rejecting the plaintiffs' argument that the MBTA had created a public forum in part because "[t]he MBTA's policy clearly evidenced an intent to maintain control over the forum").

The record is clear that the City owns the flagpole at issue and that it controls which third-party flags are raised in place of the City flag. Interested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole. The City's Office of Property and Construction Management then reviews all applications to ensure that they comply with governing guidelines, and the Commissioner of Property Management himself screens flag-raising requests for the pole at issue to ensure that those requests are "consistent with the City's message, policies, and practices." And unlike many other public spaces controlled by a permitting process, for access to which the City might grant thousands of applications a year, the flagpole at issue is only rarely occupied by a third-party flag. Appellant's complaint lists only fifteen instances, over a period of years, in which the City has granted a third party's flag-flying request. That rarity highlights the City's tight control over the flagpole in question and that it engages in symbolic speech as to the replacement flags it allows. Moreover, the absence of a written policy outlining the content of the flags that may be raised on City Hall Plaza is irrelevant to the government speech analysis. Summum, 555 U.S. at 473, 129 S.Ct. 1125 (finding that the City there effectively controlled its message even though it did not adopt an express policy as to which monuments it would accept or reject until after rejecting the plaintiff's proposed monument); see also Sutliffe, 584 F.3d at 332 (noting that the absence of a written policy is "irrelevant to whether the [City's] actions constitute government speech").

A straightforward assessment under the Summum/Walker factors thus requires us to conclude that the City's decision about which flags to display on the flagpole at issue is likely government speech. However, as we noted before, Shurtleff insists that the flagpole cannot convey government speech because the flags raised on it are those of third parties and they are only displayed temporarily. This argument is unavailing. First, the fact that the flags are ***175** privately owned (or at least not owned by the City) changes nothing because the City enjoys the "same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message" like that which the City Hall flagpole communicates. Summum, 555 U.S. at 468, 129 S.Ct. 1125. Second, Shurtleff is wrong to suggest that permanence is required for there to be government speech. Shurtleff contends that the Summum Court emphasized the permanent nature of monuments as supporting a finding of government speech, and that Walker reiterated the relevance of permanence in government speech analysis. But the Walker Court actually clarified that permanence is not a necessary element of its government speech framework.[6] See Walker, 135 S. Ct. at 2249 ("That is not to say that every element of our discussion in Summum is relevant here. For instance, in Summum we emphasized that monuments were 'permanent' ....").

[6] We also note that Shurtleff's argument takes Summum's discussion of permanence out of context. There, it was

> important that the monuments were permanent because public parks could "accommodate only a limited number of permanent monuments." Summum, 555 U.S. at 478, 129 S.Ct. 1125. Thus, the real issue was not permanence, but space. See Walker, 135 S. Ct. at 2261 (Alito, J., dissenting) ("A final factor that was important in Summum was space.").

Shurtleff argues that this is a case in which the City is using government speech doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint," Summum, 555 U.S. at 473, 129 S.Ct. 1125, or as a means of "silenc[ing] or muffl[ing] the expression of disfavored viewpoints," Matal, 137 S. Ct. at 1758. We think not. The record shows that the City has "regularly" granted permission for religious events to be held on City Hall Plaza. And the City has not refused Shurtleff permission to hold an event at City Hall Plaza that celebrates Christianity and includes speeches by local clergy. Nor has it refused him the opportunity to request to raise a flag that conforms with City policy.

We now turn to Shurtleff's argument that the government speech doctrine is inapplicable here because the City has designated the flagpole as a public forum. Shurtleff's success on this theory is also unlikely because that argument is precluded by our government-speech finding. Walker, 135 S. Ct. at 2250 ("Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.").

However, the argument also fails under traditional public-forum analysis. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). To ascertain if the City has designated the flagpole as a public forum, we look to the City's "policy and practice" and may also consider "the nature of the [flagpole] and its compatibility with expressive activity." See id. However, "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent ... nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." Id. at 803, 105 S.Ct. 3439.

In Shurtleff's view, the City Hall pole at issue is a designated public forum because the application to request a permit for its ***176** use states that, "[w]here possible, the Office of Property and Construction Management seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums." But other than that statement, the record is barren of any indication that the City "intentionally open[ed] a nontraditional forum," on that flagpole, "for public discourse." Sutliffe, 584 F.3d at 333 (citing Del Gallo v. Parent, 557 F.3d 58, 72 (1st Cir. 2009)). Instead, the record contains clear evidence suggesting that the City did not intend to create a public forum in

the choice of which flags to fly from that pole. As we have noted before, the City strictly controls which third-party flags are raised on the City Hall pole, with the Commissioner of Property Management screening all proposed flags for "consisten[cy] with the City's message, policies, and practices." The City has articulated a policy of not flying non-secular flags in place of the City flag and its rejection of Shurtleff's flag-flying request is consistent with that policy.

Moreover, the nature of this flagpole is also inconsistent with unregulated expressive activity. City Hall Plaza has three flagpoles, and only one of these is occasionally available for the temporary use of the flags of qualifying third parties. The Plaza, therefore, may only accommodate a very limited number of flag-flying requests. The City may reasonably conclude that opening the pole for widespread public use could create disruptions that compromise the access and operations of City Hall. Cf. Summum, 555 U.S. at 478, 129 S.Ct. 1125 (noting that "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program"). Accordingly, Shurtleff's argument that the choice of flag cannot be government speech because the City has designated the flagpole as a public forum lacks any likelihood of success.

Considering the foregoing and the record as it is at present, we find that the City's choice of which flags

to raise on the flagpole at issue likely conveys government speech. And because this is the case, the City retains the ability not to promote or be associated with certain flags flown in place of the City flag on the flagpole in dispute. Thus, Shurtleff and Camp Constitution failed to establish a likelihood of success on their free speech claim against the City. See Summum, 555 U.S. at 467, 129 S.Ct. 1125 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." (citing Johanns, 544 U.S. at 553, 125 S.Ct. 2055)).[7]

[7] We also note that, in making choices about which flags to allow as temporary replacements for the City flag, the City and its officials are subject to "the democratic electoral process." Walker, 135 S. Ct. at 2245; Sutliffe, 584 F.3d at 331 n.9 ("If the voters do not like those in governance or their government speech, they may vote them out of office or limit the conduct of those officials 'by law, regulation, or practice.' " (quoting Summum, 555 U.S. at 468, 129 S.Ct. 1125) (citation omitted)).

B.

Our final task is to review the district court's determination that Shurtleff's Establishment Clause claim is unlikely to succeed.

Shurtleff argues that the City violated the Establishment Clause by excluding Camp Constitution's religious speech while flying what he calls "other religious flags." He alleges, for example, that the City has flown the flag of Portugal and the

Bunker Hill Association flag, which both ***177** contain some religious symbols. But a flag that references religion by using religious symbols in part of its field is not itself a religious flag. And as appellants conceded at oral argument and is also evident from the record, there is no evidence that the City has ever raised the flag of any religion on the flagpole at issue. Shurtleff has not established that the City's policy and practice shows a preference for one religion or religious denomination over another.

Next, Shurtleff claims that the City acts in contravention of the Establishment Clause "by allowing the numerous and varied [secular] flags of a broad spectrum of private organizations while specifically excluding Camp Constitution's 'non-secular' flag." But the "secular" flags -- really, flags of secular organizations or causes -- the City has allowed to fly instead of the City flag do not show that the City has espoused a preference for non-religion over religion. And the record contains no evidence that would suggest otherwise. Thus, in light of the current record, we agree with the district court that the likelihood of success of Shurtleff's Establishment Clause claim is dim.

IV.

For the reasons explained above, the district court did not abuse its discretion in denying Shurtleff's request for a preliminary injunction and its judgment is affirmed.

Affirmed.

All Citations

928 F.3d 166

DISTRICT COURT ORDER DENYING JUDGMENT ON THE PLEADINGS, FILED MAY 3, 2019

385 F.Supp.3d 109
United States District Court, D. Massachusetts.

Harold SHURTLEFF et al., Plaintiffs,
v.
CITY OF BOSTON et al., Defendants.

Case No. 18-cv-11417-DJC
|
Filed May 3, 2019

Attorneys and Law Firms

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MEMORANDUM AND ORDER

Denise J. Casper, United States District Judge

I. Introduction

Plaintiffs Harold Shurtleff and Camp Constitution (collectively, "Plaintiffs") filed this lawsuit against Defendants, the City of Boston and Gregory T.

Rooney, in his official capacity as Commissioner of the City of Boston Property Management Department (collectively, "Defendants" or "the City"), seeking to enjoin the City from denying permission to the Plaintiffs to display the Christian flag on a City Hall flagpole in conjunction with their Constitution Day and Citizenship Day event. D. 1. Defendants have now moved for judgment on the pleadings. D. 39. For the reasons discussed below, the Court DENIES Defendants' motion for judgment on the pleadings, D. 39.

II. Standard of Review

Rule 12(c) allows a party to move for judgment on the pleadings at any time "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A motion for judgment on the ***113** pleadings pursuant to Fed. R. Civ. P. 12(c), is "ordinarily accorded much the same treatment" as a Rule 12(b)(6) motion. Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 54 (1st Cir. 2006). To survive a motion for judgment on the pleadings, therefore, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Because a motion for judgment on the pleadings "calls for an assessment of the merits of the case at an embryonic stage," the Court "view[s] the facts contained in the pleadings in the light most favorable to the nonmovant and draw[s] all reasonable inferences therefrom" in their favor. Pérez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008) (citation omitted).

On a Rule 12(c) motion, unlike a Rule 12(b) motion, the Court considers the pleadings as a whole, including the answer. See Aponte-Torres, 445 F.3d at 54-55. Those assertions in the answer that have not been denied and do not conflict with the assertions in the complaint are taken as true. See Santiago v. Bloise, 741 F.Supp.2d 357, 360 (D. Mass. 2010). In addition, "[t]he court may supplement the facts contained in the pleadings by considering documents fairly incorporated therein and facts susceptible to judicial notice." R.G. Fin. Corp. v. Vergara-Nuñez, 446 F.3d 178, 182 (1st Cir. 2006).

III. Factual Background

The City owns and manages three flagpoles located in front of the entrance to City Hall, in an area called City Hall Plaza. D. 11-1 ¶ 5. The three poles are the same height, approximately 83 feet tall. D. 11-1 ¶ 6. One pole regularly displays the flags of the United States and the National League of Families Prisoner of War/Missing in Action ("POW/MIA") flag. D. 11-1 ¶ 8. A second pole flies the flag of the Commonwealth of Massachusetts. Id. The dispute in this case centers on the third flagpole, which displays the City of Boston flag except when replaced by another flag—usually at the request of a third-party. Id. ¶¶ 8-9. Such a request is often made in conjunction with a proposed third-party event to take place at a location owned by the City, one of which is City Hall Plaza. D. 11 at 2. Examples of other flags that have been raised on the third flagpole are country flags, e.g., the flags of Brazil, Ethiopia, Portugal, Puerto Rico, the People's Republic of China and Cuba, and the flags of private organizations, including the

Juneteenth flag recognizing the end of slavery, the LGBT rainbow pride flag, the pink transgender rights flag, and the Bunker Hill Association flag. D. 1 ¶¶ 36-37; D. 43 at 18; D. 11 at 2. As Plaintiffs allege, the flag of Portugal contains "dots inside the blue shields represent[ing] the five wounds of Christ when crucified" and "thirty dots that represents [sic] the coins Judas received for having betrayed Christ." D. 1 ¶ 36. The City of Boston flag includes the Boston seal's Latin inscription, which translates to "God be with us as he was with our fathers." D. 1 ¶ 41(a). As Plaintiffs note, the Bunker Hill Flag contains a red St. George's cross. D. 1 ¶ 41(b). Many religious groups, including Plaintiffs, have held events at City-owned properties in the past. D. 8 at 4; D. 11 at 3.[1]

[1] In or about 2012, Plaintiffs obtained permission to and did fly an unspecified flag on the City Hall flagpole as part of a free speech event. D. 1 ¶ 19; D. 8 at 4. Plaintiffs do not allege that they received permission to fly the Christian flag at that event.

To apply for a permit to raise a flag at City Hall and hold an event on a City-owned property, a party submits an application to the City. D. 11 at 3; D. 11-1 ¶ 13. ***114** The City has published guidelines on its website for applicants. D. 8 at 3; D. 11 at 3; D. 11-1 ¶ 13. The guidelines state that an application may be denied if the event involves illegal or dangerous activities or if it conflicts with scheduled events. D. 8 at 3-4; D. 11 at 3. In addition, an application may be denied if the applicant lacks an insurance certification, lies on their application, has a history

of damaging city property or failing to pay city fees or fails to comply with other administrative requirements. D. 8 at 4; D. 11 at 3. After a party has submitted an application, the City reviews the request to ensure it complies with all guidelines. D. 1-8 at 2; D. 11 at 3; D. 11-1 ¶ 15. The Commissioner of Property Management reviews applications for the City flagpole to ensure flag requests are "consistent with the City's message, policies, and practices." D. 11 at 3; D. 11-1 ¶¶ 16-17. The City does not have a written policy regarding the content of flags to be raised. D. 8 at 4.

On July 28, 2017, Plaintiff Shurtleff emailed the City on behalf of his organization, Camp Constitution, requesting to "raise the Christian flag on City Hall Plaza," accompanied by "short speeches by some local clergy focusing on Boston's history" on one of several dates in September 2017. D. 1-1. The email included a photograph of the Christian flag, D. 1-1, which "displays a red Latin cross against a blue square bordered on three sides by a white field." D. 1-4. On September 5, 2017, the City denied Shurtleff's request to raise the Christian flag without explanation. D. 1-3. Shurtleff asked for the "official reason" for denying the permit. Id. Defendant Rooney wrote to Shurtleff that "[t]he City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." D. 1-4. Rooney further explained that the City's "policy and practice" was based upon the First Amendment prohibition on government establishing religion and the City's authority to decide how to use its flagpoles, which

are a "limited government resource." Id. Rooney concluded that "[t]he City would be willing to consider a request to fly a non-religious flag, should [Shurtleff's] organization elect to offer one." Id. In response, Plaintiffs' counsel sent a letter to the City on September 14, 2017, taking the position that the denial was unconstitutional and declining to "submit a 'non-religious' flag." D. 1-6 at 2. Plaintiffs' counsel attached a second application for "Camp Constitution's Christian Flag Raising" on October 19 or October 26, 2017. D. 1-5. The stated purpose of the event was to "[c]elebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth." Id. The letter stated that if Plaintiffs did not receive a response by September 27, 2017, Plaintiffs would take "additional actions to prevent irreparable harm to the rights of [their] clients." D. 1-6 at 4. The City neither issued a permit to Plaintiffs nor responded to the letter. D. 8 at 5; D. 11 at 4. Since receiving the letter, Plaintiffs have not applied to hold further events on City-owned property, with or without a flag. D. 11 at 19-20.

IV. Procedural History

On July 6, 2018, Plaintiffs filed the present complaint seeking injunctive relief, declaratory relief and damages against Defendants. D. 1. Plaintiffs moved for a preliminary injunction, D. 7, which the Court denied on August 29, 2018, D. 19. Plaintiffs have appealed the Court's decision denying them injunctive relief to the First Circuit. D. 23. The Court denied Plaintiffs' motion to stay

these proceedings during the pendency of that appeal. D. 34. Defendants have now moved for judgment on the pleadings. D. 39. The ***115** Court heard the parties on the pending motion and took the matter under advisement. D. 46.

V. Discussion

Plaintiffs have asserted six claims—three federal and three state constitutional: 1) a violation of the First Amendment free speech clause; 2) a violation of the First Amendment establishment clause; 3) a violation of the Fourteenth Amendment equal protection clause; 4) a violation of the freedom of speech clause of Article 16 of the Massachusetts Declaration of Rights; 5) a violation of the non-establishment of religion clauses of Articles 2 and 3 of the Massachusetts Declaration of Rights; and 6) a violation of equal protection under Articles 1 and 3 of the Massachusetts Declaration of Rights. The City seeks judgment on the pleadings as to all of those claims. Federal law governs the Court's analysis of Plaintiffs' claims under both the United States and Massachusetts Constitutions. See, e.g., Commonwealth v. Barnes, 461 Mass. 644, 650, 963 N.E.2d 1156 (2012) (classifying the free speech provisions of Article 16 of the Massachusetts Declaration of Rights as a "cognate provision" of the First Amendment); Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 243, 850 N.E.2d 533 (2006) (noting that "[t]he standard for equal protection analysis under [Massachusetts'] Declaration of Rights is the same as under the Federal Constitution"); Opinion of the Justices to the House of Representatives, 423 Mass. 1244, 1247, 673 N.E.2d 36 (1996) (explaining

that the court's analysis under Article 2 of the Massachusetts Declaration of Rights was "based on the same standards applied under the establishment clause of the First Amendment").

A. Free Speech Claims

The parties disagree about whether the City's selection and presentation of the flags on the City flagpole constitute government speech or private speech. If the flags are government speech, as the City asserts, "then the Free Speech Clause has no application" and the City may "select the views that it wants to express." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-68, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). In contrast, if the flags are private speech displayed in a limited public forum, as Plaintiffs argue, the restriction on non-secular flags must be reasonable and viewpoint neutral. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). In its order denying the preliminary injunction, the Court concluded that the selection and display of the flags on the City Hall flagpole constituted government speech. That, however, was based upon a standard of reasonable likelihood of success, unlike here, where the City seeks judgment in its favor without the benefit of discovery (which was scheduled to close this week, months after the filing of this motion). At this stage, the Court "must view the facts contained in the pleadings in the light most favorable to the nonmovant," in this case, the Plaintiffs. Pérez-Acevedo, 520 F.3d at 29. Accordingly, the Court cannot enter judgment for the City where the record upon which this motion

relies was not as fully developed as to the determination of government speech.

1. The Court Cannot, at this Juncture, Issue Judgment in the City's Favor As to the Government Speech Issue

Two leading Supreme Court cases inform this Court's analysis of whether the City's selection and presentation of flags on the City flagpole constitute government speech. In the first case, Summum, members of a religious organization called Summum sued the city of Pleasant Grove under the free speech clause of the First ***116** Amendment for the city's failure to erect Summum's proposed monument in a public park. Summum, 555 U.S. at 464, 129 S.Ct. 1125. The city had previously erected other privately donated monuments in the park, including a monument of the Ten Commandments. Id. at 465, 129 S.Ct. 1125. Summum's proposed monument was to contain "the Seven Aphorisms of SUMMUM" and would "be similar in size and nature to the Ten Commandments monument." Id. The city rejected Summum's proposal pursuant to an unwritten rule "limit[ing] monuments in the Park to those that 'either (1) directly relate[d] to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community.' " Id. The Supreme Court unanimously concluded that the city's rejection of Summum's proposal constituted government speech and that the "Free Speech Clause ... does not regulate government speech." Id. at 467, 129 S.Ct. 1125.

The Supreme Court subsequently considered a similar free speech challenge in Walker v. Tex. Div., Sons of Confederate Veterans, Inc., —— U.S. ——, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015). Walker concerned the Texas Department of Motor Vehicle Board's rejection of a proposal by the Sons of Confederate Veterans for a vanity license plate featuring the Confederate flag. Id. at 2243-44. In considering the design, the Board sought public comments. Id. at 2245. Following the comments, the Board voted unanimously to reject the proposed plate because "many members of the general public [found] the design offensive," "such comments [were] reasonable" and "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." Id. (internal quotation mark omitted). The Court held that the Texas license plates, like the monuments in Summum, constituted government speech and thus were not subject to the free speech clause. Id. at 2246. The Court primarily focused on 1) the history of the speech at issue; 2) a reasonable observer's perception of the speaker and 3) control over the speech. Id. at 2248-50. Relying heavily on Summum, the Court concluded that 1) license plates "long have communicated messages from the States;" 2) license plates "are often closely identified in the public mind with the [State]" and reasonable observers "interpret them as conveying some message on the [State's] behalf" and 3) the state had "effectively controlled" the content of the license plates by exercising approval authority over each request. Id. at 2247-49 (first alteration in original)

(citations omitted).

Summum and Walker, which govern the analysis here, were resolved upon more developed records, particularly as to the first two Walker factors. Here, as to the first Walker factor, the current record does not detail the history of the flagpole and whether the non-governmental flags at City Hall "long have communicated messages from the [City]." Id. at 2248. Although "[t]he absence of historical evidence can be overcome by other indicia of government speech," here Defendants have not provided any other such indicia. Mech v. Sch. Bd. of Palm Beach Cnty., Fla., 806 F.3d 1070, 1076 (11th Cir. 2015). Defendants have cited to general propositions about the messaging of flags, see, e.g., Texas v. Johnson, 491 U.S. 397, 405, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (observing that "[p]regnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America' "), but have not supplied the Court with any information about the history of the flags flown at City Hall. "The absence of historical evidence ***117** weighs in [Plaintiffs'] favor." Mech, 806 F.3d at 1075.

As to the second Walker factor, the present record contains limited facts relevant to whether the reasonable observer would perceive the flying of a flag to be an endorsement of the flag's message by the City. See Walker, 135 S.Ct. at 2260-2261 (Alito, J., dissenting) (warning against the use of "extrarecord" information in the government speech analysis). Moreover, the reasonable observer's perception of a given display may be informed by the

history of the display itself. See Summum, 555 U.S. at 477, 129 S.Ct. 1125 (explaining that an observer's perception of a display may change over time as society and "historical interpretations" evolve) (citation omitted). Accordingly, without sufficient information to analyze the first Walker factor, the Court cannot properly assess the second, making judgment on the pleadings inappropriate.

The Court is aware that since the decisions in Summum and Walker, at least one federal court has determined that a city's selection of private flags on a city-owned flagpole constitutes government speech. In United Veterans Mem'l & Patriotic Ass'n of New Rochelle v. City of New Rochelle, 615 Fed. App'x. 693, 694 (2d Cir. 2015), the court considered a challenge to the city's removal of a veterans group's flag from a flagpole in a city-owned armory. Id. Applying the Supreme Court's reasoning in Walker, the Second Circuit in New Rochelle held that "[t]he City was well within its rights to delegate to [a private organization] the right to display and maintain flags on the City-owned flagpole without creating a public forum of any sort, or relinquishing control of the flags displayed." Id. at 694. In New Rochelle, however, the record before the district court contained more information about the history of the speech at issue. See United Veterans Mem'l & Patriotic Ass'n of New Rochelle v. City of New Rochelle, 72 F.Supp.3d 468, 471, 475, 477-78 (S.D.N.Y. 2014) (relying upon facts in the record that detailed the history of the armory and the flags flown there, the shifting meaning of the particular flag over time, the length of time for which flags flew

at the armory, a demonstrated history of complaints about the flag and a breakdown of the city council's vote against flying the flag). The record in the case before this Court has not been similarly developed, however, and such judgment now would be premature.

2. Alternatively, the City is Not Entitled at this Juncture to Judgment that any Restriction on Flag Selection and Presentation was Reasonable and Viewpoint Neutral in a Limited Public Forum

If the City's selection and presentation of flags on the City flagpole was not government speech, its permissibility under the Constitution would be determined based on the type of forum at issue. There are three types of fora under First Amendment jurisprudence. One is a traditional public forum, such as a street or a park, which "has immemorially been held in trust for the use of the public...." Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). The second type is a non-public forum, "which is not by tradition or designation a forum for public communication...." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Between these two types is a "limited public forum," which is a non-public forum that the government "has opened for use by the public as a place for expressive activity." Id. at 45, 47, 103 S.Ct. 948.

Plaintiffs assert that the City has designated the flagpole as a limited public forum and that the City's

restriction on non-secular flags in such a forum should ***118** be subject to strict scrutiny.[2] Strict scrutiny, however, is not the correct standard for speech in a limited public forum. Rather, the Supreme Court's rule is that in a limited public forum the government may not exercise viewpoint discrimination and "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.' " Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510 (quoting Cornelius v. Nat'l Ass'n for the Advancement of Colored People Legal Def. & Ed. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)).

[2] Because Plaintiffs assert that the flagpole is a limited public forum, rather than a traditional public forum or non-public forum, the cases that Plaintiffs cite concerning the latter categories do not aid the Court's analysis. See Rosenberger, 515 U.S. at 829-30, 115 S.Ct. 2510 (stating that a prior restraint on content discrimination, unlike viewpoint discrimination, "may be permissible if it preserves the purposes of [the] limited forum"); cf. D. 43 at 15-16; Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 154, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (scrutinizing ordinance that regulated speech on "private residential property"); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (considering "the constitutionality of charging a fee for a speaker in a public forum"); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 220, 110 S.Ct. 596, 107 L.Ed.2d 603 (weighing zoning ordinance regulating "sexually oriented business[es]").

In Rosenberger, the Supreme Court held that a public university could not deny funding to a student magazine expressing Christian viewpoints on a wide

range of topics while it subsidized other student journals. Id. at 837, 846, 115 S.Ct. 2510. The Court emphasized that the reason the University's policy ran afoul of the free speech clause was that "the University [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Id. at 831, 115 S.Ct. 2510. Following Rosenberger, other courts have upheld government exclusions of religion when the policy excluded religion as a subject matter, rather than a viewpoint on other subjects, in limited public fora. See, e.g., DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 969 (9th Cir. 1999) (upholding high school's decision to exclude religious advertising funded by third parties on baseball field fence open exclusively to commercial messages); Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 281 F.Supp.3d 88, 96 (D.D.C. 2017) (denying injunctive relief to plaintiffs challenging bus company's policy of excluding religious advertisements funded by third parties on buses), aff'd, 897 F.3d 314 (D.C. Cir. 2018), reh'g denied, 910 F.3d 1248 (D.C. Cir. 2018).

None of the cases cited above, however, were resolved at the "embryonic stage" under Rule 12(c). Pérez-Acevedo, 520 F.3d at 29; see Rosenberger, 515 U.S. at 827, 846, 115 S.Ct. 2510 (reversing summary judgment); DiLoreto, 196 F.3d at 962 (affirming summary judgment); Archdiocese of Wash., 281 F.Supp.3d at 116 (denying preliminary injunction and temporary restraining order). In Rosenberger specifically, the developed record included prior issues of the student magazine, the history of the

student magazine's organizational status on campus and the number of applications and approvals for school funding for all student organizations during the relevant school year. Rosenberger, 515 U.S. at 825-26, 115 S.Ct. 2510.

At this stage of the litigation, the Court cannot determine whether exclusion of the Christian flag is reasonable in light of the purpose served by the forum. Here, the City's written policies about the flagpole do not include any provisions about non-secular ***119** flags, nor do they provide insight into the City's purpose in controlling the flags that may be flown. See D. 1-7; D. 1-8. The City asserts that the policy is reasonable given its interest in avoiding the appearance of endorsing a particular religion and a consequential violation of the Establishment Clause. See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (noting that "[t]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment") (alteration in original) (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)). This assertion, however, is contested, and the Court must view all facts contained in the pleadings in the light most favorable to Plaintiffs. Pérez-Acevedo, 520 F.3d at 29. Applying this standard, the City is not entitled to judgment at this stage as to whether any restriction on the flagpole is reasonable and viewpoint neutral.

B. The Establishment Clause

As discussed above, the Court cannot grant judgment for the City as to the free speech issue. Even if it could, however, the Court would still be required to analyze the application of the Establishment Clause, because government speech must comply with the Establishment Clause. Summum, 555 U.S. at 468, 129 S.Ct. 1125. Plaintiffs allege that the City's policy of displaying only non-secular flags is "overtly hostile to religion and violates the Establishment Clause." D. 8 at 11-12. Defendants, on the other hand, argue that the City would violate the Establishment Clause if it were to raise the Christian flag on the City flagpole. D. 11 at 16-18.

The test for reviewing the constitutionality of religious displays on government property is the Lemon test, which holds that a government regulation must 1) "have a secular legislative purpose," 2) the "principal or primary effect must be one that neither advances nor inhibits religion" and 3) the regulation "must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (internal quotations omitted). Cases subsequent to Lemon have augmented the analysis with the "endorsement test." Lynch v. Donnelly, 465 U.S. 668, 688-89, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J. concurring); see Devaney v. Kilmartin, 88 F.Supp.3d 34, 50 (D.R.I. 2014) (treating the endorsement test as having "amplified" the Lemon test). Under the endorsement test, which parallels part two of the Lemon test, the

Court must consider whether the City's actions have the "purpose or effect of endorsing, favoring or promoting religion." Id. at 51-52 (quoting Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 10 (1st Cir. 2010)).

Like government speech, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.' " Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) (citation omitted); see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (reviewing a challenged policy's history to determine its purpose). Specifically, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring). Analysis of the Establishment Clause is also "a delicate and fact-sensitive one." ***120** Lee v. Weisman, 505 U.S. 577, 597, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); see Town of Greece, 572 U.S. at 587, 134 S.Ct. 1811 (noting that analysis of prayer at town board meetings under the Establishment Clause is "fact-sensitive" and that the Court "considers both the setting in which the prayer arises and the audience to whom it is directed"). As explained above, the current record does not contain sufficient information about the history of flags on the City flagpole to assess the primary effect of the City's policy on non-secular flags. Accordingly, the Court

cannot resolve the Establishment Clause claim at this time.

C. Fourteenth Amendment Equal Protection

Plaintiffs argue that the City's policy violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause requires that "all persons similarly situated ... be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To establish an equal protection claim, Plaintiffs must allege facts showing that "(1) the person, compared with others similarly situated, was selectively restricted; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Davis v. Coakley, 802 F.3d 128, 132-33 (1st Cir. 2015) (citation omitted).

Plaintiffs allege that the City's policy against non-secular flags violates equal protection because it discriminates against speech based on its content–namely, against religious speech. D. 43 at 21. In holding that a teacher's group separate from the union lacked a First or Fourteenth Amendment right to access a school's internal mail system, the Supreme Court in Perry explained that "on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." Perry, 460 U.S. at 55, 103 S.Ct. 948. In Perry,

however, the Court's equal protection analysis was informed by its conclusion that the teacher's group did not have a "First Amendment or other right of access" to the mail system. Id. at 54, 103 S.Ct. 948. Here, as explained above, the Court cannot reach a conclusion on the First Amendment issue at this stage. Moreover, unlike in this case, the Court in Perry had the benefit of the full summary judgment record and was able to consider, for example, the other groups that had been granted access to the school's mail system, the history of the school's policy regarding the mail boxes and the availability of other means to transmit messages at the school. Id. at 47, 103 S.Ct. 948; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 652 F.2d 1286, 1287 (7th Cir. 1981). Accordingly, the Court, therefore, also cannot grant judgment to the City on the equal protection claim at this juncture.

VI. Conclusion

For the aforementioned reasons, the Court DENIES Defendants' motion for judgment on the pleadings, D. 39.

So Ordered.

All Citations

385 F.Supp.3d 109

DISTRICT COURT ORDER DENYING PRELIMINARY INJUNCTION, FILED AUGUST 29, 2018

337 F.Supp.3d 66
United States District Court, D. Massachusetts.

Harold SHURTLEFF et al., Plaintiffs,
v.
CITY OF BOSTON et al., Defendants.

Civil Action No. 18-cv-11417-DJC
|
Filed 08/29/2018

Attorneys and Law Firms

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MEMORANDUM AND ORDER

Denise J. Casper, United States District Judge

I. Introduction

Plaintiffs Harold Shurtleff and Camp Constitution ("Plaintiffs") have moved for a preliminary injunction against Defendants, the City of Boston

and Gregory T. Rooney, in his official capacity as Commissioner of the City of Boston Property Management Department (collectively, "Defendants" or "the City"). D. 7. Plaintiffs seek to enjoin the City from denying permission to the Plaintiffs to display "the Christian flag" on a City Hall flagpole in conjunction with their Constitution Day and Citizenship Day event on or around September 17, 2018. D. 7 at 2. For the reasons discussed below, Plaintiffs' motion for a preliminary injunction, D. 7, is DENIED.

***70 II. Standard of Review**

"A preliminary injunction is an 'extraordinary and drastic remedy.' " Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) (quoting Munaf v. Geren, 553 U.S. 674, 689-90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008)). To obtain a preliminary injunction, the Court must consider: (1) the movant's likelihood of success on the merits; (2) the likelihood of the movant suffering irreparable harm; (3) the balance of equities; and (4) whether granting the injunction is in the public interest. Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 9 (1st Cir. 2013). Plaintiffs "bear[ ] the burden of establishing that these four factors weigh in [their] favor." Esso Standard Oil Co. (P.R.) v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006); see Rivera-Vega v. ConAgra Inc., 70 F.3d 153, 164 (1st Cir. 1995) (quoting Pye ex rel. NLRB v. Sullivan Bros. Printers, 38 F.3d 58, 63 (1994)) (noting that when the relief sought by the moving party "is essentially the final relief sought, the likelihood of success should be strong") (emphasis in original) (internal

quotation marks omitted).

III. Factual Background

The following facts, largely undisputed, are drawn from the complaint, D. 1, Plaintiffs' motion for a preliminary injunction, D. 7-8, and the City's opposition, D. 11. The City owns and manages three flagpoles located in front of the entrance to City Hall, in an area called City Hall Plaza. D. 11 at 2; D. 11-1 ¶ 5. The three poles are the same height, approximately 83 feet tall. D. 11 at 2. One pole regularly displays the flags of the United States and the National League of Families Prisoner of War/Missing in Action ("POW/MIA") flag. Id. A second pole flies the flag of the Commonwealth of Massachusetts. Id. The dispute in this case centers on the third flagpole, which displays the City of Boston flag except when replaced by another flag—usually at the request of a third-party. Id. Such a request is often made in conjunction with a proposed third-party event to take place at a location owned by the City, one of which is City Hall Plaza. Id. Examples of other flags that have been raised on the third flagpole are country flags, e.g., the flags of Brazil, Ethiopia, Portugal, Puerto Rico, the People's Republic of China and Cuba, and the flags of private organizations, including the Juneteenth flag recognizing the end of slavery, the LGBT rainbow pride flag, the pink transgender rights flag, and the Bunker Hill Association flag. D. 8 at 3; D. 11 at 2. As Plaintiffs allege, the flag of Portugal contains "dots inside the blue shields represent[ing] the five wounds of Christ when crucified" and "thirty dots that represents [sic] the coins Judas received for

having betrayed Christ." D. 1 ¶ 36. The City of Boston flag includes the Boston seal's Latin inscription, which translates to "God be with us as he was with our fathers." D. 1 ¶ 41(a). As Plaintiffs note, the Bunker Hill Flag contains a red St. George's cross. D. 1 ¶ 41(b). Many religious groups, including Plaintiffs, have held events at City-owned properties in the past. D. 8 at 4; D. 11 at 3.[1]

[1] In or about 2012, Plaintiffs obtained permission to and did fly an unspecified flag on the City Hall flagpole as part of a free speech event. D. 1 ¶ 19; D. 8 at 4. Plaintiffs do not allege that they received permission to fly the Christian flag at that event.

To apply for a permit to raise a flag at City Hall and hold an event on a City-owned property, a party submits an application to the City. D. 11 at 3; D. 11-1 ¶ 13. The City has published guidelines on its website for applicants. D. 8 at 3; D. 11 at 3; D. 11-1 ¶ 13. The guidelines state that an application may be denied if the event ***71** involves illegal or dangerous activities or if it conflicts with scheduled events. D. 8 at 3-4; D. 11 at 3. In addition, an application may be denied if the applicant lacks an insurance certification, lies on their application, has a history of damaging city property or failing to pay city fees or fails to comply with other administrative requirements. D. 8 at 4; D. 11 at 3. After a party has submitted an application, the City reviews the request to ensure it complies with all guidelines. D. 1-8 at 2; D. 11 at 3; D.11-1 ¶ 15. The Commissioner of Property Management reviews applications for the City flagpole to ensure flag requests are

"consistent with the City's message, policies, and practices." D. 11 at 3; D. 11-1 ¶¶ 16-17. The City does not have a written policy regarding the content of flags to be raised. D. 8 at 4.

On July 28, 2017, Plaintiff Shurtleff emailed the City on behalf of his organization, Camp Constitution, requesting to "raise the Christian flag on City Hall Plaza," accompanied by "short speeches by some local clergy focusing on Boston's history" on one of several dates in September 2017. D. 1-1. The email included a photograph of the Christian flag, D. 1-1, which "displays a red Latin cross against a blue square bordered on three sides by a white field." D. 1-4. On September 5, 2017, the City denied Shurtleff's request to raise the Christian flag without explanation. D. 1-3. Shurtleff asked for the "official reason" for denying the permit. Id. Defendant Rooney wrote to Shurtleff that "[t]he City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." D. 1-4. Rooney further explained that the City's "policy and practice" was based on the First Amendment prohibition on government establishing religion and the City's authority to decide how to use its flagpoles, which are a "limited government resource." Id. Rooney concluded that "[t]he City would be willing to consider a request to fly a non-religious flag, should [Shurtleff's] organization elect to offer one." Id. In response, Plaintiffs' counsel sent a letter to the City on September 14, 2017, taking the position that the denial was unconstitutional and declining to "submit a 'non-religious' flag." D. 1-6 at 2. Plaintiffs'

counsel attached a second application for "Camp Constitution's Christian Flag Raising" on October 19 or October 26, 2017. D. 1-5. The stated purpose of the event was to "[c]elebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth." Id. The letter stated that if Plaintiffs did not receive a response by September 27, 2017, Plaintiffs would take "additional actions to prevent irreparable harm to the rights of [their] clients." D. 1-6 at 4. The City neither issued a permit to Plaintiffs nor responded to the letter. D. 8 at 5; D. 11 at 4. Since receiving the letter, Plaintiffs have not applied to hold further events on City-owned property, with or without a flag. D. 11 at 19-20.

IV. Procedural History

On July 6, 2018, Plaintiffs filed the present complaint seeking injunctive relief, declaratory relief and damages against Defendants. D. 1. On July 9, 2018, Plaintiffs moved for a preliminary injunction. D. 7. On August 9, 2018, the Court heard the parties on the pending motion and took this matter under advisement. D. 14.

V. Discussion

Plaintiffs have asserted six claims—three federal and three state constitutional: 1) a violation of the First Amendment free speech clause; 2) a violation of the First Amendment establishment clause; 3) a violation of the Fourteenth Amendment equal protection clause; 4) a violation of ***72** the freedom of speech clause of Article 16 of the Massachusetts

Declaration of Rights; 5) a violation of the non-establishment of religion clauses of Articles 2 and 3 of the Massachusetts Declaration of Rights; and 6) a violation of equal protection under Articles 1 and 3 of the Massachusetts Declaration of Rights.[2]

[2] Although Plaintiffs request an order compelling the City to include a description of Plaintiffs' event on its website, Plaintiffs have not alleged that the City denied any such request. As such, Plaintiffs have not "present[ed] a real, substantial controversy ... a dispute definite and concrete, not hypothetical or abstract" that is ripe for resolution as to this request. Nomad Acquisition Corp. v. Damon Corp., 701 F.Supp. 10, 11 (D. Mass. 1988) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)) (internal quotation marks and punctuation omitted). Accordingly, the Court's analysis is limited to Plaintiffs' claims with respect to the prayer for relief concerning the denial of permission to raise the Christian flag on the City flagpole.

As an initial matter, federal law governs the Court's analysis of the Plaintiffs' claims under both the United States and Massachusetts Constitutions. See, e.g., Commonwealth v. Barnes, 461 Mass. 644, 650, 963 N.E.2d 1156 (2012) (classifying the free speech provisions of Article 16 of the Massachusetts Declaration of Human rights as a "cognate provision" of the First Amendment); Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 243, 850 N.E.2d 533 (2006) (noting that "[t]he standard for equal protection analysis under [Massachusetts'] Declaration of Rights is the same as under the Federal Constitution"); Opinion of the Justices to the House of Representatives, 423 Mass. 1244, 1247, 673

N.E.2d 36 (1996) (explaining that the court's analysis under Article 2 of the Declaration of Rights of the Massachusetts Constitution was "based on the same standards applied under the establishment clause of the First Amendment"). Here, neither party has meaningfully cited to Massachusetts law to assess the constitutionality of the City's actions. In a single footnote, Plaintiffs assert that rights to freedom of expression are generally coextensive under the United States and Massachusetts Constitutions and that where the two diverge, the state protections are "more extensive." D. 8 at 6, n.1 (citing Flaherty v. Knapik, 999 F.Supp.2d 323, 332 (D. Mass. 2014)). Plaintiffs, however, do not specifically address how these "more extensive" protections under Massachusetts law would apply to the instant case. Defendants assert that federal jurisprudence governs the analysis. D. 11 at 5, n. 3. Like Plaintiffs, they note that in some instances, provisions of the Massachusetts Constitution are more protective than those of the United States Constitution, but Defendants contend that those instances are inapplicable to the present case. Because neither party has argued that the Court should rely on Massachusetts law rather than federal law, the Court will address the Massachusetts constitutional claims coextensively with their federal counterparts.

A. Likelihood of Success on the Merits

Although the Court considers all factors of the preliminary injunction analysis, "[t]he sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate

that [it] is likely to succeed in [its] quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002); see Boathouse Grp., Inc. v. TigerLogic Corp., 777 F.Supp.2d 243, 248 (D. Mass. 2011) (explaining that "[l]ikelihood of success on the merits is the critical factor in the analysis and, accordingly, a strong likelihood of ***73** success may overcome a 'somewhat less' showing of another element") (quoting EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 743 (1st Cir. 1996)).

1. Free Speech Claims

The parties disagree about whether the City's selection and presentation of the flags on the City flagpole constitute government speech or private speech. If the flags are government speech, as Defendants assert, "then the Free Speech Clause has no application" and the City may "select the views that it wants to express." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-68, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). In contrast, if the flags are private speech displayed in a limited public forum, as Plaintiffs argue, the restriction on non-secular flags must be reasonable and viewpoint neutral. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). This Court concludes that the selection and display of the flags on the City flagpole constitute government speech. Moreover, even if they did not constitute government speech, the Court finds that the City's restriction on non-secular flags satisfies the constitutional requirements for

limitations on speech in a limited public forum.

a) The City's Selection and Presentation of Flags Constitutes Government Speech

Two leading Supreme Court cases compel the conclusion that the City's selection and presentation of flags on the City flagpole constitute government speech. In the first case, Pleasant Grove City, members of a religious organization called Summum sued the city of Pleasant Grove under the free speech clause of the First Amendment for the city's failure to erect Summum's proposed monument in a public park. Pleasant Grove City, 555 U.S. at 464, 129 S.Ct. 1125. The city had previously erected other privately donated monuments in the park, including a monument of the Ten Commandments. Id. at 465, 129 S.Ct. 1125. Summum's proposed monument was to contain "the Seven Aphorisms of SUMMUM" and would "be similar in size and nature to the Ten Commandments monument." Id. The city rejected Summum's proposal pursuant to an unwritten rule "limit[ing] monuments in the Park to those that 'either (1) directly relate[d] to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community.' " Id. The Supreme Court unanimously concluded that the city's rejection of Summum's proposal constituted government speech and that the "Free Speech Clause ... does not regulate government speech." Id. at 467, 129 S.Ct. 1125.

The Supreme Court subsequently considered a similar free speech challenge in Walker v. Tex. Div.,

Sons of Confederate Veterans, Inc., —— U.S. ——, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015). Walker concerned the Texas Department of Motor Vehicle Board's rejection of a proposal by the Sons of Confederate Veterans for a vanity license plate featuring the Confederate flag. Id. at 2243-44. In considering the design, the Board sought public comments. Id. at 2245. Following the comments, the Board voted unanimously to reject the proposed plate because "many members of the general public [found] the design offensive," "such comments [were] reasonable" and "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." Id. (internal quotation mark omitted). The Court held that the Texas license plates, like the monuments in Summum, constituted government speech and thus ***74** were not subject to the free speech clause. Id. at 2246-47. The Court primarily focused on 1) the history of the speech at issue; 2) a reasonable observer's perception of the speaker and 3) control over the speech. Id. at 2248-50. Relying heavily on Summum, the Court concluded that 1) license plates "long have communicated messages from the States;" 2) license plates "are often closely identified in the public mind with the [State]" and reasonable observers "interpret them as conveying some message on the [State's] behalf" and 3) the state had "effectively controlled" the content of the license plates by exercising approval authority over each request. Id. at 2247-48 (internal quotations and citations omitted).

Applying the factors from Summum and Walker to this case, the Court concludes that the City's selection and presentation of flags on the City flagpole constitute government speech. First, like public monuments, "[g]overnments have long used [flags] to speak to the public." Summum, 555 U.S. at 470, 129 S.Ct. 1125; see Texas v. Johnson, 491 U.S. 397, 405, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (observing that "[p]regnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America' "); W. Va. State Bd. of Educ. v Barnette, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (noting that "[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner ..."). Second, "there is little chance that observers [would] fail to appreciate the identity of the speaker" as the City when confronted with a flag flying 83 feet in the air above City Hall on City property next to the flags of the United States and the Commonwealth. Summum, 555 U.S. at 471, 129 S.Ct. 1125. Third, the City has "effectively controlled" which flags have flown at City hall "by exercising 'final approval authority' over their selection." Walker, 135 S.Ct. at 2247 (quoting Summum, 555 U.S. at 473, 129 S.Ct. 1125) (internal quotation marks omitted). Like the government entities in Summum and Walker, here the City has a controlled process through which applicants can request to fly a flag on City-owned property.

Plaintiffs' rejection of a proposed alternative for expressing itself also supports the contention that flag-raising is government speech. As the Supreme Court reasoned in Walker:

> Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.
>
> Walker, 135 S.Ct. at 2249.

Similar to the bumper sticker, there is nothing in the record to suggest that Plaintiffs could not display the Christian flag on City Hall Plaza as part of their event. See D. 11 at 10. That Plaintiffs have apparently rejected this option indicates a wish to "convey government agreement with the message displayed." Id.

Since the Supreme Court decisions in Summum and Walker, at least one federal court has determined that a city's selection of private flags on a city-owned flagpole constitutes government speech. In ***75** United Veterans Mem'l & Patriotic Ass'n of New Rochelle v. City of New Rochelle, 615 Fed.Appx. 693, 694 (2d Cir. 2015), the court considered a First Amendment challenge to the city's removal of a

veterans group's flag from a flagpole in a city-owned armory. Id. The group had previously been granted "the right to display and maintain flags" on the flagpole. Id. Nonetheless, considering the Supreme Court decision in Walker, the Second Circuit held that "[t]he City was well within its rights to delegate to [a private organization] the right to display and maintain flags on the City-owned flagpole without creating a public forum of any sort, or relinquishing control of the flags displayed." Id. Like the court in New Rochelle, this Court concludes that the City's selection of flags on City-owned property is government speech and, as a result, the free speech clause does not apply.

b) Even if the Selection and Presentation of Flags Were Not Government Speech, the Restriction on Non-Secular Flags is Reasonable, View-Point Neutral and Permissible in a Limited Public Forum

If the City's selection and presentation of flags on the City flagpole were not government speech, their permissibility under the Constitution would be determined based on the type of forum at issue. There are three types of fora under First Amendment jurisprudence. One is a traditional public forum, such as a street or a park, which "has immemorially been held in trust for the use of the public...." Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). The second type is a non-public forum, "which is not by tradition or designation a forum for public communication...." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794

(1983). Between these two types is a "limited public forum," which is a non-public forum that the government "has opened for use by the public as a place for expressive activity." Id. at 45, 103 S.Ct. 948.

Plaintiffs assert that the City has designated the flagpole as a limited public forum and that the City's restriction on non-secular flags in such a forum should be subject to strict scrutiny.[3] Strict scrutiny, however, is not the correct standard for speech in a limited public forum. Rather, the Supreme Court's rule is that in a limited public forum government may not exercise viewpoint discrimination and "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.' " Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510 (quoting Cornelius v. Nat'l Ass'n for the Advancement of Colored People Legal Def. & Ed. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)).[4]

[3] Because Plaintiffs assert that the flagpole is a limited public forum, rather than a traditional public forum, the cases that Plaintiffs cite concerning this latter category do not aid the Court's analysis. See Rosenberger, 515 U.S. at 829-30, 115 S.Ct. 2510 (stating that a prior restraint on content discrimination, unlike viewpoint discrimination, "may be permissible if it preserves the purposes of [the] limited forum"); cf. D. 8 at 13-14; Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 154, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (scrutinizing ordinance that regulated speech on "private residential property"); Forsyth County v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (considering "the constitutionality of charging a fee for a speaker in a

public forum"); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 753, 108 S.Ct. 2138, 100 L.Ed.2d 771 (adjudicating appellee's rights to place newsracks on "city sidewalks," which are traditional public fora).

[4] Similarly, Plaintiffs' argument that the burden shifts to the City to prove the constitutionality its policy is unavailing in the context of a limited public forum. In support of their arguments, Plaintiffs rely on Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 665-66, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) and Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). Those cases, however, involved challenges to federal legislation restricting speech and religious expression, rather than a municipal policy regulating private speech in a limited public forum. Such legislation is reviewed under strict scrutiny, which places the burden on the government to demonstrate a compelling interest in limiting speech and narrow tailoring of the legislation, even at the preliminary injunction stage. Gonzales, 546 U.S. at 429, 126 S.Ct. 1211. In contrast, as explained above, strict scrutiny is not the proper standard of review for a restriction on speech in a limited public forum.

***76** The City's policy of excluding non-secular flags is viewpoint neutral because it excludes religion as a subject matter of speech on the flagpole, rather than prohibiting religious viewpoints on otherwise permissible subjects. See Rosenberger, 515 U.S. at 831, 115 S.Ct. 2510. In Rosenberger, the Supreme Court held that a public university could not deny funding to a student magazine expressing Christian viewpoints on a wide range of topics while it subsidized other student journals. Id. at 837, 846,

115 S.Ct. 2510. The Court emphasized that the reason the University's policy ran afoul of the free speech clause was that "the University [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Id. at 831, 115 S.Ct. 2510. Following Rosenberger, other courts have upheld government exclusions of religion when the policy excluded religion as a subject matter, rather than a viewpoint on other subjects, in limited public fora. See, e.g., DiLoreto v. Downey Unified Sch. District Bd. of Ed., 196 F.3d 958, 969 (9th Cir. 1999) (upholding high school's decision to exclude religious advertising funded by third parties on baseball field fence open exclusively to commercial messages); Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 281 F.Supp.3d 88, 96 (D.D.C. 2017) (denying injunctive relief to plaintiffs challenging bus company's policy of excluding religious advertisements funded by third parties on buses). Here, as in the cases above, the City has permissibly chosen to exclude religion as a subject matter, rather than as one perspective among many on other subjects. Therefore, the City's policy is viewpoint neutral.

The City's policy is also reasonable based on the City's interest in avoiding the appearance of endorsing a particular religion and a consequential violation of the Establishment Clause. See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (noting that "[t]he interest of the State in avoiding an Establishment Clause violation 'may be

[a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment") (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)). Moreover, where the Plaintiffs the opportunity to conduct their event on City Hall Plaza, fly a secular flag on the City flagpole or display the Christian flag on City Hall Plaza but not on the City flagpole, the City has demonstrated reasonableness and that it does not seek to silence Plaintiffs.

2. The Establishment Clause

As discussed above, the Court rules that the City's selection and presentation of flags on the City flagpole constitute government speech. Government speech must still comply with the Establishment Clause. Summum, 555 U.S. at 468, 129 S.Ct. 1125. Plaintiffs allege that the City's policy of displaying only non-secular flags is "overtly hostile to religion and violates the Establishment Clause." D. 8 at 11-12. Defendants, on the other hand, ***77** argue that the City would violate the Establishment Clause if it were to raise the Christian flag on the City flagpole. D. 11 at 16-18. The Court concludes that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claim under the Establishment Clause.

The test for reviewing the constitutionality of religious displays on government property is the Lemon test, which holds that a government regulation must 1) "have a secular legislative purpose," 2) the "principal or primary effect must be

one that neither advances nor inhibits religion" and 3) the regulation "must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (internal quotations omitted). Cases subsequent to Lemon have augmented the analysis with the "endorsement test." Lynch v. Donnelly, 465 U.S. 668, 688-89, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J. concurring); see Devaney v. Kilmartin, 88 F. Supp. 3d 34, 50 (D.R.I. 2014) (treating the endorsement test as having "amplified" the Lemon test). Under the endorsement test, the Court must consider whether the City's actions have the "purpose or effect of endorsing, favoring or promoting religion." Id. at 51-52 (D.R.I. 2014) (quoting Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 10 (1st Cir. 2010)).

Applying the Lemon and endorsement test, the Court concludes that compelling the City to display the Christian flag on the City flagpole, as Plaintiffs seek to do, may well violate the Establishment Clause. Certainly, an event to "raise the Christian flag" could serve some of Plaintiffs' cited secular purposes, such as the celebration of religious freedom in Boston and the contributions of Boston's Christian residents to the City. However, its primary purpose would be to convey government endorsement of a particular religion by displaying the Christian flag alongside that of the United States and the Commonwealth in front of City Hall. Blowing in the wind, these side-by-side flags could quite literally become entangled. If Plaintiffs were not seeking government endorsement, then

Plaintiffs would presumably be content to raise their own flag on their own in the same location as has been suggested. See Walker, 135 S.Ct. at 2249 (explaining that plaintiffs sought to have their speech displayed on a license plate, rather than on a sticker next to a license plate, because the license plate would "convey government agreement with the message displayed").

3. Fourteenth Amendment Equal Protection

Plaintiffs argue that the City's policy violates the Equal Protection Clause of the Fourteenth Amendment as it is stated and as it is applied to Plaintiffs. The Court does not conclude that Plaintiffs have shown a likelihood of success that the City's policy as it stands and as applied does not rise to the level of violating Plaintiffs' rights under the Equal Protection Clause.

First, Plaintiffs allege that they have been deprived of equal protection of the laws because the City's policy prohibiting non-secular flags is unconstitutionally vague. Plaintiffs cite to five cases standing for the proposition that government regulations cannot be overly vague so that citizens can be informed of their rights. D. 8 at 16-17. However, none of these cases apply to the regulation of government speech or even private speech in a limited public forum. Moreover, although the City's policy against flying non-secular flags is unwritten, that does not make it unconstitutional. See Summum, 555 U.S. at 465, 129 S.Ct. 1125 (upholding city's practice ***78** of limiting the types of

monuments in park despite the policy not being put into writing until the year after the city's rejection of Plaintiffs' proposed monument). While the City should strive to make its policies clear, here Plaintiffs have failed to show that any vagueness in the policy has risen to the level of a Fourteenth Amendment violation.

Next, Plaintiffs allege that the City's policy against non-secular flags violates Equal Protection because it discriminates against speech based on its content. In support, Plaintiffs mainly rely on Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) and Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), in which the plaintiffs prevailed on claims of speech-related Equal Protection violations. However, the Supreme Court specifically held that the "key" to the plaintiffs' success in Mosley and Carey was "the presence of a public forum." Perry, 460 U.S. at 55, 103 S.Ct. 948. The Court further reasoned that "[c]onversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." Id. For the reasons already discussed above, and consistent with the conclusions in Perry, the Court concludes that here the City's policy, as applied outside of a public forum, permissibly excludes the subject of religion and does not violate Equal Protection.

Finally, Plaintiffs allege that they have been treated differently from other similarly situated groups

under the City's policy in violation of Equal Protection. The Supreme Court has held that "[w]hen speakers and subjects are similarly situated, the State may not pick and choose." Id. As evidence of their differential treatment, Plaintiffs cite to the display of the flags of Portugal, the City of Boston and the Bunker Hill Association—all of which feature references to God and Christ—on the City flagpole.[5] Plaintiffs are correct that under the City's unwritten policy, there may be some close cases regarding which flags are "non-secular," but these examples are not among them. The exemplar flags, unlike the Christian flag, comply with the Lemon test in that their primary effect is not to advance or inhibit religion. Lemon, 403 U.S. at 612, 91 S.Ct. 2105. The names of the flags alone are enough to reveal their primary purposes. The Christian flag primarily represents a specific religion, while the other cited flags represent a sovereign nation, a city government and a group committed to remembering a military victory. Therefore, Plaintiffs are not similarly situated to the sponsors of the Portuguese, City of Boston and Bunker Hill Association flag events and have failed to make out a claim of differential treatment in violation of the Fourteenth Amendment.

[5] Plaintiffs also emphasize the City's prior decisions to grant permission to private parties to raise the LGBT rainbow pride flag, transgender rights flag and the Juneteenth flag on the City flagpole. However, none of these flags are religious on their face. To the extent that Plaintiffs are being treated differently than the groups that raised those flags, that treatment is based on the City's reasonable choice to exclude religion as a subject matter on the flagpole

and does not violate the Fourteenth Amendment.

For all of the aforementioned reasons, Plaintiffs have failed to show a reasonable likelihood of success on the merits of their claims.

B. Irreparable Harm

To obtain a preliminary injunction, Plaintiffs must show a "significant risk of irreparable harm if the injunction is withheld," Nieves-Márquez v. P.R., 353 F.3d 108, 120 (1st Cir. 2002). It is well-established "[t]he loss of First Amendment freedoms, for even minimal periods of ***79** time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Plaintiffs' claims of irreparable harm absent expedited relief, however, are undermined by their delay in raising constitutional claims related to the City's denial of their application. See Gorman v. Coogan, 273 F.Supp.2d 131, 134 (D. Me. 2003) (noting that "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights ... tends to indicate at least a reduced need for such drastic, speedy action") (internal citation and quotation marks omitted).

Plaintiffs are also unlikely to suffer irreparable harm without a preliminary injunction because they may still hold an event celebrating Constitution Day in their desired forum. Although Plaintiffs have not applied to the City to hold an event since September

2017, the record in this case indicates that the City will give Plaintiffs permission to communicate their ideas in several ways, on or around Plaintiffs' requested date this year. As the City has done in the past, it will allow Plaintiffs to hold an event on City Hall Plaza. It will also give Plaintiffs the opportunity to raise a non-secular flag on the City flagpole and display the Christian flag while on City Hall Plaza. D. 1-4; D. 11 at 10. The City has only denied Plaintiffs permission to compel the City to endorse a particular religion by raising the Christian flag. Given the range of options available to Plaintiffs for their event on City-owned property, the Court concludes Plaintiffs are unlikely to suffer irreparable harm without an injunction.

C. The Balance of Harms and the Public Interest

The final considerations in weighing the grant of a preliminary injunction are "a balance of equities in the plaintiff's favor, and [ ] service of the public interest." Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, 794 F.3d 168, 171 (1st Cir. 2015). In support of their arguments, Plaintiffs rightly remind the Court that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 15 (1st Cir. 2012) (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)) (internal quotation marks omitted). However, on this record, the Court is persuaded that Defendants

have not unlawfully restricted Plaintiffs' ability to speak publicly.

On the other hand, Defendants risk serious consequences from the grant of a preliminary injunction. Given that Plaintiffs have not established a substantial likelihood of success on the merits, it makes little sense to require the City to fly the requested flag pending the adjudication of this case. Raising the Christian flag might also possibly make the City vulnerable to Establishment Clause claims and other constitutional challenges before this case had been decided on the merits. D. 11 at 20. With these considerations in mind, the balance of harms to the parties and the public interest weigh against granting the preliminary injunction that Plaintiffs seek.

VI. Conclusion

For these reasons, Plaintiffs' motion for preliminary injunction, D. 7, is DENIED.

So Ordered.

All Citations

337 F.Supp.3d 66

**JOINT STATEMENT
OF UNDISPUTED FACTS,
FILED JANUARY 22, 2021**

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION**

HAROLD SHURTLEFF, and CAMP CONSTITUTION, a public charitable trust,	:	CIVIL ACTION No. 1:18-cv-11417-DJC
Plaintiffs,	:	
v.	:	
CITY OF BOSTON, and GREGORY T. ROONEY, in his official capacity as Commissioner of the City of Boston Property Management Department,	:	
Defendants.	:	

**JOINT STATEMENT
OF UNDISPUTED FACTS**

Plaintiffs, HAROLD SHURTLEFF ("Shurtleff") and CAMP CONSTITUTION, and Defendants, CITY OF BOSTON ("Boston" or the "City") and GREGORY T. ROONEY, in his official capacity as Commissioner of the City of Boston

Property Management Department ("Rooney"), in accordance with the Court's instructions regarding summary judgment motions at the status conference hearing held on May 6, 2019, file this joint statement of the material facts of record as to which there is no genuine issue to be tried.

I. THE PARTIES.

1. Plaintiff HAROLD SHURTLEFF is a resident of the Commonwealth of Massachusetts and is the Director and co-founder of Plaintiff CAMP CONSTITUTION. (Verified Complaint, D.1, ¶ 10.)

2. Plaintiff CAMP CONSTITUTION is a public charitable trust, registered in the State of New Hampshire. It is an unincorporated association with the ability to sue and be sued under the laws of the Commonwealth of Massachusetts. (V. Compl. ¶ 11.)

3. Camp Constitution is an all-volunteer association first formed in 2009. It offers classes and workshops on a number of subjects including U.S. History, the U.S. Constitution, current events, and how to be a freedom activist. (V. Compl. ¶ 14.)

4. Camp Constitution's mission is to enhance understanding of the country's Judeo-Christian moral heritage, the American heritage of courage and ingenuity, the genius of the United States Constitution, and the application of free enterprise. (V. Compl. ¶ 15.)

5. Defendant CITY OF BOSTON is a public body corporate and politic, established, organized, and authorized under and pursuant to the laws of Massachusetts, with the authority to sue and be sued. (V. Compl. ¶ 12.)

6. Defendant GREGORY T. ROONEY is the Commissioner of the City of Boston Property Management Department, which position he has held since August 1, 2016. (V. Compl. ¶ 13; Transcript of Deposition of [Gregory] T. Rooney ("Rooney Deposition") 22:20–23:4.[1])

II. THE CASE.

A. Camp Constitution's Application to Hold a Public Flag Raising Event at the City Hall Flag Poles.

7. In connection with the 2017 observance of Constitution Day and Citizenship Day, Plaintiffs desired to conduct an event close in time to September 17, 2017, to commemorate the civic and social contributions of the Christian community to the City, the Commonwealth of Massachusetts,

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[1] The Rooney Deposition is filed at D.57-1, as an attachment to Plaintiffs' Notice of Filing Deposition Transcript in Support of Motion for Summary Judgment, D.57. Exhibits to the Rooney Deposition are filed as attachments to Plaintiffs' Notice of Filing Deposition Exhibits in Support of Motion for Summary Judgment, D.58, such that Exhibit 1 is D.58-1, Exhibit 2 is D.58-2, etc.

religious tolerance, the Rule of Law, and the U.S. Constitution, by raising a Christian flag on one of Boston's City Hall Flag Poles at City Hall Plaza. (V. Compl. ¶ 24.)

8. On July 28, 2017, Shurtleff telephoned Lisa Menino[2], the City's senior special events official, and then e-mailed Menino at her request, seeking approval—

> . . . to raise the Christian Flag on City Hall Plaza. Here are a few potential dates:
>
> Thursday the 7th of September 10:00.--11:00AM Thursday the 14th of September 10:00 AM-11:00 or Saturday September 23--10:00 AM-11:00 AM.
>
> It will be sponsored by Camp Constitution. We will have short speeches by some local clergy focusing on Boston's history.

(V. Compl. ¶ 24, Ex. A; Rooney Dep. 32:1-13.) Shurtleff included a picture of the flag he proposed to raise on the City Hall Flag Poles:

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[2] In record e-mail correspondence Lisa Menino's name appears as Lisa Lamberti, but her name officially had been changed to Menino prior to July 2017. (Rooney Dep. 35:4–24.)

This is the flag:

Hal Shurtleff
Director, Camp Constitution

(V. Compl. ¶ 24, Ex. A.)

9. Menino forwarded Shurtleff's e-mail to Rooney for approval. (Rooney Dep. 35:4–36:21, Ex. 5.)

B. The City's Policies and Practices for Public Flag Raising Events at the City Hall Flag Poles.

1. The City's Policies Applicable to All Public Events on City Properties, Including Flag Raising Events.

10. The City has made available designated City properties for the public to hold events including Faneuil Hall, Samuel Adams Park, City Hall Plaza, City Hall Lobby, City Hall Flag Poles, and North Stage. (V. Compl. ¶ 33, Exs. G, H; Rooney Dep. 149:18–153:17, Exs. 30, 31; Affidavit of

Gregory T. Rooney, D.11-1 ("Rooney Afffidavit") ¶ 14.)

11. The City has established written policies and an application process for use of these public spaces and has posted them on its website, City of Boston, *How to Hold an Event Near City Hall*, https://www.boston.gov/departments/property-management/how-hold-event-near-city-hall. (V. Compl. ¶ 34, Ex. G; Rooney Dep. 149:18–151:17, Ex. 30; Rooney Aff. ¶ 13.) The online policies provide, in part:

> You need our permission if you want to hold a public event at certain properties near City Hall. These locations include:
>
> - Faneuil Hall
> - Sam Adams Park
> - City Hall Plaza
> - the lobby of City Hall
> - at the City Hall Flag Poles, and
> - the North Stage.
>
> If someone else already applied for the space, we may recommend other places for you to use.
>
> We may deny your application if:
>
> - Your application is incomplete
> - You didn't give us the required insurance certificate
> - You're unable to hold a contract, or to

sue and be sued
- You had an event in the past and caused public property damage
- You have unpaid debts with the City
- You plan to have any illegal activities
- Your event causes a danger to the health or safety in the area
- You have a history of disobeying City regulations or permits, or
- You lied about your information on your application.

. . . .

We'll get back to you in writing within 10 days. We might ask for more information or documents about your event.

You may have to apply for other permits and meet with the Special Events Committee. We'll tell you what other departments to contact. If you don't get the right permits and licenses before your event, we will revoke your application.

If we approve your application, you have to follow our event guidelines:

- You can't allow illegal activity to take place at your event.
- You must agree to pay for any damage to public property.
- You can't hold us responsible for any

damage or violations that happen at your event.
- We have the right to make other rules for your event at any time.

(V. Compl. ¶ 34, Ex. G; Rooney Dep. 149:18–151:17, Ex. 30.)

12. The website offers an option to complete an application online through the website, or by fax or mail using a printable application form linked to the website, titled, "Property and Construction Management Department City Hall and Faneuil Hall Event Application." (V. Compl. ¶ 35, Ex. H; Answer, D.18, ¶ 35; Rooney Dep. 151:18–153:17, Ex. 31.) The printable application form appears, in part, as follows:

Property and Construction Management Department
City Hall and Faneuil Hall Event Application
Boston City Hall, Rm. 811
Boston MA, 02201
Phone: 617-635-4100 Fax: 617-635 -3250

Name of Contact Person:_____

Billing Address: _____

Telephone Number: (_____)-_____

E-Mail Address: _____

Name of Event:_____

Event Date (s):_____

Event Start Time:_____ **a.m./ p.m. Event End Time:**_____ **a.m./ p.m.**

Set-up Date(s): _____

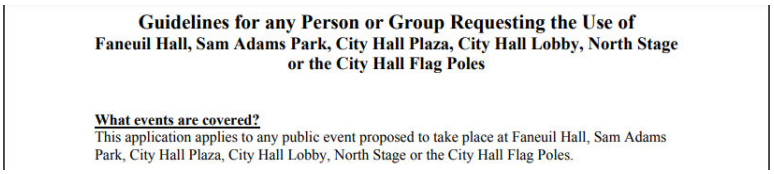
Set-up Start Time:_____ **a.m./ p.m. Break-down Time:**_____ **a.m./ p.m.**

Location:

Faneuil Hall ☐ **Samuel Adams Park** ☐ **City Hall Plaza** ☐
City Hall Lobby ☐ **City Hall Flag Poles** ☐ **North Stage**☐

(V. Compl. ¶ 35, Ex. H; Rooney Dep. 151:18–153:17, Ex. 31.)

13. The printable application form incorporates written policies titled "Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles." (V. Compl. ¶ 35, Ex. H; Rooney Dep. 151:18–153:17, Ex. 31.) The printed application guidelines appear, in part, as follows:



Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles

What events are covered?
This application applies to any public event proposed to take place at Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles.

(V. Compl. ¶ 35, Ex. H; Rooney Dep. 151:18–153:17, Ex. 31.)

14. The printable application guidelines further provide, in part:

> **What will happen after the request is filed?**
>
> The Office of Property and Construction Management will review the request, and respond in writing to the applicant within Ten (10) days. The Office of Property and Construction Management may make further inquiries of the applicant, and require additional documentation from the applicant. Unless there are specific

reasons for denying the request, the request will be approved. . . .

What are the reasons a request could be denied?

Where possible, the Office of Property and Construction Management seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums. To maximize efficient use of these forums and ensure the safety and convenience of the applicants and the general public, access to these forums must be regulated. To this end, the Office of Property and Construction Management may deny a request for the following reasons:

- The use or activity intended by the applicant is prohibited by law, ordinance, or by regulation.

- A fully executed prior application for a permit for the same time and place has been received and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area. In such cases, the City will propose an alternative space, if available.

- The use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the City and previously scheduled for the same time and place. In such cases, the City will propose an alternative space, if available.

- The use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant or other users of the area, City employees, or the public.

- The applicant has not complied with applicable license or permit requirements, ordinances, or regulations of the City.

- The application contains a material falsehood or misrepresentation.

- The applicant has made on prior occasions material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of any applicant.

- The application is not fully completed and executed.

- The applicant has failed to tender the required insurance certificate.

- The applicant is legally incompetent to contract, or to sue and be sued.

- The applicant or person or group on whose behalf the application for permit was made has on prior occasions damaged City property, and has not paid for such damage, or has other outstanding and unpaid debts to the City of Boston.

In addition, applicants whose requests have been granted will be required to comply with the Rules the Office of Property and Construction Management sets forth governing the use of the designated venues, as set forth below:

a. The applicant is responsible to ensure there is no illegal activity at the venue.

b. The applicant will responsible for any damage to public property.

c. The applicant shall indemnify and hold harmless the City of Boston's Property and Construction Management Department an its employees from any damage it may

> sustain or be or required to pay, by reason of said event, or by reason of any act or neglect by the applicant or their agent relating to such event or by the reason of any violation of the terms and conditions of permit.
>
> d. Further conditions and rules for the use of venues for approved requests may be set forth at the discretion of the Office of Property and Construction Management, in order to maximize efficient use of these venues and ensure the safety and convenience of the applicants and the general public.

(V. Compl. ¶ 35, Ex. H; Rooney Dep. 151:18–153:17, Ex. 31.)

15. Prior to October 2018, the City had no other written policies regarding requirements for permission to use City properties for public events. (V.Compl. ¶¶ 38, 39; Answer ¶¶ 38, 39; Rooney Dep. 178:21–179:24, Ex. 40.)

16. The City processes all applications for public events on City properties, including flag raisings, in the same way. (Rooney Dep. 98:2–104:12, Ex. 18; Rooney Dep. 159:15–161:1, 162:11–167:4, 167:11–169:18, Exs. 34, 35, 36.)

17. Rooney evaluates flag-raising requests for approval in a different manner than he evaluates

requests to use other City property for events, particularly those events described as religious. (Rooney Dep. 39:13–42:7, V.Compl. ¶ 29.)

18. Rooney, as Commissioner, has final say over approvals for all public events to be held on the City's properties. (Rooney Dep. 28:17–20; Rooney Aff. ¶ 16.)

19. The City has approved numerous religious events not involving a flag raising to be held on its property. (Rooney Dep. 39:13–40:3, Ex. 2 (Defs.' Resps. Pl.'s Interrogs.) No. 12.)

2. The City's Practices and Unwritten Policies Applicable to Flag Raising Events at the City Hall Flag Poles.

20. Among the locations designated by the City as available for public events are the City Hall Flag Poles on City Hall Plaza, comprising three flag poles near the entrance to City Hall standing approximately 83 feet tall. (Rooney Aff. ¶¶ 5–6, 8–11.)

21. The City Hall Flag Poles location on City Hall Plaza is also used for events that do not involve flag-raisings. (Rooney Dep. 42:1–7.)

22. "Generally, the City raises the United States of America flag and the National League of Families POW/MIA flag on one pole, the Commonwealth of Massachusetts flag on a second

pole, and the City of Boston flag on the third pole." (Rooney Aff. ¶ 8.)

23. "At times, the City has raised other flags in place of the City of Boston flag. Such substitute flags are typically raised after receipt of a third-party request." (Rooney Aff. ¶ 9.) "Often, the request to raise a substitute flag is made in connection with a proposed event." (Rooney Aff. ¶ 11.)

24. Occasionally the City approves a flag raising on one of two alternate City-owned flag poles on the Congress Street side of City Hall. (Rooney Aff. ¶ 5; Rooney Dep. 99:12–100:4.)

25. For the twelve years preceding Camp Constitution's request, from June 2005 through June 2017, the City approved 284 flag raising events. (Rooney Dep. 87:19–89:15, Ex. 17.) During the one-year period preceding Camp Constitution's request, from July 2016 through June 2017, the City approved 39 flag raising events. (Rooney Dep. 87:19–89:15, Ex. 17.) Approved flag raising events include ethnic and other cultural celebrations, the arrival of dignitaries from other countries, the commemoration of independence or other historic events in other countries, and the celebration of certain causes such as "gay pride." (V. Compl. ¶ 37; Answer ¶ 37; Rooney Aff. ¶ 10; Rooney Dep. 87:19–89:15, Ex. 17.) The City also has approved flag raisings for celebrations of the countries of Albania, Brazil, Ethiopia, Italy, Panama, Peru, Portugal, Puerto Rico, Mexico, as well as China, Cuba, and Turkey, and for the flags of the private Chinese

Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, and Boston Pride. (V. Compl. ¶ 37; Answer ¶ 37; Rooney Aff. ¶ 10; Rooney Dep. 87:19–89:15, Ex. 17.)

26. Raising a flag on the City Hall Flag Poles requires the use of a hand crank, which is provided by the City for flag raising events. (Rooney Dep. 130:23–131:18, Ex. 20.)

27. The Boston City Hall Plaza Flag-Raising Dates website states the City's goals for flag raising events:

> We commemorate flags from many countries and communities at Boston City Hall Plaza during the year.
>
> We want to create an environment in the City where everyone feels included, and is treated with respect. We also want to raise awareness in Greater Boston and beyond about the many countries and cultures around the world. Our goal is to foster diversity and build and strengthen connections among Boston's many communities.

(Rooney Dep. 153:18–155:24, Ex. 32.)

28. The City has raised flags on the City Hall Flag Poles that contain religious language and symbols. (V.Compl. ¶ 41; Answer ¶ 41.)

29. The City of Boston flag, which is usually raised on one of the City Hall Flag Poles,

depicts the City Seal, containing the inscription "SICUT PATRIBUS, SIT DEUS NOBIS" which means "God be with us as he was with our fathers":

(V.Compl. ¶ 41.a, Ex. J; Answer ¶ 41.a; Rooney Aff. ¶ 8; Rooney Dep. 156:1–158:7, Ex. 33.)

30. The Turkish flag, which the City has approved for raising on the City Hall Flag Poles at least thirteen times, in 2005, 2006, and 2009–2019 (Rooney Dep. 87:19–89:15, Ex. 17; 153:18–154:11, Ex. 32), depicts the star and crescent of the Islamic Ottoman Empire:

31. The City for at least three years, 2016–2018, has allowed the Bunker Hill Association to raise the Bunker Hill Flag on a City Hall flag pole to commemorate the Revolutionary War Battle of Bunker Hill and Bunker Hill Day, which occurs on June 17 each year. (V. Compl. ¶¶ 37, 41.b; Answer ¶ 37; Rooney Dep. 87:19–89:15, Ex. 17; 114:15–115:15, Ex. 20; 141:23–143:21, Ex. 28.) The Bunker Hill Flag contains a red cross against a white field on a blue flag, as shown here on one of the Congress Street City Hall flag poles:

(Rooney Dep. 114:15–115:15, Ex. 20.)

32. The City partnered with a private enterprise, Delaware North, in a three-year revenue-sharing agreement to promote public events on City Hall Plaza, including both events hosted by Delaware North and events approved through the Department of Property Management

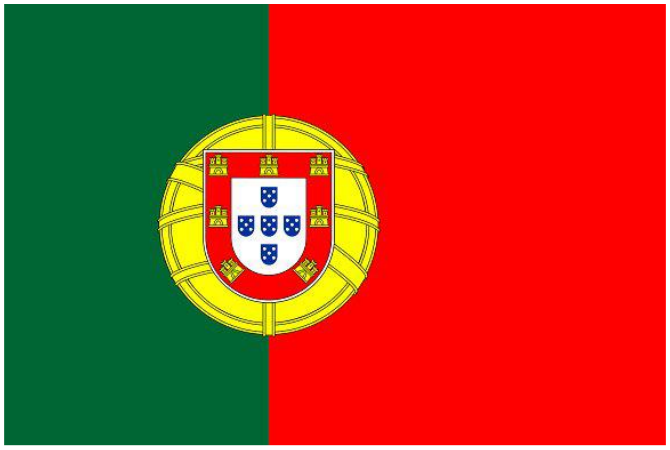
application process. (Rooney Dep. 104:13–108:2, Ex. 19.) City Hall Plaza events, including flag raisings, generally are featured on the partnership website, http://cityhallplazaboston.com/events/. (Rooney Dep. 108:24–109:16.)

33. Delaware North cannot host any event on City Hall Plaza without the City's approval and would not have the authority to promote or advertise public events at City Hall Plaza but for its partnership with the City. (Rooney Dep. 107:7–108:2.) The City has the ability to request Delaware North to make corrections to event information posted on the cityhallplazaboston.com website, and the City has effected a change to the website information for a flag raising event on at least one occasion. (Rooney Dep. 108:13–23, 119:9–123:6, Ex. 21.) Former Deputy Commissioner of the Property Management Department, Steve Stephanou, wrote in an e-mail regarding the correction that the City was "hoping to leverage the city's existing calendar software so we can control the content" of the partnership website. (Rooney Dep. 119:9–121:12, Ex. 21; 28:21–29:12, Ex. 4.)

34. Rooney approved a June 2017 Portuguese Flag Raising Ceremony at City Hall Plaza, involving the raising of the Portuguese flag on the City Hall Flag Poles. (Rooney Dep. 98:2–99:11, 102:20–103:7, Ex. 18; 104:13–105:16, 107:18–21, Ex. 19.) For the City-approved Portuguese Flag Raising Ceremony, the Delaware North partnership website posted, in part:

> The five blue shields of the Portuguese flag represents the five moor kings defeated by the first King of Portugal, D. Afonso Henriques, at the Battle of Ourique. **The dots inside the blue shields represent the five wounds of Christ when crucified. Counting the dots and doubling those five in the center, there are thirty dots that represents the coins Judas received for having betrayed Christ**. The seven castles represents the fortified cities D. Afonso Henriques conquered from the moors.
>
> . . . .
>
> Come and join us in honoring the flag of Portugal in what represents the official recognition of the Portuguese community's presence and importance in the State of Massachusetts. Your presence is of key importance to pay this solemn homage to Portugal and the Portuguese emigrant community with grandeur.

(Rooney Dep. 104:13–105:16, 106:14–19, 110:12–111:6, Ex. 19 (emphasis added).) As described above, the Portuguese flag appears as follows:



35. At the time of Camp Constitution's flag raising request in July 2017, Rooney had never denied a flag raising application. (Rooney Dep. 94:5–8.) According to Rooney, "[f]or the most part, [the City] will allow any event" to take place on City Hall Plaza. (Rooney Dep. 39:13–23.)

36. "Before a flag raising event is approved, [Rooney] must review whether the City's decision to raise a flag is consistent with the City's message, policies, and practices and provide final approval for the flag-raising." (Rooney Aff. ¶ 17.)

37. At the time of Camp Constitution's request in July 2017, the City had no written policies specifically for handling flag raising applications. (Rooney Dep. 39:5–12, 43:11–18.) Pursuant to the City's unwritten policies and historical practice, every flag raising request was reviewed on a case-by-case basis, though the Property Management Department "never really had a lot of discussion prior to [Camp Constitution's] request related to flag

raisings in any way" and "most had been approved in previous years." (Rooney Dep. 43:19–44:16.)

38. It is Rooney's usual practice not to see a proposed flag before approving a flag raising event, and Rooney has never requested to review a flag or requested changes to a flag in connection with approval. (Rooney Dep. 94:9–95:21, 144:10–19.) The City does not require any applicant to give possession or ownership of its flag to the City as a condition for approval. (Rooney Dep. 96:5–16, 174:23–175:10.)

39. It is not necessary for any applicant to use the City's podium for a flag raising event. (Rooney Dep. 139:16–141:9, Ex. 27.) It is possible for the City to provide a podium for use during a flag raising event with the City's official seal removed from the podium. (Rooney Dep. 141:10–22.)

40. Rooney has no knowledge of any person's believing Boston has endorsed any organization or subject matter as a result of approving a flag raising event at the City Hall Flag Poles. (Rooney Dep. 96:17–97:23.)

C. The City's Denial of Camp Constitution's Application to Hold a Public Flag Raising Event at the City Hall Flag Poles.

41. Rooney was "concerned about how to handle" Camp Constitution's request because he considered it "the first request I had ever received in my tenure related to a religious flag." (Rooney Dep.

36:22–37:2.) Rooney "didn't know whether or not it was appropriate to put a religious flag on a public building, so [he] wanted to inquire a little bit more." (Rooney Dep. 37:3–6.)

42. After "a couple of weeks" Rooney consulted with the City's law department for guidance "[d]ue to the fact that the flag in question was described as a religious flag." (Rooney Dep. 37:15–21, 62:1–24, 64:14–21, Ex. 10.)

43. In the meantime, on August 8, 2017, Shurtleff had e-mailed Menino to follow up on his permit request. (V. Compl. ¶ 25, Ex. B.) Menino responded the same day, writing, "I am just waiting for the approval from my bosses I just sent them another e-mail." (V. Compl. ¶ 25, Ex. B.)

44. On August 18, 2017, three weeks after Camp Constitution's request, Shurtleff sent another e-mail inquiry to Menino asking, "Any word?", prompting Menino to e-mail Rooney, "has there been any decision made on Christian flag raising[?]" (V. Compl. ¶ 26, Ex. B; Rooney Dep. 54:6–55:6, Ex. 8.) Rooney e-mailed in response, "The Law Department is reviewing our flag raising protocols. Do we have a complete list of organizations that have held flag raisings on the Plaza in recent years?" (Rooney Dep. 54:6–55:6, Ex. 8.)

45. Rooney sought the list of previous flag raising requests from Menino "to confirm whether or not we had in the past had a practice of flying a religious flag." (Rooney Dep. 55:13–56:10, Ex. 8.) Rooney's review "found no past practice of ever

having done that in the past." (Rooney Dep. 56:11–14.)

46. Rooney considered input from the Law Department, including an e-mail from a Law Department attorney on August 24, 2017. (Rooney Dep. 59:1–60:15, 62:1–17, 64:14–65:5, Ex. 10.) Rooney ultimately decided to deny Camp Constitution's request because "we didn't have a past practice of allowing religious flags, and we weren't going to allow this flag raising." (Rooney Dep. 58:14–24.) Rooney alone made the decision to deny Camp Constitution's flag raising request. (Rooney Dep. 33:17–21.)

47. On August 25, 2017, Rooney e-mailed Menino, "Please let them know that the request has been denied. Thanks." (Rooney Dep. 57:15–58:13, Ex. 9.) Rooney had no intention of providing an explanation for the denial to Menino or Camp Constitution. (Rooney Dep. 60:16–61:3.) Rooney did not create any record memorializing his reasons for denial. (Rooney Dep. 61:4–8.)

48. On September 5, 2017, Lamberti e-mailed Shurtleff, "I was on vacation last week and i [sic] just wanted to get back to you. Your request for the Flag Raising was denied." (V. Compl. ¶ 28, Ex. C.) On September 6, 2017, Shurtleff responded by e-mail, asking, "What was the official reason for denying us . . . ?" (V. Compl. ¶ 28, Ex. C.)

49. On September 7, 2017, Daniel Pesquera from the Boston CBS affiliate WBZ-TV e-mailed the Boston Mayor's press office requesting an

explanation for the City's denial of Camp Constitution's request. (Rooney Dep. 62:1–17, 63:3–64:8, Ex. 10.) In response, Rooney forwarded to the Mayor's press official an August 24, 2017 e-mail guidance he had received from the Law Department for the press official to use in response to the media inquiry. (Rooney Dep. 64:9–66:5, Ex. 10.) The Mayor's press official called WBZ-TV's Pesquera, "and said, on background, it was due to the Establishment Clause and we do not want to endorse a particular religion and we feel a [sic] flying a flag would be just that. . . . [She] also said, off the record, that if Camp Constitution hasn't heard from the city yet, they will shortly." (Rooney Dep. 67:4–23, 69:12–70:2, Ex. 11.)

50. The same day, September 7, 2017, Rooney advised the Mayor's press official and other officials by e-mail that he would prefer the Law Department, not Menino, to draft a response to Camp Constitution's request for a reason for denial. (Rooney Dep. 71:24–73:15, Ex.12.)

51. The next day, September 8, 2017, Rooney e-mailed Shurtleff the following explanation for the City's denial of Camp Constitution's flag raising request:

> I am writing to you in response to your inquiry as to the reason for denying your request to raise the "Christian Flag". The City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles. This policy

> and practice is consistent with well-established First Amendment jurisprudence prohibiting a local government from "respecting an establishment of religion." This policy and practice is also consistent with City's legal authority to choose how a limited government resource, like the City Hall flagpoles, is used.
>
> According to the above policy and practice, the City of Boston has respectfully denied the request of Camp Constitution to fly on a City Hall flagpole the "Christian" flag, as it is identified in the request, which displays a red Latin cross against a blue square bordered on three sides by a white field.
>
> The City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one.
>
> Regards,
>
> Gregory T. Rooney

(V. Compl. ¶ 29, Ex. D; Rooney Dep. 73:16–74:21, Ex. 13.)

52. Where Rooney wrote to Shurtleff, "Boston maintains a policy and practice of respectfully refraining from flying non-secular flags

on the City Hall flagpoles. This policy and practice . . . . This policy and practice . . . . According to the above policy and practice . . . ," he "was referring to past practice" because "up to this point, there had not been any formal written policy regarding flying non-secular flags on the flagpoles." (Rooney Dep. 73:16–75:10, Ex. 13.) By "non-secular" Rooney meant "a religious flag that was promoting a specific religion." (Rooney Dep. 75:22–76:1, Ex. 13.) By "practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles" Rooney did not mean Rooney "had determined that the city had declined to fly non-secular or religious flags in the past," but meant that Rooney "had no record of ever having one had been approved." (Rooney Dep. 75:11–16, Ex. 13.)

53. Rooney did not work from any formal definition of "non-secular" or "religious" when he denied Camp Constitution's request. (Rooney Dep. 81:7–82:13.)

54. Rooney was concerned that the flag Camp Constitution intend to raise "was a flag that was promoting a specific religion" and "didn't think that it was in the city's best interest to necessarily have that flag flying above City Hall" because Camp Constitution called the flag "the Christian flag;" Rooney would not have been concerned if the same flag was called "the Camp Constitution flag" because then "it would have been the flag of the organization and not a religious symbol." (Rooney Dep. 47:5–48:18, 116:13–21, Ex. 5.)

55. Rooney's concern with allowing the Christian flag was not based on the content of the flag ("a red cross on a blue field on a white flag"), and, but for Camp Constitution's having called it the "Christian Flag" Rooney would have treated it no differently from the Bunker Hill flag ("a red cross on a white field on a blue flag"), which Rooney had approved. (Rooney Dep. 116:13–117:22, Exs. 5, 20.) Rooney did not consider the Bunker Hill flag a "religious" flag, despite its depiction of a red cross, because "it's to commemorate the Battle of Bunker Hill." (Rooney Dep. 117:17–22, Ex. 20.) If the Bunker Hill flag had been presented to Rooney as "the Christian flag or a Christian flag, then Rooney "would . . . have had the same concerns that [he] had about Camp Constitution's flag." (Rooney Dep. 118:17–22, Ex. 20.)

56. Rooney would not have been concerned about approving the Portuguese flag raising, had he known about the religious content of its flag, because Portugal is a "sovereign nation." (Rooney Dep. 110:12–112:13, Ex. 19.)

57. Rooney, however, would weigh and think of differently a request to raise the Vatican flag "because of the fact that although it's a sovereign nation, it's also the Catholic church . . . ." (Rooney Dep. 112:8–113:18.) The City previously had allowed the Vatican flag to be raised over Boston Common, alongside the United States and Massachusetts flags, in connection with the 1979 visit to Boston of Pope John Paul II, four years prior to diplomatic recognition of the Vatican by the United States. (Rick Tinory, *Pope John Paul II*

Boston Common October 1, 1979 (Mar. 4, 2014), https://www.youtube.com/watch?v=OiDz1cBHyPc (video depicting (beginning at 1:17) Vatican flag on Boston Common flag pole).)

58. Rooney recognizes no goal or purpose of the City in allowing flag raising events on the City Hall Flag Poles is served by excluding religious flags, except "concern for the so-called separation of church and state or the constitution's establishment clause." (Rooney Dep. 183:22–186:12.)

59. On September 13, 2017, Shurtleff submitted to the City a new, written City Hall and Faneuil Hall Event Application, requesting use of City Hall Plaza and the City Hall Flag Poles for the event "Camp Constitution Christian Flag Raising," and proposing dates of October 19, 2017 or October 26, 2017. (V. Compl. ¶ 30, Ex. E.) Shurtleff described the event as follows:

> Celebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth. The Christian flag is an important symbol of our country's Judeo-Christian heritage. During the flag raising at the City Hall Plaza, Boston recognizes our Nation's heritage and the civic accomplishments and social contributions of the Christian community to the Commonwealth of Massachusetts, religious tolerance, the Rule of Law,

> and the U.S. Constitution, which together gave our Nation an unprecedented history of growth and prosperity. The event program includes a speech by Rev. Steve Craft, an instructor at Camp Constitution on the need for racial reconciliation, a speech by Pastor William Levi, formerly of the Sudan, on the blessings of religious freedom in the U.S. and an historical overview of Boston by Hal Shurtleff, director of Camp Constitution.

(V. Compl. ¶ 30, Ex. E.)

60. On September 14, 2017, Plaintiffs' counsel sent a letter to Boston Mayor Martin J. Walsh, with copies to the Boston City Council and its members, and Defendant Rooney, enclosing the completed City Hall and Faneuil Hall Event Application and requesting that the City approve the application on or before September 27, 2017. (V. Compl. ¶ 31, Ex. F; Answer ¶ 31.)

61. The City did not respond to either Shurtleff's new application or the letter from Plaintiffs' counsel. (V. Compl. ¶ 32; Answer ¶ 32.) Only Rooney could have reconsidered Camp Constitution's new request, and Rooney did not respond to the new request because the first request "was asked and answered." (Rooney Dep. 77:7–79:18, Ex. 14.)

D. The City's Subsequent Written Flag Raising Policy.

62. In October 2018 the City committed its past policy and practice to a written Flag Raising Policy. (Rooney Dep. 178:21–179:24, Ex. 40.) The written policy reflects what the City "understood the policy to be but updated to address other concerns . . . ." (Rooney Dep. 180:1–9.)

63. The written Flag Raising Policy does not require the City "to handle flag-raising requests today differently from how they were handled when Camp Constitution submitted its request in July of 2017." (Rooney Dep. 180:10–15.) Under the written policy, as in July 2017, the Commissioner of Property Management has final approval authority for all flag raising requests, "such decision to be made in the City's sole and complete discretion." (Rooney Dep. 180:16–181:20.)

64. The written Flag Raising Policy incorporates seven Flag Raising Rules. (Rooney Dep. 183:15–21, Ex. 40.) If an application for a flag raising event satisfies all seven of the Flag Raising Rules, the Flag Raising Policy still reserves to Rooney "sole and complete discretion" to deny the application for a reason not reflected in the Flag Raising Rules. (Rooney Dep. 191:19–192:6, Ex. 40.) The Flag Raising Policy also reserves to Rooney the discretion to offer applicants flexibility on rule compliance, and to approve a flag application even if it does not meet one or more of the Flag Raising Rules. (Rooney Dep. 194:6–195:13.)

65. The first Flag Raising Rule provides, "At no time will the City of Boston display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." (Rooney Dep. 183:15–184:4, Ex. 40.) Whether a flag is deemed "inappropriate or offensive in nature," supporting "discrimination" or "prejudice," or supporting "religious movements" is a determination to be made at Rooney's discretion, and there are no separate guidelines or criteria for Rooney to use to make any such determination. (Rooney Dep. 192:7–194:5, Ex. 40.)

66. Rooney does not know whether the text of the Boston City Seal on the City's flag, translated, "God be with us as he was with our fathers," is a religious statement. (Rooney Dep. 156:1–159:2, Ex. 33.)

67. Rooney has denied one flag raising event request since denying Camp Constitution's request, and since adopting the written Flag Raising Policy. On April 5, 2019, Rooney denied the request of Super Happy Fun America to raise a "Straight Pride" flag on the City Hall Flag Poles. In his written denial, Rooney wrote, "Decisions on the raising of flags on the City Hall Flag Poles are at the City's sole and complete discretion." Rooney did not otherwise explain the denial.

THE BOSTON GLOBE ARTICLE,
WHY IS BOSTON CITY HALL THE WAY IT IS?
FILED JULY 29, 2019

Why is Boston City Hall the way it is?

The brutalist concrete building and its plaza have many critics. But its creators had their reasons.

Boston City Hall Plaza. –*John Tlumacki / The Boston Globe, File*

By Nik DeCosta-Klipa July 25, 2018

Boston City Hall is brutal, and that's not a subjective statement. The late longtime Mayor Tom Menino once proposed selling off the "cold, unfriendly" building to be demolished and moving city government to the waterfront. His successor, Mayor Marty Walsh, campaigned on the idea. But notwithstanding the looming concrete fortress's many detractors — and there are many — the design of City Hall and its surrounding plaza is a testimonial to brutalist architecture.

Fifty years after City Hall opened, it's a style that was as popular back in the 1960s as it is misunderstood today, says Mark Pasnik, an architecture professor at Wentworth Institute of Technology and author of "Heroic: Concrete Architecture and the New Boston."

"So many people call these buildings Stalinist, but nothing could be further from the truth," Pasnik said. "They were very American, and they were also very democratic in their aspiration."

City Hall is just one — though perhaps the most notable — example in a wave of major brutalist buildings constructed in Boston in the 1960s. The city had been suffering from a period of decline during the early- to mid-20th century. However, the Boston Redevelopment Authority, flush with public investment, was hoping to reinvigorate the city's urban center. Boston City Hall, as well as City Hall Plaza and the rest of Government Center, replaced the run-down neighborhood of Scollay Square.

"The intentions behind Government Center as a whole were to show a new direction for the city of Boston, which at the time in the '50s was really starting to sink into the doldrums of not a lot of economic activity," Rosanne Foley, the executive director of the Boston Landmarks Commission, said. "People at the time felt that the sort of 18th and 19th century narrow streets and lots of old buildings … were holding them back."

An aerial view of downtown Boston, looking over the construction site of the new City Hall, Faneuil Hall, and the Custom House to Boston Harbor, in 1965. —*Hal Sweeney / The Boston Globe*

"The idea was that we'd moved into a new world, and the new world needed modern, up-to-date, stylist, progressive buildings," says Daniel Abramson, an architectural history professor at Boston University.

The city went on an international contest to select the design for Boston's "New City Hall." After receiving a total of 256 entries, a panel of judges picked the winning design, a collaboration between Gerhard Kallmann, Noel McKinnell and Edward Knowles, in May 1962.

Admirers of the Swiss-French architect known as Le Corbusier and his modernist designs, such as La Tourette monastery in France, the trio's exposed concrete, nine-story design — with the City Council

Chamber and Mayor's Office both projecting out over the plaza — was constructed almost exactly according to plan, said Foley, "which is pretty rare." In their decision, the judges raved about their "daring yet classical architectural statement" that went above and beyond their criteria for the project and clearly defined "the areas of heavy public contact and the areas devoted to ceremonial functions."

"Kallmann, McKinnell, and Knowles did have an idea that this would be a very democratic building," Pasnik said. "They saw it as open. There's very large columns that allow you to enter into the building in multiple ways. It doesn't work like that anymore, but that was the original idea of that."

Though the building's north entrance has been closed since 2001, the original idea allowed people to enter City Hall through that side, take care of transactions, like paying a parking ticket or getting a permit, and then continue to walk through the rest of the city.

"The whole thing was conceived with that sense of openness and aspiration to be very public, to be grand, to represent the civic realm," Pasnik said. "You might just flip through it like you might a galleria in Europe or something."

Concrete as a material was both popular, economically viable, and locally appropriate in what was predominantly a masonry city at the time, according to Pasnik.

"We have a lot of stone buildings. We have a lot of brick building," he said. "Concrete buildings are similar to that. They're heavy, they're bold, they're simple construction."

It also symbolized modernity and durability and set civic buildings apart from the glass and steel style of architecture that had become "synonymous with corporate America" in the 1950s, according to Pasnik. In fact, seven of the eight finalists in the design contest for City Hall were made of concrete (the term brutalism originates from the French phrase "béton brut," meaning raw concrete).

The seven other finalists for the New City Hall.
—*The Boston Globe*

"Concrete brought with it a kind of boldness, a heaviness, a weightiness, something that could seem more permanent, that would have a greater sense of longevity," Pasnik said.

The wide-open brick plaza also had democratic inspirations. As opposed to being formally

organized, it allowed residents to move freely through the area, according to Abramson.

"In a democracy, people are not directed where to look or to go," the BU professor said.

Inspired by wide-open public gathering spaces in Europe, like the Piazza del Campo in Siena, Italy, City Hall Plaza was intended to serve as a blank campus for large events, whether it be a Super Bowl championship celebration, a political protest, or a winter festival. Pasnik says it's "incredibly effective for big events."

"It's Boston's fairground," Abramson said.

"During the majority of days of the year, it's kind of empty, as fairgrounds are, or kind of underutilized and formless," he said. "And yet at certain moments, it's very lively and filled with temporary programming. And in those instances, people enjoy it."

Tom Brady, Bill Belichick, and Rob Gronkowski address the crowd at City Hall Plaza after winning the Super Bowl in 2017. —*Stan Grossfeld / The Boston Globe*

However, not all of the initial aspirations for City Hall and City Hall Plaza were fulfilled.

Brutalism as a style began to fall out of favor in the 1970s. Experts attribute a variety of potential reasons. Abramson notes that concrete as a material can appear "off-putting," "overbearing," and "indecipherable."

"The building doesn't look familiar," he said. "It's hard to understand. And I think those types of buildings — because they're unfamiliar and don't convey easily what their rationale is — that people are more perplexed and put off by them."

Pasnik says that the popularity of brutalism was correlated with decreasing public trust of

government in the 1970s — on both sides of the ideological divide.

"There is somewhat of a curious alignment of the left and the right against brutalism, because the left sees it as like oppressive government and the right sees it as big government," he said. "So they both sort of are not fans of brutalism for its symbolism of its role of government."

However, perhaps more important than people's personal feelings about City Hall is the fact that the style never lent itself well to creating a particularly welcoming public space, as Paul McMorrow wrote in a scathing 2013 column for *The Boston Globe*.

> City Hall is so ugly that its insane upside-down wedding-cake columns and windswept plaza distract from the building's true offense. Its great crime isn't being ugly; it's being anti-urban. The building and its plaza keep a crowded city at arm's length. It disperses crowds, instead of gathering them together. It creates an island of inactivity, several blocks long and wide, in the middle of what is otherwise a bustling commercial district. It's as if the complex's architects vowed to make up for the bawdy sins of Scollay Square by creating a space that no one would ever want to congregate around. The primary function of cities is clustering people together, but City Hall goes to great lengths to repel them.

City officials have been a bit more diplomatic. Foley notes that, with the rise of the internet, many face-to-face transactions are not as necessary.

"People can pay their parking tickets online," she said. "They don't have to come down and write a check with a quill pen or whatever."

The criticisms of City Hall Plaza's functionality underscore the city's recently announced plans to move forward with a "comprehensive redesign for the City Hall campus" as it approaches its 50th birthday this summer. The host of planned infrastructure upgrades to the area include plants, a fountain, and better access to utilities.

The plans also call for the reopening of the north side entrance in an effort to increase access to both "the public, transactional places in City Hall, as well as improve overall accessibility to City Hall Plaza."

"These improvements are not only necessary for the long-term viability of City Hall and the plaza, but are an important part of our plan to make these spaces a destination," Walsh said in an announcement earlier this month.

The proposed renovation of Boston City Hall Plaza. —*Boston Mayor's Office*

Harkening back to his earlier metaphor, Abramson said that, generally, fairgrounds are not in the middle of cities and have no "intrinsic beauty."

"The positive of [the plaza] is it's Boston's fairground and the negative part is that you don't really want an empty fairground in front of your city hall in the middle of your city the rest of the year," he said.

According to Pasnik, another one of its shortcomings is that, unlike its inspiration across the Atlantic, the plaza isn't as enclosed along and activated along its edges.

"If you were to look at a plaza like Siena, it's surrounded by cafes and small shops and things like that all the way around the perimeter," he said. "That makes people spill into the site."

While the added greenery and infrastructure improvements aim to improve the day-to-day life in

City Hall Plaza, Abramson says it's important to balance those efforts with the consideration that "you're going to lose something." Namely, he says, the city's ability to host big, lively gatherings downtown.

"It was planned to be unplanned," he said, later adding, "It's always better if you look to see what's both good and bad about something as it exists, before you decide to change that."

https://www.boston.com/news/history/2018/07/25/boston-city-hall-brutalism

CITY OF BOSTON FLAG RAISINGS
2005–2017,
FILED JULY 8, 2019

2017 Flag Raisings Ceremonies

February 16, 2017	Lithuania Flag Raising
February 24, 2017	Dominican Flag Raising
March 10, 2017	Tibetan Flag Raising
March 17, 2017	Irish Flag Raising
April 7, 2017	United Nations Flag Raising
April 30, 2017	Vietnamese Flag Raising
May 3, 2017	Polish Flag Raising
May 14, 2017	Murder Victims Flag Peace Walk
May 17, 2017	Haitian Flag Raising
May 18, 2017	Malcolm X Flag
May 19, 2017	EMS Flag Raising
June 2, 2017	Pride Flag Raising
June 9, 2017	Bunker Hill Day Flag Raising
June 11, 2017	Portugal Flag Raising
June 19, 2017	Juneteenth Day Flag Raising
June 20, 2017	Argentina Flag Raising
June 25, 2017	Philippine Flag Raising
July 5, 2017	Cape Verde Flag Raising
July 5, 2017	Venezuelan Flag Raising
July 20, 2017	Colombian Flag Raising
July 24, 2017	Puerto Rican Flag Raising
July 28, 2017	Peruvian Flag Raising

August 11, 2017	Dominican Flag Raising
August 17, 2017	Marcus Garvey Flag Raising
August 24, 2017	Ukraine Flag Raising
August 25, 2017	Uruguay Flag Raising
September 8, 2017	Brazilian Flag Raising
September 10, 2017	Ethiopian Flag Raising
September 11, 2017	Central American Countries (Costa Rica, Nicaragua, Honduras, Guatemala,)
September 14, 2017	El Salvador Flag Raising
September 15, 2017	Mexican Flag Raising
October 1, 2017	Chinese Progressive Flag Raising
October 2, 2017	Southern Cameroon Flag Raising
October 2, 2017	Italian Flag Raising
October 7, 2017	Chinese Flag Raising
October 15, 2017	Cuban Flag Raising
October 29, 2017	Turkish Flag Raising
November 28, 2017	Albanian Flag Raising

2016 Flag Raisings

February 16, 2016	Lithuanian Flag Raising
February 24, 2016	Dominican Flag Raising
March 10, 2016	Tibetan Flag Raising
March 17, 2016	Trish Flag Raising
April 6, 2016	United Nations Flag Raising
April 30, 2016	Vietnamese Flag Raising

May 3, 2016	Polish Flag Raising
May 14, 2016	Murder Victims Flag Peace Walk
May 17, 2016	Haitian Flag Raising
May 19, 2016	EMS Flag Raising
June 2, 2016	Pride Flag Raising
June 9, 2016	Bunker Hill Day Flag Raising
June 11, 2016	Portugal Flag Raising
June 19, 2016	Juneteenth Day Flag Raising
June 20, 2016	Argentina Flag Raising
June 25, 2016	Panama Flag Raising
July 5, 2016	Cape Verde Flag Raising
July 5, 2016	Venezuelan Flag Raising
July 20, 2016	Colombian Flag Raising
July 24, 2016	Puerto Rican Flag Raising
July 28, 2016	Peruvian Flag Raising
August 11, 2016	Dominican Flag Raising
August 24, 2016	Ukraine Flag Raising
September 8, 2016	Brazilian Flag Raising
September 10, 2016	Ethopian Flag Raising
September 11, 2016	Central American Countries September 14, 2016 El Salvador Flag Raising
September 15, 2016	Mexican Flag Raising
October 1, 2016	Chinese Progressive Flag Raising
October 2, 2016	Italian Flag Raising
October 7, 2016	Chinese Flag Raising

October 15, 2016	Cuban Flag Raising
October 29, 2016	Turkish Flag Raising
November 28, 2016	Albanian Flag Raising

2015 Flag Raisings Ceremonies

February 13, 2015	Lithuanian Flag Raising
February 27, 2015	Dominican Flag Raising
March 10, 2015	Tibetan Flag Raising
March 17, 2017	Trish Flag Raising
April 8, 2015	United Nations Flag Raising
April 30, 2015	Vietnamese Flag Raising
May 15, 2015	Haitian Flag Raising
May 20, 2015	EMS Flag Raising
June 5, 2015	Pride Flag Raising
June 7, 2015	Portugal Flag Raising
June 20, 2015	Philippine Independence Day
July 5, 2015	Venezuelan Flag Raising
July 20, 2015	Columbian Flag Raising
July 27, 2015	Puerto Rican Flag Raising
September 12, 2015	Central American Festival
September 15, 2015	El Salvador Flag Raising
September 16, 2015	Mexico Flag Raising
October 4, 2015	Cuban Flag Raising
October 10, 2015	Chinese Flag Raising
October 29, 2015	Turkish Flag Raising

2014 Flag Raisings Ceremonies

February 22, 2014	Dominican Flag Raising
February 24, 2014	Lithuanian Flag Raising
March 10, 2014	Tibetan Flag Raising
April 7, 2014	United Nations Day Flag Raising
April 30, 2014	Vietnamese Flag Raising
May 31, 2014	Pride Flag Raising
June 1, 2014	Philippine Independence Day
June 9, 2014	Portugal Flag Raising
July 5, 2014	Venezuelan Flag Raising
July 5, 2014	Cape Verdean Flag Raising
July 22, 2014	Puerto Rican Flag Raising
August 4, 2014	Panama Flag Raising
August 16, 2014	Dominican Flag Raising
August 24, 2014	Ukraine Flag Raising
September 14, 2014	Central American Festival
September 15, 2014	Guatemalan Flag Raising
September 21, 2014	Honduras Flag Raising
September 29, 2014	Cuban Flag Raising
October 29, 2014	Turkish Flag Raising

2013 Flag Raising Ceremonies

February 22, 2013	Dominican Flag Raising
February 24, 2013	Lithuanian Flag Raising
March 10, 2013	Tibetan Flag Raising
April 7, 2013	United Nations Day Flag Raising
April 30, 2013	Vietnamese Flag Raising
May 31, 2013	Pride Flag Raising
June 1, 2013	Philippine Independence Day
June 9, 2013	Portugal Flag Raising
July 5, 2013	Venezuelan Flag Raising
July 5, 2013	Cape Verdean Flag Raising
July 22, 2013	Puerto Rican Flag Raising
August 4, 2013	Panama Flag Raising
August 16, 2013	Dominican Flag Raising
August 24, 2013	Ukraine Flag Raising
September 14, 2013	Central American Festival
September 15, 2013	Guatemalan Flag Raising
September 21, 2013	Honduras Flag Raising
September 29, 2013	Cuban Flag Raising
October 29, 2013	Turkish Flag Raising

2012 Flag Raising Ceremonies

February 16, 2012	Lithuanian Flag Raising
February 17, 2012	Kosovo Flag Raising
February 24, 2012	Dominican Flag Raising
March 10, 2012	Tibetan Flag Raising
April 7, 2012	United Nations Day Flag Raising
April 30, 2012	Vietnamese Flag Raising
May 18, 2012	Haitian Flag Raising
June 2, 2012	Philippine Flag Raising
June 8, 2012	Pride Flag Raising
June 10, 2012	Portugal Flag Raising
July 5, 2012	Cape Verdean Flag Raising
August 4, 2012	Panama Flag Raising
August 16, 2012	Dominican Flag Raising
August 17, 2012	Trinidad & Tobago
August 24, 2012	Ukrainian Flag Raising
September 9, 2012	Central American Flag Raisings
September 14, 2012	Mexican Flag Raising
September 15, 2012	Honduras Flag Raising
September 16, 2012	Guatemalan Flag Raising
September 29, 2012	Chinese Flag Raising
September 30, 2012	Costa Rican Flag Raising
October 7, 2012	Frank Chin Flag Raising

October 21, 2012	Cuban Flag Raising
October 29, 2012	Turkish Flag Raising

2011 Flag Raisings Ceremonies

February 16, 2011	Lithuania Flag Raising
February 17, 2011	Stephan Kochi
February 25, 2011	Dominican Flag Raising
March 10, 2011	Tibet Flag Raising
March 18, 2011	Consulate General Canada
April 27, 2011	Haitian Flag Raising
April 30, 2011	Vietnamese Flag Raising
May 13, 2011	Haitian Flag Raising
June 3, 2011	Pride Flag Raising
June 4, 2011	Philippine Flag Raising
June 12, 2011	Portugal Flag Raising
July 5, 2011	Cape Verdean Flag Raising
July 18, 2011	Puerto Rican Flag Raising
July 20, 2011	Columbian Flag Raising
August 6, 2011	Panama Flag Raising
August 11, 2011	Dominican Flag Raising
September 7, 2011	Brazilian Flag Raising
September 10, 2011	Honduras Flag Raising
September 11, 2011	Guatemalan Flag Raising
September 18, 2011	Costa Rican Flag Raising

October 1, 2011	Lydia Lowe (Chinese Flag Raising)
October 2, 2011	Cuban Flag Raising
October 9, 2011	Frank Chin Flag Raising
October 29, 2011	Turkish Flag Raising
November 11, 2011	Veteran's Day Flag Raising

2010 Flag Raisings Ceremonies

February 16, 2010	Lithuania Flag Raising
February 17, 2010	Kosovo Flag Raising
February 26, 2010	Dominican Flag Raising
March 10, 2010	Tibetan Flag Raising
April 30, 2010	Vietnamese Flag Raising
May 14, 2010	Haitian Flag Raising
June 5, 2010	Boston Pride Flag Raising (Linda DeMarco)
June 13, 2010	Portugal Flag Raising
June 13, 2010	Philippine Flag Raising
July 5, 2010	Venezuelan Flag Raising
July 19, 2010	Puerto Rican Flag Raising
July 20, 2010	Columbian Flag Raising
July 28, 2010	Peruvian Flag Raising
August 7, 2010	Panama Flag Raising
August 24, 2010	Ukraine Flag Raising

September 5, 2010	Brazil Flag Raising
September 11, 2010	Honduras Flag Raising (Lusi Garcia)
September 12, 2010	Guatemalan Flag Raising (David Ovalle)
September 13, 2010	Mexico Flag Raising
September 15, 2010	El Salvador Flag Raising
September 18, 2010	Nicaragua Flag Raising
September 19, 2010	Costa Rican Flag Raising (Darwin Cordova)
September 25, 2010	Chinese Progressive Association
October 3, 2010	Cuban Flag Raising (Regla Gonzalez)
October 10, 2010	Chinese Flag Raising (Frank Chin)
October 22, 2010	United Nations Flag Raising
October 29, 2010	Turkish Flag Raising
November 27, 2010	Albanian Flag Raising

2009 FLAG RAISINGS

February 16, 2009	Lithuania Flag Raising
March 10, 2009	Tibet Flag Raising
March 20, 2009	France Flag Raising
April 30, 2009	Vietnamese Flag Raising (Diane Huyhn)

May 15, 2009	Haitian Flag Raising Ceremony (Wilner Auguste)
June 6, 2009	Boston Pride Flag Raising (Linda DeMarco)
July 19, 2009	Columbian Flag Raising
July 20, 2009	Puerto Rican
July 28, 2009	Peru (Chrisitian Malpica)
August 12, 2009	Dominican
September 6, 2009	Brazilian Flag Raising
September 12, 2009	Honduras Flag Raising (Luis Garcia)
September 13, 2009	Guatemala Flag Raising (David Ovalle)
September 14, 2009	El Salavador Flag Raising
September 20, 2009	Costa Rican Flag Raising (Elba Cleland)
September 26, 2009	Chinese Progressive Flag Raising (Hong Jiang)
October 4, 2009	Cuban Flag Raising Regla Gonzalez
October 10, 2009	Chinese Flag Raising (Frank Chin)
October 11, 2009	Nicaraguan Flag Raising Alfonso Hernandez
October 22, 2009	United Nations Flag Raising Alma Morrisson
October 29, 2009	Turkish Flag Raising Erkut Gomulu

2008 FLAG RAISINGS:

June 6, 2008	Boston Pride Flag Raising
June 23, 2008	Puerto Rican Flag Raising
July 5, 2008	Cape Verdean Flag Raising
July 5, 2008	Venezuelan Flag Raising
July 28, 2008	Peruvian Flag Raising
August 2, 2008	Panama Flag Raising
August 7, 2008	Bolivian Flag Raising
August 22, 2008	Ukraine Flag Raising
September 6, 2008	Costa Rican Flag Raising
September 7, 2008	Brazil Flag Raising
September 12, 2008	Guatemalan Flag Raising
September 13, 2008	Honduras Flag Raising
September 14, 2008	El Salvador Flag Raising
September 20, 2008	Nicaragua Flag Raising
October 1, 2008	Chinese Progressive Flag Raising
October 4, 2008	Chinese Flag Raising (Frank Chin)
October 23, 2008	United Nations Flag Raisings
November 11, 2008	Veteran's Day Flag Raising

These flag raising are subject to change/add,

FLAG RAISINGS 2007:

February 27, 2007	Dominican Flag Raising
March 6, 2007	Guyana Flag Raising
March 26, 2007	Irish Flag Raising
June 10, 2007	Portugal Flag Raising
July 5, 2007	Venezuelan Flag Raising
July 20, 2007	Columbian Flag Raising
July 23, 2007	Puerto Rican Flag Raising
July 27, 2007	Peruvian Flag Raising
August 4, 2007	Panama Flag Raising
August 6, 2007	Bolivian Flag Raising
August 24, 2007	Lloyd Pertiver
September 7, 2007	Brazilian Flag Raising
September 8, 2007	Nicaraguan Flag Raising
September 14, 2007	El Salvador Flag Raising
September 15, 2007	Honduras Flag Raising
September 16, 2007	Costa Rican Flag Raising
September 22, 2007	Guatemalan Flag Raising
September 24, 2007	Ukraine Flag Raising

These Flag Raisings are subject to change/added.
Thanks

FLAG RAISINGS 2006:

February 27, 2006	Dominican Flag Raising

May 18, 2006	Haitian Flag Raising
June 2, 2006	Boston Pride Flag Raising
June 11, 2006	Portugal Flag Raising
July 5, 2006	Cape Verdean Flag Raising
July 5, 2006	Venezuela Flag Raising
July 20, 2006	Columbian Flag Raising
July 28, 2006	Peruvian Flag Raising
August 5, 2006	Panama Flag Raising
August 6, 2006	Bolivian Flag Raising
August 13, 2006	Ecuador Flag Raising
August 9, 2006	Dominican Flag Raising
August 26, 2006	Ukraine Flag Raising
September 2, 2006	Nicaraguan Flag Raising
September 9, 2006	Honduras Flag Raising
September 10, 2006	Costa Rican Flag Raising
September 13, 2006	El Salvador Flag Raising
September 15, 2006	Mexico Flag Raising
September 29, 2006	Chinese Progressive Flag Raising
October 8, 2006	Cuban Flag Raising
October 29, 2006	Turkish Flag Raising
November 28, 2006	Albanian Flag Raising

FLAG RAISINGS	2005:
June 3, 2005	Boston Pride Flag Raising

June 19, 2005	Israel Independence Flag Raising
July 5, 2005	Cape Verde Flag Raising
July 5, 2005	Venezeula Flag Raising
July 27, 2005	Peru Flag Raising
July 28, 2005	Acadian Flag Raising
August 8, 2005	Dominican Flag Raising
September 3, 2005	Guatemala Flag Raising
September 7, 2005	Brazil Flag Raising
September 10, 2005	Honduras Flag Raising
September 15, 2005	Mexico Flag Raising
September 23, 2005	Nicaraguan Flag Raising
September 24, 2005	El Salvador Flag Raising
September 30, 2005	Chinese Progressive Flag Raising
October 2, 2005	Cuban Flag Raising
October 8, 2005	Chinese Flag Raising
October 9, 2005	Columbus Day Flag Raising
October 29, 2005	Turkish American Flag Raising
November 28, 2005	Albanian Flag Raising

EXCERPTS OF GREGORY T. ROONEY DEPOSITION TRANSCRIPT, FILED JULY 8, 2019

DEPOSITION OF [GREGORY] T. ROONEY
Boston City Hall
One City Hall Square
Boston, Massachusetts
March 20, 2019 10:05 a.m.

* * *

Q. And what was the result of that search or compilation of prior flag raisings?

A. We found no past practice of ever having done that in the past.

Q. Does that also mean you found no evidence of having denied a flag raising request on religious grounds before?

A. I don't believe at the time we were looking at specific applications, only what had been approved and on, you know, had actually been on the flagpoles.

Q. So as part of this exercise, did you try to find whether any organizations had been denied requests to raise a flag?

A. It could have been part of the search. I don't recall. I know that we were looking at all of the flag raisings that had occurred and didn't find any

evidence that one had been—you know, that a religious flag had ever been raised in the records that we could find.

Q. If you had found that a religious flag had been raised in the past, would that have affected your decision regarding Camp Constitution?

A. I don't know. It would have certainly been something that we'd have to consider, but I don't know.

* * *

Q. And this is an email from Gregory Rooney to Shurtleff, Hal, September 8, 2017, Subject: Flag Raising; is that correct?

A. Yes.

Q. Do you recognize this email?

A. Yes.

Q. And what is this?

A. This is the response that I sent to Mr. Shurtleff.

Q. And is this your response to him explaining the denial of the flag raising request?

A. Yes.

Q. The second sentence reads, "The City of Boston maintains a policy and practice of

respectfully refraining from flying non-secular flags on the City Hall flagpoles." Did I read that correctly?

A. Yes.

Q. Now up to this point, there had not been any formal written policy regarding flying non-secular flags on the flagpoles, correct?

A. Correct.

Q. So to the extent you're referring to a policy here, that would be a new policy, correct?

A. I was referring to past practice.

Q. Okay. So you say a policy and practice. The practice refers to what you had determined was the past practice of the city prior to the Camp Constitution request?

A. Yes.

Q. Now when you say "respectfully refraining," does that mean you had determined that the city had declined to fly non-secular or religious flags in the past?

A. We had no—I had no records of ever having one had been approved, so.

Q. So as you wrote this, wouldn't it be fair to say you didn't know if one had ever been denied before on those grounds?

A. No, I don't—I can't say with certainty.

* * *

Q. When you allow a flag raising on one of the City Hall flagpoles, do you usually provide that to the organization that's raising the flag so they can get the flag up and down?

A. We assist. It's our crank. It doesn't—it's not permanently affixed to the pole, so we have to provide it in order for the flag raising to occur.

Q. Okay. Does a city employee usually actually do the cranking?

A. I don't attend all the flag raisings. I can't answer that.

Q. Okay. Are requestors permitted to do it themselves? In other words, if your department provides the crank for a particular flag raising, can the organizer of the flag raising do that part themself?

A. I honestly don't attend the majority of flag raisings. I've never paid attention to who was cranking it. I believe that it's done typically in conjunction with the organizers. So whether we have them assisting with them raising or it's done by a custodian, I can't give you a definitive answer to that.

(Tr. 1:19–23; 56:11–57:14; 74:3–75:21; 131:11–132:10.)