No. 20-1800

IN THE

Supreme Court of the United States

HAROLD SHURTLEFF; CAMP CONSTITUTION,
Petitioners,

v.

CITY OF BOSTON AND ROBERT MELVIN, IN HIS 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

BRIEF IN OPPOSITION

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this case is appropriate for certiorari review where (a) the analysis to determine whether a government entity has engaged in government speech has been defined by the Court in recent decisions in Pleasant Grove City v. Summum, 555 U.S. 460 (2009) and Texas Div., Sons of Confederate Veterans, Inc. v. Walker, 135 S. Ct. 2239 (2015); and (b) the First Circuit held that the selection and presentation of flags on a City-owned flagpole constitutes government speech consistent with the factors espoused in Summum and Walker?

2. Whether this case is appropriate for certiorari review where the First Circuit held forum analysis was inappropriate where a finding of government speech had been made by the Court, consistent with the decisions in Summum and Walker?

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I. STATEMENT OF THE CASE

This case arises out of a dispute between Petitioners, Harold Shurtleff and Camp Constitution,[1] and Defendants, the City of Boston and Gregory T. Rooney, in his official capacity as Commissioner of the City of Boston Property Management Department,[2] over the City's denial of Petitioners' request to display a "Christian flag" on a City owned flagpole in connection with an event to be held at the flagpoles on City Hall Plaza on or around September 17, 2018.

The City owns and manages three flagpoles in an area in front of City Hall referred to as City Hall Plaza. (App. 141a.)[3] The three flagpoles are each approximately eighty-three feet tall and are prominently located in front of the entrance to City Hall, which is the seat of the city government of Boston. (Id.) 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. (App. 141a-142a.) The dispute in this case focuses on the third flagpole, where the City at times will replace the City of Boston flag with another flag, typically at the request of a third party. (App. 142a.) Such a request is often made in connection with an event

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[1] Camp Constitution and Harold Shurtleff will be referred to collectively as "Petitioners" herein.

[2] The City of Boston and the predecessor to Robert Melvoin as the City's Commissioner of the Property Management department, Gregory T. Rooney, will be referred to collectively as the "City" herein.

[3] References to the Appendix filed by the Petitioners will be referred to as "App." Followed by the page number.

taking place on City-owned property within the immediate area of the flagpoles. (Id.)

The City has published event guidelines on its website for those wishing to hold an event at locations near City Hall. (App. 133a.) The guidelines state that applicants need the City's permission to hold events at City-owned properties and directs applicants to an application form that they can fill out to request an event at certain locations. (Id.) Locations at which one may hold an event include Faneuil Hall, Sam Adams Park, City Hall Plaza, the City Hall Lobby, the City Hall Flag Poles and the North Stage. (Id.) The website refers to these portions of City-owned properties as locations at which one may hold an event. (App. 133a.) The website does not make any reference to a flag-raising event where a third party may request to raise a flag on one of the City's three flagpoles. (Id.)

The City also provides a written event application form for those that do not apply online to hold an event near City Hall. (App. 135a.) The written application states that it "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." (App. 136a.) The application further states that the City "seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums." (App. 137a.) Similar to the online application, the written application refers to the City-owned properties as locations at which one may hold an event and no reference is made to a flag-raising event taking place on one of the City's three flagpoles. (App. 136a.)

The website and written application each contain guidelines outlining the circumstances under

which an application for an event at a city-owned property may be denied. (App. 133a-140a.) An application may be denied if the event involves illegal or dangerous activities or if it conflicts with scheduled events. (Id.) An application may also be denied if the applicant fails to adhere to the additional guidelines stated on the City's application. (Id.) Once an application is received, the City's policy is to review the request to ensure that the proposed event satisfies these guidelines. (App. 140a-141a.)

At the time of Petitioners' flag request, the City had no written policies specifically addressing flag raising applications. (App. 140a.) From June 2005 through June 2017, the City approved 284 flag raising events, including 39 event approvals in the year directly preceding Petitioners' request. (App. 142a-143a.) The City has raised flags of other countries in place of the City of Boston flag, e.g., the flags of Brazil, Ethiopia, Portugal, Puerto Rico, the People's Republic of China and Cuba. (Id.) The City has also raised the flags of private organizations including the Juneteenth flag representing the end of slavery, the LGBT rainbow Pride flag, the pink transgender rights flag and the Bunker Hill Association flag. (Id.) Some of these flags contain religious imagery. 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." (App. 147a.) 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." (App. 144a.) The Bunker Hill Association flag contains a red cross against a white field. (App. 146a.)

The City had never denied a flag raising request prior to Petitioners' request. (App. 142a.) The

City had also never requested to see a proposed flag prior to approval of a flag raising request. (App. 150a.) The City considered Petitioners' request to be the first it had received related to a religious flag. (Id.) Commissioner Rooney conducted a review of past flag raising requests and determined that the City had no past practice of flying a religious flag. (App. 151a-152a.) Following the denial of the request, Petitioners requested an official reason for the denial. (App. 152a.) 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. (App. 153a-154a.) The City did not deny the Petitioners' request to hold the event, but rather denied the request to raise the Christian flag and suggested the raising of a non-religious flag as an alternative. (App. 154a.) On September 13, 2017, Petitioners renewed their flag raising request. (App. 158a.) The City did not respond to the second request. (App. 158a.)

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. (App. 159a-160a.) 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.) The City also created a webpage for flag-raising events which states the goals for the 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.)

The City has denied one other flag-raising event request since denying Petitioners' request. (App. 160a.) The City denied the request of Super Happy Fun America to raise a "Straight Pride" flag on the City Hall Flag Poles. (Id.)

II. REASONS FOR DENYING THE PETITION

The Petitioners' contention that the City violated their free speech rights when the City denied the request to fly a Christian flag in front of City Hall must fail. When the City raises a third-party flag on the City Hall Flag Poles, which are prominently located in front of City Hall and over which the City maintains ownership and control, it is engaging in government speech consistent with the Court's recent decisions in Pleasant Grove City v. Summum, 555 U.S. 460 (2009) and Texas Div., Sons of Confederate Veterans, Inc. v. Walker, 135 S. Ct. 2239 (2015). When engaging in government speech, the City has the same freedom to express itself as individuals and cannot be compelled to engage in speech it does not endorse. Therefore, the traditional forum analysis applicable to private speech on government property does not apply and Petitioners may not maintain their

claim that the City engaged in viewpoint discrimination. The City's flagpole is not a public forum, it is government property which the City may use in a manner best suited to its goals. Petitioners therefore have no constitutional right to express their message on the City's flagpole nor can they force the City to express itself in a particular way.

For these reasons, which are developed more fully below, this Court should deny the petition for writ of certiorari.

A. The Selection And Presentation Of Flags By The City On A City-Owned Flagpole Constitutes Government Speech.

The entire premise of Petitioners' argument rests on its conclusion that the City's flagpoles are a public forum available for private speech and that the City violated Petitioners' free speech rights when it denied their request to fly the Christian flag. The Free Speech Clause does not regulate or limit the government when it uses its own property to engage in its own speech. Summum, 555 U.S. at 467-68. A governmental entity is "entitled to say what it wishes," Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995), and to select the views that it wants to express. See Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998); Rust v. Sullivan, 500 U.S. 173, 194 (1991). Furthermore, a government's own speech is exempt from First Amendment scrutiny. Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 329 (1st Cir. 2009). Government has the same freedom to express itself as it wishes even when receiving third-party assistance for the purpose of delivering a government message. See Summum, 555 U.S. at 468.

The Summum Court relied on three factors in determining that the selection and presentation of privately donated, permanent monuments in a city-owned park constituted government speech. See id. at 470-80; Walker, 135 S. Ct. at 2247; see also Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018)(stating that the Walker Court cited three factors underlying its conclusion and that the Summum Court applied a similar framework in reaching its decision.); New Hope Family Services, Inc. v. Poole, 966 F.3d 145, 174-78 (2d Cir. 2020)(Court cites the three factors present in Summum and Walker decisions and applies those three factors in determining the absence of government speech.) Petitioners' argument that the First Circuit created a novel, three-part test to analyze government speech is not supported by cases decided by this Court and other Circuit Courts.

First the Summum Court focused on tradition and the fact that history has demonstrated that governments have long used monuments to speak to the public. Summum, 555 U.S. at 470; see also Walker, 135 S. Ct. at 2247. Second the Summum Court accepted the proposition that a property owner typically does not open his or her property to the installation of monuments that convey messages with which he or she do not want to associate. 555 U.S. at 471. Because property owners do not usually behave in such a manner, those "who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the owner's behalf," and there is little chance that "observers will fail to appreciate the identity of the speaker." Id.; see also Walker, 135 S. Ct. at 2247. The third factor relied upon is that the government had effectively controlled the monuments by exercising final

approval authority over their selection. Summum, 555 U.S. at 473; see also Walker, 135 S. Ct. at 2247. Furthermore, the fact that a town or government does not have a written policy in place is irrelevant as to whether a government or town's actions constitute government speech. See Sutliffe, 584 F.3d at 332; see also Summum, 555 U.S. at 473 (stating that the town's subsequent adoption of express criteria to use in making future monument selections supported a finding of government speech).

Other Circuit Courts, have focused on the Summum and Walker factors in determining that government rejection of private viewpoints constituted government speech. See Sutliffe, 584 F.3d at 329 (holding town's use of town website to advocate for approval of budget and its refusal to include hyperlink to Petitioners' website, which communicated opposing views, constituted government speech because town's decision to include certain hyperlinks was within its sole discretion and communicated an important message about its own views); see also Mech v. School Bd. of Palm Beach Cty., Fla., 806 F.3d 1070, 1075 (11th Cir. 2015) (finding school's decision to remove appellant's advertising banner from its fence constituted government speech where circumstances indicated school's endorsement); see also 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.").

1. Governments Have Long Used Flags To Communicate Messages To The Public And Select Messages With Which The City Chooses To Identify.

With regards to the instant case, the use of flags to communicate messages throughout history and into the present day is beyond dispute. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (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 a banner…"); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (Government engages in speech when it flies its own flags over a national cemetery and may favor one viewpoint over another in selecting flags).

Furthermore, the City maintains a website dedicated to its flag-raising events declaring the City's goal of commemorating flags from many countries and communities at City Hall Plaza during the year by conducting such events. (App. 143a.) Here, the City has chosen to communicate messages to the public through the presentation of flags on its flagpoles celebrating the many communities that make up Boston and identify the City as a diverse community. Evidence of such a purpose is consistent with both the traditional use of flags as a means for government to communicate with and identify itself to the public and supports a finding that the City has engaged in government speech through the selection and presentation of flags on its flagpoles. See Summum, 555 U.S. at 472 (stating that governments "select the monuments that portray what they view

as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.").

2. Observers Of A Flag Flying Above City Hall Would Reasonably Interpret The Flag As Conveying A Message On The City's Behalf And Perceive The City As The Speaker.

The second factor in the Summum analysis focused on the close identification between government-owned land and the public mind resulting in "little chance that observers will fail to appreciate the identity of the speaker" as the government when viewing a monument situated on public land. 555 U.S. at 471-72. When the Court in Summum determined that the City would be the reasonably perceived speaker with regards to monuments placed in its public park, it focused on the practical, common sense principal that "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." Id.

In Walker, the Court found that license plates "are often closely identified in the public mind with the [State]" and that in this case they were "essentially government IDs," noting that in Texas the state required each driver to display a plate, issued its own plates, and included the word "TEXAS" at the top of every plate. 135 S. Ct. at 2248. Furthermore, the state dictated the manner in which drivers disposed of unused plates. Id. The presence of close identification between the license plates and the state that issued them made it reasonable that the

state issuing the plate would routinely and reasonably be perceived as the speaker of the displayed message. See also United Veterans Memorial and Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle, 72 F. Supp. 3d 468, 474, 478 (S.D.N.Y. 2014) aff'd, 615 F. App'x 693 (2d Cir. 2015) (granting city's motion to dismiss Petitioner's claim that city violated its First Amendment rights by removing its flag from city armory flagpole where reasonable observer would assume the flag, located on a flagpole on city property used for park and recreation purposes, was conveying a message on city's behalf, even where city had ceded control of flagpole to private organization). Additionally, government speech is found where it is inherent from the nature of a request that the requestor is not merely seeking to engage in his or her desired speech but is instead seeking to convey government endorsement of their views. See Walker, 135 S. Ct. at 2249. 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.

Id.

The City offered to allow Petitioners' event to occur that would feature local clergy and a celebration of the Christian contributions to the founding of the United States and the only request that was denied was that of raising a Christian flag on the city-owned flagpole. (App. 153a-154a.) The City did not deny the Petitioners the ability to hold an event featuring speeches by local clergy and celebrating Christian values at the location of the City Hall Flag Poles. Rather, the City denied them access to one of three city-owned flagpoles to raise a flag representing a particular religion in place of the City's flag. Thus, it can be inferred from the circumstances that the Petitioners are not seeking permission to present their flag as part of an event celebrating the Christian religion or to engage in private speech, but are instead seeking to use the flagpole to obtain the powerful image of City approval of their religious views. See Walker, 135 S. Ct. at 2249.

3. The City Effectively Controls Messages Broadcast Through Its Flagpole By Exercising Final Approval Authority Over The Flags That Are Raised.

The third factor relied upon by the Summum Court in determining the existence of government speech was the fact that the town "effectively controlled" the messages sent by monuments in the public park by "exercising final approval authority" over their selection. 555 U.S. at 473. The Court held that public parks, which are closely identified with the government in the public mind, play an important role in defining the identity projected by a town or city to its residents and visitors alike. Id. at 472. The fact that government decision-makers took care to select

the monuments that they deemed to be appropriate identifiers for the city, considering "content-based factors as aesthetics, history and local culture," demonstrated that the monuments were meant to convey and had the effect of conveying a government message, thus constituting government speech. Id. The City selected those monuments that it wanted to display for the purpose of presenting a desired image of the City to all visitors of the park. Id. at 473; see e.g., Sutliffe, 584 F.3d at 331 (town defendants effectively controlled the content of the message on the town's website by exercising final approval authority over information displayed on it).

Furthermore, the selectivity exercised by a government or town in selecting those messages with which it chooses to identify need not be limited or circumscribed in any way. As the Walker Court pointed out in comparing Texas's license plates to the monuments in Summum;

> Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in Summum wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

Walker, 135 S. Ct. at 2251-52.

In the instant case, the record is clear that the City exercises final approval authority over the flags that are raised on its flagpoles and that the flagpoles are treated differently than other locations at which the City hosts events. In order for a flag-raising to be approved, Rooney, as Commissioner of the Property

Management Department, must review the flag-raising request to determine whether the proposed flag-raising is consistent with City message and practice. (App. 151a.) In this particular case, the City, for the first time, received a request to raise a flag purported to represent a religion. Due to concerns related to the Establishment Clause brought about by the prospect of hanging a religious flag prominently in front of City Hall, in place of the City flag and alongside the United States and Massachusetts flags, Rooney consulted the City Law Department and reviewed historical flag-raisings to determine whether any overtly religious flags had been raised in the past. (App. 150a-152a.) After conducting this thorough inquiry and determining that the City had not raised overtly religious flag in the past, Rooney determined that it was not in the best interest of the City to raise a Christian flag above City Hall. (App. 155a.)

Moreover, Petitioners attempt to point to the fact that the City has held 284 flag-raising ceremonies over a twelve-year period as evidence that the City has failed to maintain control of its flagpole, in turn designating a public forum in its place. When viewed in context though, 284 flag raisings over 12 years only amounts to a flag other than the City of Boston flag being raised approximately 15% of the time. The Turkish flag itself has been raised over ten times during that twelve year time period (App. 144a); and the Bunker Hill Association flag raised three (3) times during that time period (App. 145a). This record demonstrates that the City has a practice of conducting recurring flag-raising events with many sovereign nations and several civic groups, and this practice has spanned at least twelve years and occupied the city-owned flagpole in place of the city

flag 284 times over those 12 years. (App. 174a-187a.) This type of selective program is not indicative of a City opening its flagpole to all comers wishing to broadcast any message they choose, high above the City in some type of come one, come all policy. See Shurtleff v. City of Boston, 928 F.3d 166, 174 (2019)(holding that the City controls program of raising third-party flags through application process, approval by Property Management Commissioner and limited instances of flag-raisings over a period of years.). The City furthermore maintains that on the instances it does open its flagpoles to third parties for flag-raisings, it does so pursuant to the goals stated on its website lending more support to the position that the City has not designated its flagpole as a public forum. (App. 143a.) Where the City has a number of messages it wishes to broadcast over its flagpole, it does not mean that those messages are not the City's own. See Walker, 135 S. Ct. at 2252.

Finally, the fact that the City, until recently, did not have a policy governing its flag-raising policy is irrelevant to the government speech analysis as well. Summum, 555 U.S. at 473 (City did not adopt express policy regarding monuments until after rejection of Petitioner's monument); see also Sutliffe, 584 F.3d at 332 (stating that written policy is "irrelevant to whether (City's) actions constitute government speech").

Petitioners' allegation that the City commits a crime by flying the flag of a foreign country from its flagpoles because of a state law that prevents the display of a foreign country's flag ***upon*** an official building is nonsensical. See Petitioner Brief at p. 9 (emphasis added). No fact exists in the record that indicates the City places flags upon an official building as opposed to flying such flags from flagpoles

that are separate and apart from the City Hall building. Based on the plain and obvious meaning of the statute cited by Petitioners, the City has committed no violation where it has not placed any foreign flags upon City Hall and such an allegation demonstrates a failure to consider the words used in the statute. Here the plain meaning of the statute is conclusive and Petitioners' argument has no merit. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

4. Petitioners' Reliance On the Court's Decision In Matal Is Misplaced Where Federal Trademarks Bear Little Resemblance To A Flag Raised On An 83 Foot Tall, City-Owned Flagpole Located In Front Of City Hall.

Petitioners rely on language in Matal where the Court warns that passing off private speech as government speech "by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." Matal v. Tam, 137 S. Ct. 1744, 1758 (2017). Petitioners though merely repeat this holding without examining any of the facts forming the basis of the Matal Court's decision. In that case, the Court determined that the content of trademarks registered by the federal government did not qualify as a form of government speech in part because "an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register." Id. at 1758. The Court in Matal made it a point to specify

that the facts of that case were "far afield" from the decision in Summum where monuments had been used to speak to the public since ancient times, the town exercised selectivity over the monuments, and found government speech where the essential function of the park would be destroyed if the town were forced to accept all monuments. Id. at 1759.

The facts presented by the instant case are inapposite to those presented in Matal, where here, the City does in fact review flag-raising requests to determine whether the message conveyed by a flag comports with City message and policies. (App. 149a.) The circumstances of the present case are far more similar to those found in Summum where the City is using its flagpole to convey messages to the public about the city's diversity and culture, the purpose of which would be destroyed if the City were forced to apply a policy of viewpoint neutrality with regards to the flags it chooses to raise. (App. 143a.) The facts in Matal bear little relationship to those presented here and are inapplicable to this analysis.

Furthermore, the City did not refuse the Petitioners the ability to hold an event featuring local clergy on City Hall Plaza celebrating Christianity. (App. 153a.) Such actions by the City are in no way consistent with a desire to "silence or muffle the expression of disfavored viewpoints." Matal, 137 S. Ct. at 1758.

B. The City Has Not Designated Its Flagpole As A Public Forum.

1. The Facts Do Not Support The Conclusion That The City Hall Flag Pole Is A Designated Public Forum.

A government entity creates a designated public forum "only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). To determine whether a government has created a designated public forum Courts have looked to the policy and practice of the government to determine whether it intended such a designation. Id. A designated public forum will not be found to have been created where evidence of a contrary intent exists on the part of the government, and in cases where the principal function of the property would be disrupted by the designation. Id. at 804. Of particular importance in assessing the government's intent is the control that it asserts over the forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (2001) (finding that a school's mail system had not been designated as public forum where permission to access the system needed to be granted by individual school principal); see also Ark. Edu. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998)(holding that government does not create a designated public forum by reserving access to a specific class of speakers that, in turn, must obtain permission to access the forum).

In the present case, Petitioners only rely on a City website and written event application to argue that the City has made an explicit designation of a public forum for the purpose of flag-raising

ceremonies on one of its flagpoles. (App. 132a-140a.) This is not enough. The Petitioners fail to provide the proper context as to how the City Hall Flag Poles are referenced in the City's online and written applications, and do not once mention the fact that the "City Hall Flag Poles" are treated as a location at which one may request an event. The distinction is critical. A closer look at the actual verbiage used in the City's available materials provides the needed context.

With regards to the City's written application, it provides that the 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. (App. 136a)(emphasis added). Furthermore, the application contains a section entitled "**Location:**" (App. 135a-136a.) Within the "Location" section of the application, "City Hall Flag Poles" is listed with a square checkbox next to it among other locations at which one may request to hold a public event. Id. Even when one continues on to the City's website detailing the process for holding an event on city-owned properties near City Hall Plaza, the website in pertinent part states that one needs permission from the City to hold events ***at*** certain properties that include a list of ***locations***. (App. App. 133a)(emphasis added). Among these ***locations***, the City lists "***at the*** City Hall Flag Poles," Id. (emphasis added). The City explicitly treats the ***location at the*** City Hall Flag Poles as a public forum in its written and website materials. Other than a statement on the City's written application reading, "[w]here possible, the Office of Property and Construction Management seeks to accommodate all applicants seeking to take advantage of Boston's public forums" (App. 137a), the

record is barren of any indication that the City intentionally opened a nontraditional forum on that flagpole for public discourse. Shurtleff, 928 F.3d at 176 (citing Sutliffe, 584 F.3d at 333) (internal quotations omitted). The record further reinforces the fact that the designation of the location at the City Hall Flag Poles as a public forum has no implications on the separate and distinct flag-raising program. Hosting events at the City Hall Flag Poles does not necessarily entail a flag-raising ceremony. (App. 141a.) While a flag-raising event would necessarily occur at the location of the City Hall flagpoles, such a request would be analyzed differently, with the Commissioner of PMD reviewing the request to ensure it aligns with City messaging, than a request at the same location not involving a flag-raising. (App. 140a-141a, 149a.)

Further distinguishing a flag-raising event from those events taking place in the public forums listed on the City's materials is the access that the public has to the locations referred to as public forums. The City concedes that despite its application process and set of posted guidelines, there is little it can do to prevent groups of citizens from arriving unannounced at those locations referred to as public forums in order to exercise First Amendment rights without first receiving the City's permission. At most, the City's application process serves as a way to reserve a public space for an event ahead of time.

In the event that a group of dissatisfied citizens decided to descend upon the location at the City Hall Flag Poles to protest a decision made by City government, the City does not have the ability to remove such protesters from a public forum merely because they failed to fill out the proper application form. Those same dissatisfied citizens though would

have no ability to raise a flag on the city-owned flagpole once they arrived at the location of the City Hall Flag Poles because to do so requires not only the approval of the Commissioner of PMD, but also the provision by the City of the hand crank necessary to lower the City flag and raise the substitute flag. (App. 143a.) As the Court stated in Cornelius, "such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." 473 U.S. at 805.

The City has not designated a public forum because it maintains discretion over the flags allowed to be raised and it must also provide the means by which to raise the flag, and thus the Petitioners have failed to demonstrate such a purposeful designation. Where the primary function of the City's flagpole, i.e., conveying a City message, would be disrupted by a finding that a designated public forum exists, the Court should not infer that the City intended such a designation.

2. By Engaging In Government Speech, The City Does Not Implicate The Defendants' Rights Under The First Amendment and Forum Analysis Is Inappropriate.

Moreover, where the City engages in government speech when it decides to fly certain flags, the traditional forum analysis applied to government action related to private speech on government property does not apply and Petitioners cannot maintain their claims that the City has engaged in viewpoint discrimination. See Summum, 555 U.S. at 481 (City's decision is not subject to First Amendment where Court had found existence of government speech). When the City approves an

applicant's flag-raising request, it has determined that the message conveyed by the proposed flag comports with the City's policies and positions, and that it agrees to engage in the expressive conduct of raising the third-party flag in place of the City flag on its own flagpoles. (App. 149a.) Thus, the inquiry into whether the flagpoles constitute a "traditional" or "designated" or "limited" public forum does not apply.

Unlike in the case of public parks or squares, there is no history of governments allowing their flagpoles to be used in a way that does not express a message with which the government agrees. Cf. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995) (finding analysis of content-based restriction on speech appropriate where statute authorized state-owned plaza at issue to be used for public speeches, gatherings and festivals, both religious and non-religious, and that property had been used this way for over a century). Moreover, a single flagpole occasionally and temporarily made available for use by the public could only accommodate a limited number of flag-raising requests and could not reasonably be maintained as an unregulated public forum without disruption to the access and operations of City Hall. Shurtleff, 928 F.3d at 176 (citing Summum, 555 U.S. at 478 (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").

Additionally, by allowing applicants to make flag-raising requests, the City has not made an affirmative choice to open up its flagpoles as a public forum because it retains final approval authority over the flags that are raised. See New Rochelle, 72 F.

Supp. 3d 468, 474, 478 (City was within its rights to delegate to a third party the display and maintenance of flags on a City-owned flagpole without creating a public forum, or surrendering control of the flags displayed).

Petitioner has argued that the First Circuit's decision in the instant case runs counter to precedent, when in fact an analysis of the cases cited demonstrate the consistency of the First Circuit's holding. All cases cited by Petitioner as inconsistent involve a situation where courts have found that a government speech was not present and that in its absence, forum analysis was appropriate and viewpoint discrimination was not protected. See Matal, 137 S. Ct. at 1758; New Hope Family Servs., Inc., 966 F.3d 145, 174 (2d Cir. 2020); Wandering Dago, Inc., 879 F.3d 20, 34-38 (2d Cir. 2018); Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9, 880 F.3d 1097, 1104 (9th Cir. 2018); Robb v. Hungerbeeler, 370 F.3d 735, 745 (8th Cir. 2004). Such holdings have no bearing on the present case where the First Circuit determined the existence of government speech and correctly held that forum analysis was inappropriate in such a situation.

3. Forum Analysis Is Inappropriate Where The Viewpoint Neutrality And Open Access Mandated By The Forum Doctrine Are Incompatible With The Purpose Of The City's Flagpole.

In general, the Court has held that forum analysis is inappropriate in this type of case where the viewpoint neutrality and open access required by the forum doctrine is incompatible with the intended use of the property. Ark. Edu. Television Comm'n, 523

U.S. at 666, 672-73. The Court stated in Summum that "the forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of speakers without defeating the essential function of the land or the program." 555 U.S. at 478. In Summum, the Court held that if forum analysis were applied to the selection of permanent monuments situated in public parks and the town was forced to maintain viewpoint neutrality in selecting monuments, it would result in cluttered parks or the removal of long-standing monuments, focusing on the space that such permanent monuments would occupy within the park. Id. In such a situation, the town would have little choice but to refuse all monuments and the program of selecting monuments to place in public would cease to exist. Id.

The First Circuit relied on the Court's reasoning in Summum when it held that a town's use of its own website to advocate for approval of a budget, and its refusal to include a hyperlink to a website that communicated opposing views, constituted government speech because the town's decision to include certain hyperlinks, even to other private organizations, was within its sole discretion and communicated an important message about its own views. Sutliffe, 584 F.3d at 329. The Court supported its holding by determining that forum analysis was inappropriate where the requirement of viewpoint neutrality and open access to the town's website was incompatible with the purpose of such a website. Id. at 334. The Court reasoned that the application of the public forum doctrine "could risk flooding the town website with private links, thus making it impossible for the town to effectively convey its own message and defeating the very purpose of the website and

hyperlinks chosen by the town." Id. Where the town would be forced to open its website to such a degree that it lost the ability to communicate a town message through its own website, it would be reasonable for that town to eliminate all private links from its website. Id. Thus, the Court found that application of the forum doctrine was inappropriate in a situation where it would result in less as opposed to more speech. Id. Furthermore, if a designated public forum were found to exist, the City faces the potential "prospect of cacophony on the one hand, and First Amendment liability, on the other … the safe course is to avoid controversy … and by so doing diminish the free flow of information and ideas." Ark. Edu. Television Comm'n, 523 U.S. at 681 (internal quotations omitted).

A requirement of viewpoint neutrality on the City's flagpole forces the City into a position of choosing between the prospect of cacophony on one hand and First Amendment liability on the other. In such a situation, forum analysis is inappropriate.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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