No. 20-1800

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules of Court

Other Authorities

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) files this amicus curiae brief in support of Petitioners Harold Shurtleff and Camp Constitution.[1]

PLF was founded in 1973 to advance the principles of individual rights and limited government. PLF promotes and defends the right of every individual to express their own thoughts, as guaranteed by the First Amendment. To that end, PLF attorneys represent many individuals whose expression is censored by the state, in this Court and others. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (counsel of record); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (counsel of record); *Kissel v. Seagull*, No. 3:21-cv-00120-JAM (D. Conn. July 21, 2021) (successful challenge to statute demanding professional fundraisers submit scripts for approval); *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST, __ F. Supp. 3d __, 2020 WL 10963945 (N.D. Cal. Nov. 24, 2020) (successful challenge to vanity license plate regulation that prohibited offensive configurations). PLF also filed an amicus brief in the First Circuit in this case. PLF believes the First Circuit's expansion of the government speech doctrine, giving the government broad authority to censor explicitly on the basis of viewpoint, cannot be

[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

reconciled with the principles of free expression that animate American law and philosophy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government always has had the ability to speak on its own behalf. It promotes its own programs, communicates its own policies, and announces its position on affairs of state. These programs, policies, and positions are established by our elected representatives, who—ideally—may be held accountable if we Americans don't like them. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). The government speech doctrine ostensibly developed to serve the important but very limited purpose of ensuring the government has the ability to control its own speech.

With this Court's decision in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), however, the doctrine expanded to justify increasing censorship of private speech. In *Walker*, the Court exempted the government from the blanket ban on viewpoint discrimination that applies to every type of forum. The result was a doctrine that encourages intentional and blatant government viewpoint discrimination that censors certain groups and causes based on the ideas that they espouse—the exact evil that the First Amendment is intended to combat.

This Court should replace the malleable *Walker* test with a simpler assessment that respects first principles. Namely, government speech may be exempted from the rule banning viewpoint discrimination only when the government proves (1) a

clear intention to speak and (2) that a reasonable observer would understand that the government is speaking. If both these requirements are not present, then ordinary First Amendment protections remain in force.

ARGUMENT

I

THE GOVERNMENT SPEECH DOCTRINE IMMUNIZES VIEWPOINT DISCRIMINATION AND SHOULD BE NARROWLY CABINED

Government speech is exempted from the core protections of the First Amendment because a "requirement of viewpoint-neutrality on government speech would be paralyzing." *Matal v. Tam*, 137 S. Ct. 1744, 1757–58 (2017). But the government speech doctrine is "susceptible to dangerous misuse" because "[i]f 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." *Id.* As the Court suggested, the current doctrine presents two problems: one philosophical and one practical.

Philosophically, the doctrine undermines constitutional first principles by allowing the government to invite a wide-array of private speech on public property and then exercise unreviewable, viewpoint-based criteria to exclude disfavored speakers or content. For example, in *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1073 (11th Cir. 2015), the government speech doctrine validated a school board's refusal to permit a math tutor's poster advertisement on a school fence alongside other posters because the school board disapproved of his

earlier career in the sex industry. "It is as if Mech, due to his former job, had committed a felony that justified stripping him of his First Amendment right of speech." Clay Calvert, *The Government Speech Doctrine in* Walker*'s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 Wm. & Mary Bill Rts. J. 1239, 1271 (2017). Government officials escape accountability for their censorship because reasonable observers are unlikely to know about the behind-the-scenes censorship or even to guess that the approved messages are deemed "government speech."

As a practical matter, the current doctrine relies on highly subjective and difficult to measure factors. Under *Walker*, courts must consider (1) the history of that medium as a vehicle to "communicate[] messages from the States;" (2) whether the State maintained "direct control over the messages conveyed;" (3) whether the government "intentionally open[ed] a nontraditional forum for public discourse;" and (4) whether a reasonable observer would associate the speech in question with the government. 576 U.S. at 210–13. The Court did not explain how to weigh these various factors and lower courts have found them difficult to apply with any consistency. *See* Jessica Pagano, *The Elusive Meaning of Government Speech*, 69 Ala. L. Rev. 997, 1023 (2018); Calvert, Walker*'s Wake*, 25 Wm. & Mary Bill Rts. J. at 1293 (calling the test a "guessing game"). Under this test, neither the government nor those looking to participate in the forum can predict with any degree of certainty what the outcome will be.

This uncertainty emboldens government bureaucrats to err on the side of censorship. In short, the government need not be the loudest speaker if it holds the ability to become the only speaker. Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 Va. L. Rev. Online 224, 225–26, 241 (2021) ("Thanks to the government speech doctrine, the government does not need to overpower to dominate the marketplace of ideas. Rather, it manages to eliminate the competition with a doctrinal sleight of hand."). This power is magnified because government censorship in a forum otherwise open to multiple speakers signals to private forums that they, too, should censor the disfavored speech. *See, e.g.*, *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (state violates First Amendment when it "stifle[s] protected speech" even through "less-direct" means); *Paige v. Coyner*, 614 F.3d 273, 284 (6th Cir. 2010) (plaintiff states First Amendment retaliation claim when government made false and threatening speech that leads employer to fire employee). This compounding effect narrows available channels for communication, perhaps closing them entirely.

The doctrine thus allows government officials to "take advantage of this muddle and the proliferation of difficult cases by contending, in any given case, that it has not created a limited public forum for private speech but, instead, is speaking for itself in a forum it controls." Calvert, Walker*'s Wake*, 25 Wm. & Mary Bill Rts. J. at 1289. The *Walker* test perversely "rewards precisely what the rest of the First Amendment forbids—viewpoint-based limitations on private speech." Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 728 (2011). Indeed, the more censorship and viewpoint

restrictions the city employs, the easier it becomes to satisfy the test. And as government grows at an increasingly accelerated pace,[2] government speech also continues to increase. Hence, Boston chose censorship even though there were many reasons to conclude that Boston's flagpole is far beyond the "outer bounds of the government-speech doctrine." *Matal*, 137 S. Ct. at 1760.

Boston is not unique in abusing ambiguities in the *Walker* test to exclude speech. In the aftermath of *Walker*, there has been "a worrisome trend toward finding government speech in any situation where there is a message and some government involvement." Will Soper, *A Purpose-and-Effect Test to Limit the Expansion of the Government Speech Doctrine*, 90 U. Colo. L. Rev. 1237, 1255 (2019). Courts have emphasized the "context specific inquiry" and make no requirement that all factors weigh in favor of finding government speech. *Mech*, 806 F.3d at 1075 (acknowledging no history of government speech in the form of posters hung on schoolyard fences). The government thus has an incentivize to commandeer private speech as its own when any *Walker* factors are present.

Personalized license plates offer one example. *See Walker*, 576 U.S. at 204 (declining to address the State's personalization program, which allows "a vehicle owner [to] request a particular alphanumeric pattern for use as a plate number, such as 'BOB' or 'TEXPL8'"). Most courts faced with First Amendment challenges to the denial of personalized plates have

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[2] *See generally* Stephen Moore, *The Growth of Government in America*, Found. for Econ. Ed. (Apr. 1, 1993), https://fee.org/articles/the-growth-of-government-in-america/.

correctly held that personalized plates constitute personal speech. *See Mitchell v. Md. Motor Vehicles Admin.*, 450 Md. 282, 295 n.6 (2016); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019); *Kotler v. Webb*, No. CV 19-2682-GW-SKx, 2019 WL 4635168, at *8 (C.D. Cal. Aug. 29, 2019); *Ogilvie v. Gordon*, No. 20-CV-01707-JST, 2020 WL 10963944, at *5 (N.D. Cal. July 8, 2020); *Carroll v. Craddock*, 494 F. Supp. 3d 158 (D.R.I. 2020). But prior to losing in court, the California Department of Motor Vehicles rejected around 30,000 personalized license plate requests *each year*. *Ogilvie*, 2020 WL 10963944, at *4. That's a significant amount of censorship, depriving Americans of their First Amendment right to communicate their thoughts. And many states continue to enforce these types of speech restrictions. *See Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015) (upholding statute that allows agency to reject "offensive" or "misleading" personalized license plates because the plates represented government speech). Permitting this type of viewpoint-based censorship encourages governments to censor first and see if they are sued later. The government speech doctrine thus undermines core First Amendment protections that are designed explicitly to restrain government.[3]

[3] The First Amendment requires three key safeguards for private speech in any forum. Speech restrictions must reasonably advance the purpose of the forum, must not discriminate among viewpoints or speakers, and cannot be subject to haphazard implementation. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018).

II

THE COURT SHOULD ADOPT A NARROW INTENT AND EFFECT TEST

The First Circuit's decision in this case and the continued battle over personalized license plates shows that the *Walker* test fails to provide sufficient protection for speech. Amicus proposes that the Court limit the government speech doctrine with a speech protective standard that focuses on the core purpose of the government speech doctrine and is narrowly drawn to ensure viewpoint neutrality toward private speech. The government speech doctrine should apply when it proves both that it intended to speak and that it plainly conveyed that intent such that reasonable observers would attribute the speech to the government.[4] This approach results in the government having less ability to "adopt" private speech as its own when lawsuits challenge viewpoint-based censorship.

A. The government must prove intent to speak

First, the government must clearly intend to speak. This intent, or purpose, prong would "prevent the government from retroactively claiming speech as

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[4] The test resembles Justice O'Connor's approach in *Lynch v. Donnelly* to determining whether messages violate the Establishment Clause. She asks "whether government's *actual* purpose is to endorse or disapprove of religion" and whether "the practice under review *in fact* conveys a message of endorsement or disapproval." 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (emphasis added). Justice O'Connor's test was presented in the alternative, however, finding an Establishment Clause violation if *either* question was answered affirmatively. The test proposed here requires an affirmative response to *both*.

its own and also make it more difficult for a government actor to surreptitiously pass off its own speech as private speech." Soper, *Purpose-and-Effect Test*, 90 U. Colo. L. Rev. at 1268. *See also Vista-Graphics, Inc. v. Va. Dep't of Transp.*, 171 F. Supp. 3d 457, 475 (E.D. Va.), *aff'd*, 682 Fed. App'x 231 (4th Cir. 2017) (the government must demonstrate "the perverse consequences of applying First Amendment doctrine" to the speech in question). The government demonstrates intent when it speaks directly or when it approves or endorses "every word that is disseminated." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005). Only when the government exercises such "tight control" will the speech be exempted from default First Amendment protection. *See Mitchell*, 450 Md. at 295. *Cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (government desires to exercise control over advertisements on city buses but does not intend to adopt the communications as its own).

Courts may consider factors such as the history of a particular speech program or the medium employed for the communication. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring) (positing factors that a hypothetical observer may know). These other factors have limited utility, however, because while "history, custom, and past practice provide cues to a message's source," the "extent and accuracy of that knowledge can vary dramatically from individual to individual." Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. Rev. 587, 610 (2008). For this reason, the inquiry should focus squarely on whether the government unmistakably

intends to speak and whether the speech is unmistakably that of the government.

This narrower doctrine holds government politically accountable for its messages while reducing government's ability to impermissibly favor or suppress opinions or viewpoints. *See* Soper, *Purpose-and-Effect Test*, 90 U. Colo. L. Rev. at 1262. If the government signals any intention to open a forum for private rather than strictly governmental expression, then the government speech doctrine no longer applies. Therefore, when the government invites a wide variety of private actors to speak yet limits disfavored messages, as it did in Boston, the government speech doctrine should be presumptively inapplicable. In these circumstances, First Amendment principles should apply absent clear evidence that the government intends to assume full responsibility for all the speech in the forum.

B. A reasonable observer must attribute the speech to the government

Second, the effect of the speech must lead a reasonable observer to conclude that the government is speaking. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring). This prong bears some similarity with the existing *Walker* test and, if it were applied in the same haphazard way, would retain the difficulties that always exist when courts attempt to discern what a "reasonable" observer would think.[5] For instance, whether a

[5] Despite these known difficulties, the reasonable observer standard permeates the law. *See, e.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20–21 (1993) (hostile work environment claims determined by a reasonable person standard); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (in Fourth Amendment

reasonable observer in this case views the changing flags on Boston's third flagpole as attributed to the city (as did the court below, "one third-party flag at a time," App. 35a), or as private speech, may depend on whether the observer is a Bostonian familiar with the extensive changing display of flags, or a tourist seeing the flagpole only once.[6]

To avoid this problem, courts should focus on what the government *does*, not what a passer-by *thinks*.[7] Viewpoint neutrality should be the default for all government action that affects private speech. If the government seeks to be excused from viewpoint neutrality, it should bear the burden of proving that passers-by assume the government is the speaker rather than a private speaker. For these reasons, the

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cases, a person is "seized" when a reasonable person in the same situation would have believed she was not free to leave); *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (The "'reasonable person' standard is a familiar feature of civil liability in tort law.").

[6] As in the trademark infringement context, courts could rely on surveys to establish how the public perceives the speech. *See* Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 Sup. Ct. Rev. 33, 37.

[7] Courts do not agree even on the nature of the perception that matters. While some ask whether the public identifies the government as the speaker, others look for more tangential connections, such as whether the public associates the government with the speech, even if it is not itself speaking, or if the public believes the government is endorsing third-party speech. *See* Calvert, Walker*'s Wake*, 25 Wm & Mary Bill Rts. J. at 1294 (citing cases); Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 Neb. L. Rev. 124, 144–45 (2013) (motorists ascribe various meanings to roadside memorials ranging from designation of sacred space to tacky bids for attention).

proposed intent and effect test reduces the ambiguity presented by assessing the inner thoughts of hypothetical reasonable observers by focusing on *whether the government is speaking with a clear voice* and articulating a coherent message.

Ultimately, it comes down to transparency: has the government indicated *in a concrete way* that observers are expected to view the speech as reflecting government policy? *See* Leslie Gielow Jacobs, *Noticing the Government's Voice and Pondering Its Implications* (book review), 36 Const. Comment. 149, 164–65 (2021) (advocating a government speech doctrine founded on government transparency). A concreteness requirement would have prevented the First Amendment exemption permitted in *Johanns*, 544 U.S. at 555, 564 n.7, where compelled communication was deemed "government speech" even though it contained text explicitly stating that it was funded by ostensibly private parties: "America's Beef Producers."

The public can hold the government accountable for its speech only if it does, in fact, know that the government is speaking.[8] *See* Norton, *The Measure of*

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[8] Recent events demonstrate that public awareness of government speech is closely linked to political accountability. For example, when the public in some jurisdictions became aware of certain curriculum choices in public schools, they expressed their disapproval of that speech by electing school board members who pledged to reverse it. *See* Joshua Q. Nelson, *Anti-CRT candidates win school board seats in Kansas, Texas and Ohio, say voters rejected 'divisive ideology'*, Fox News (Nov. 4, 2021), https://www.foxnews.com/media/anti-critical-race-theory-candidates-elected-school-boards-kansas-texas-ohio. This highlights the needs for the government to clearly identify

Government Speech, 88 B.U. L. Rev. at 588 ("[G]overnment speech is most valuable and least dangerous when its governmental source is apparent."). The government could meet the concreteness requirement through various means. For example, in parks or plazas, a posted sign that "City adopts all messages in this space as its own" would suffice. On electronic media, the government could post a box containing language, similar to disclaimers that exist on millions of websites, stating whether it wants the public to understand that it has or has not adopted the speech as its own. *See* Soper, *Purpose-and-Effect Test*, 90 U. Colo. L. Rev. at 1270. Even if some theoretical possibility of misattribution remains, this is a reasonable trade-off to protect the default of viewpoint neutrality. *See generally Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

When the government invites expression of disparate voices, as Boston did here, it presumptively creates a forum for private speech rather than engaging in government speech. *See Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 798–99 (4th Cir. 2004) ("The array of choices makes the license plate forum appear increasingly like a forum for private speech. As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished."); *Kountze Ind. Sch. Dist. v. Matthews*, No. 09–13–00251–CV, 2017 WL 4319908, at *7–*8 (Tex. Ct. App. Sept. 28, 2017) (although school district exercised some editorial control over cheerleader-drafted and -painted "run-

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its own speech, so that the electorate can respond to the information provided.

through" banners, it did not exercise the level of control necessary to deem the banners government speech and therefore could not censor banners containing Bible verses). When the government invites a multiplicity of voices, it should bear the burden of proving that it intends that all the messages should be attributed to the government and that it has taken affirmative steps to ensure that reasonable observers will make that attribution. Otherwise, it is barred from engaging in viewpoint discrimination.[9]

In this case, Boston did not clearly indicate an intention to speak. To the contrary, Boston's official application documents expressed intent to "accommodate *all* applicants" and create a "public forum[]" to allow community group expression. App. 136a–140a. Boston never took steps to claim the hundreds of approved flags' messages as its own. It never posted a general statement that the city endorses or affirms the messages of any flags flown. The lack of a clear voice and a coherent government-sponsored message means that the reasonable observer would not believe that the government has spoken. Boston cannot retroactively claim private speech as its own to exclude viewpoints that it disfavors. *See Lamb's Chapel v. Ctr. Moriches Union*

[9] If it's too painful for the government to permit a flag expressing a particular viewpoint, it retains the option of closing the forum entirely. *See Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 681–82 (1998) (public television station canceled a debate between U.S. Senate candidates rather than face potential First Amendment liability for failing to include all candidates who might appear on the ballot); *Grossbaum v. Indianapolis–Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1290 (7th Cir. 1996) (closing a forum to all displays to avoid displaying a religious symbol was not unconstitutional).

Free Sch. Dist., 508 U.S. 384, 393 (1993) (allowing a forum "to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" was unconstitutional viewpoint discrimination).

CONCLUSION

The decision below should be reversed.

DATED: November, 2021.

Respectfully submitted,

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