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 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

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BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its educational mission, CVEF is concerned "that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009). CVEF believes "the precedent [*Shurtleff v. City of Boston*, 986 F.3d 78 (1st Cir. 2021)] is dangerous" because it elides the distinction "between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 222, 232 (2015) (Alito, J., dissenting); *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (acknowledging that "the government-speech doctrine … is susceptible to dangerous misuse"). Under the First Circuit's capacious view of the government speech doctrine, government officials can discriminate against religious viewpoints in the public square simply by (1) opening up some portion of its property to private individuals, (2) requiring these private parties to apply to use the property for a temporary period, (3) exercising limited review of their applications

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[1] Each party consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

(to avoid conflicts and to ensure safety) without taking ownership of the expression or exerting any editorial control over the content of the expression, and (4) permitting a wide range of secular expression with which the government agrees. This broad reading of the government speech doctrine is inconsistent with *Summum* and *Walker* as well as this Court's forum cases. Accordingly, CVEF comes forward to urge this Court to ensure that government officials cannot invoke the government speech doctrine to discriminate against religious views in a forum that the government has opened to secular expression on the same topics.

ARGUMENT

This case requires the Court to consider the proper scope of the government-speech doctrine. It does not call into question the government's ability to "speak for itself," *Bd, of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000), "say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and "select the views that it wants to express." *Summum*, 555 U.S. at 468. When the government is engaged in its own expressive conduct, "the Free Speech Clause has no application," *id.* at 467, and the government may discriminate based on content or viewpoint to ensure that *its* desired message is conveyed. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech … is exempt from First Amendment scrutiny."); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in

judgment) ("It is the very business of government to favor and disfavor points of view.").

To fall within the doctrine, though, the government itself must be *speaking*—not merely permitting third parties to engage in expression on government property and then invoking the protection of the government speech doctrine once a particular group proposes speech with which the government disagrees. *See Summum*, 555 U.S. at 469 ("While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property."). This distinction between government speech and private speech on government property is critical "to protect the marketplace of ideas." *Walker*, 576 U.S. at 207. If the government creates a forum for private speech, then, at a minimum, it cannot discriminate based on viewpoint to make sure the government does not skew public discussion in its favor. *See Matal*, 137 S. Ct. at 1758 ("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.").

In *Matal*, this Court explained that *Walker* "likely marks the outer bounds of the government-speech doctrine." 137 S. Ct. at 1760. The First Circuit's broad reading of the government-speech doctrine expands *Walker* beyond those bounds, allowing the government to discriminate based on viewpoint even when it neither takes ownership of the speech nor exercises the same level of control over expression found in *Summum* and *Walker*. Whereas "[p]ermanent monuments displayed on

public property" and specialty license plates "typically represent government speech," temporary flags—which private parties design, own, and retain, and which the City of Boston ("Boston" or "the City") approved without any meaningful review of or control over their content—do not. This Court, therefore, should reject the First Circuit's analysis for two distinct reasons: (1) it mischaracterizes and misapplies the central factors set forth in *Summum* and *Walker*, and (2) it fails to recognize that forum analysis is wholly appropriate in the context of a city-owned flagpole that is frequently opened up to temporary private flags.

I. Under the government speech doctrine, the flags temporarily displayed on the City's third flagpole are private, not government, speech.

That the First Circuit "badly misunderstands *Summum*" and *Walker*, *Walker*, 576 U.S. at 227 (Alito, J., dissenting), is apparent in two ways. First, the panel articulated a rigid three-factor test that expanded the government speech doctrine beyond the "outer bounds" established in *Walker*. Second, the First Circuit misapplied the relevant factors to the private flags the City routinely approved and flew on the third flagpole outside Boston's government buildings.

A. *Summum* and *Walker* identify several factors that serve to limit the scope of the government speech doctrine and to prevent the government from discriminating against views it dislikes.

The First Circuit distilled the government speech doctrine down to three factors: (1) "the history of the [government's] use of the medium," (2) "how closely the public identified the medium with the government," and (3) "the degree of control the government maintained over the message conveyed." *Shurtleff*, 986 F.3d at 87-88. While these three points played a central role in *Summum* and *Walker*, this Court acknowledged that "a few other relevant considerations" affected the government speech analysis. *Walker*, 576 U.S. at 210; *Matal*, 137 S. Ct. at 1759 (explaining that in *Summum* "we cited many factors"). In different contexts, different combinations of these factors might apply. *See Walker*, 576 U.S. at 213-14 (describing how the permanence of monuments and spatial limitations of parks were important in *Summum* but not in the specialty plate context). Each of the factors, though, is directed at limiting the government speech doctrine to those situations where the government is the actual speaker. This is critical because "the government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469. Courts must carefully review the nature of the speech at issue, its relation to the government property, and the government's control over that expression to determine whether the First Amendment applies.

This evaluation, though, is more nuanced than the First Circuit suggested. In *Summum*, the first of the "several factors" discussed, *Walker*, 576 U.S. at 209, was the history of governments' using the particular medium at issue "to convey some thought or instill some feeling in those who see the [expression]." *Summum*, 555 U.S. at 470. The

Court noted that "[g]overnments have long used monuments to speak to the public," whether the government commissioned the construction of the monument or accepted a privately financed and donated monument. *Id.* at 470-71. Given that private individuals also have used monuments throughout history to express messages to and instill feelings in others, this factor is not dispositive and serves as a threshold consideration.

Accordingly, the Court turned to a second (and narrowing) factor—the nature and function of the medium of expression in relation to the specific property at issue. The First Circuit characterized this as the "attribution" factor, *Shurtleff*, 986 F.3d at 88, but this description obscures the Court's concern with the kind of speech at issue and the way the expression functions in a specific context. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 798, 802 (1985) (explaining that the government creates a forum "only by intentionally opening a nontraditional forum" and that courts should "examine[] the nature of the property and its compatibility with expressive activity to discern the government's intent"). *Summum* emphasized the permanency of the monuments, which, as an enduring fixture on the governments' own property, "convey[ed] a message with which [the government] wish[ed] to be associated." 555 U.S. at 471. While the public frequently connects permanent monuments with the government, that is only "because property owners typically do not permit the construction of such monuments on their land" unless they agree with the message conveyed. *Id.*

In *Walker*, the specialty plates were government speech because of the nature and function of the medium. The majority concluded that license plates "are, essentially, government IDs" that "serv[e] the governmental purposes of vehicle registration and identification." 576 U.S. at 212. The plates were governmental property as evidenced by the State's "plac[ing] the name 'TEXAS' in large letters at the top of every plate," "requir[ing] Texas vehicle owners to display license plates," and "issu[ing]" the plates. *Id.* Texas owned all of the designs on specialty plates and determined how unused ones had to be disposed. *Id.* Moreover, because "issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated,' … 'persons who observe' designs on IDs 'routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf.' " *Id.* (quoting *Summum*, 555 U.S. at 471).

For both the majority and dissent in *Walker*, the nature and function of the medium (specialty plates) influenced to whom viewers attributed the messages. The majority concluded that specialty plates "serv[ed] the governmental purposes of vehicle registration and identification." *Walker*, 576 U.S. at 212. The dissent thought "the program's purpose was 'to encourage private plates' in order to 'generate additional revenue for the state.' " *Id.* at 231 (Alito, J., dissenting). The differing purposes informed the majority's and dissent's differing views of attribution. If the purpose was government identification, that indicated the plates conveyed the government's message; if specialty plates were a way to raise

money through mini-billboards, that reinforced that the expression belonged to the private parties designing and displaying the plates.

Yet, while attribution is relevant in many contexts, whether an observer views the speech as the government's is neither necessary nor sufficient for deciding when expression constitutes government speech. For example, in *Johanns* the Court concluded that the government's "Beef, It's What for Dinner" ad campaign was government speech and that, as a result, the compelled subsidy of the government's message was constitutional. The ad campaign sometimes included "the attribution 'Funded by America's Beef Producers' " in promotional messages and "a Beef Board logo, usually a check-mark with the word 'BEEF' " in most print and television messages. 544 U.S. at 555. Many (perhaps most) people viewing the ads, however, had no idea that the government promulgated these ads. *See id.* at 577 and n.6 (Souter, J., dissenting) (explaining how labeling the promotions as Funded by America's Beef Producers "all but ensures that no one reading the[ads] will suspect that the message comes from the" government and how "even someone generally familiar with the Beef Act and its taxation mandate might not recognize the checkoff logo as signifying Government involvement"). And the majority expressly recognized that attribution was not required: "the correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." *Id.* at 564 n.7. The expression was that of the government "whether or not the

reasonable viewer would identify the speech as the government's." *Id.* *See also Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (upholding the government's right to discriminate based on viewpoint when it was advancing its own program without requiring any evidence that patients knew the federal government was advancing its views through the Title X counseling activities).

Similarly, in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the plurality confirmed that a viewer's attributing speech to the government does not transform that expression into government speech. Although some individuals, "hearing of religious ceremonies on school premises, and not knowing of the premises' availability and use for all sorts of other private activities, *might* leap to the erroneous conclusion of state endorsement" 515 U.S. at 765, the expression remained "private" speech given the nature and use of the property after school hours. *Id.* at 760. That is, the majority concluded the government created a forum based on the character of the property and program, not on whether viewers attributed the speech to the government. As a result, "given an open forum and private sponsorship, erroneous conclusions do not count." *Id.* at 760 (plurality opinion). In addition, no other Justice joined Justice Souter's concurrence in *Summum*, which advocated for a reasonable observer test in the government speech context: "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." 555 U.S. at 487 (Souter, J., concurring). In fact, this Court has never adopted a reasonable observer test for government speech and actually has distanced itself from such a test in recent Establishment Clause cases. *See*, *e.g.*, *American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067, 2081 (2019) (rejecting *Lemon* and the reasonable observer tests in the context of longstanding religious monuments, symbols, and practices).

The Court also has emphasized a third limiting factor—the level of control the government has over the message conveyed. In particular, the Court looks to see if the government has " 'effectively controlled' the messages sent by" the medium of expression on the government's property "by exercising 'final approval authority' over their selection." *Summum*, 555 U.S. at 473. On this view, if the government lacks such control, then the person or entity determining the content of the message is apt to be the speaker.

In *Johanns*, the ads were government speech because "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560-61. Under the program,

> the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department…. Officials of the Department also attend and

> participate in the open meetings at which proposals are developed.

Id. at 561; *see also id.* at 563-4.

In *Summum*, Pleasant Grove had never "opened up the Park for the placement of whatever permanent monuments might be offered by private donors." 555 U.S. at 473. Instead, the city exercised "selective receptivity," "select[ing] those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park." *Id.* The city also took "ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern." *Id.* Contrary to the First Circuit's contention, the city's ownership of the monument bore directly on *Summum*'s control inquiry. *Shurtleff*, 986 F.3d at 91. In response to Summum's claim that Pleasant Grove had not "controll[ed] the message," the Court expressly referenced the fact that "the City took ownership of that monument and put it on permanent display in a park that it owns and manages" and that "[a]ll rights previously possessed by the monument's donor have been relinquished." 555 U.S. at 473-74. By taking ownership and permanently displaying the monuments, the city "unmistakably signif[ied] to all Park visitors that the City intends the monument to speak on its behalf." *Id.* at 474. The city's ownership of a permanent medium in the park confirmed its control over the message, doing away with any need for "the sort of formal endorsement that respondent would demand." *Id.*

In *Walker*, the majority concluded that Texas exercised the same level of control "over the messages conveyed on its specialty plates." 576 U.S. at 213. That Texas's license plates served as government IDs helped establish Texas's authority over the expression on its property. Texas "ha[d] sole control over the design, typeface, color, and alphanumeric pattern for all license plates," "must approve every specialty plate design proposal before the design can appear on a Texas plate," and had "actively exercised this authority … reject[ing] at least a dozen proposed designs." *Id.* Such "final approval authority allows Texas to choose how to present itself and its constituency" through each of its specialty plates. *Id.*

Depending on the nature of the program or property at issue, other factors might bear on the government speech analysis. *See Walker*, 576 U.S. at 213 (noting that "not … every element of our discussion in *Summum* is relevant here"). But the relevant factors in a particular case work together to ensure that the government speech doctrine does not "silence or muffle the expression of disfavored viewpoints." *Matal*, 137 S. Ct. at 1758. This Court, therefore, should do what the First Circuit did not—"exercise great caution before extending [its] government-speech precedents." *Id.*

B. The private flags on the City's third flagpole are private expression that fall outside the Court's government speech doctrine.

Having misunderstood the limited scope of the factors in *Summum* and *Walker*, it is not surprising the First Circuit mischaracterized the private flags

in *Shurtleff* as government speech. A careful application of the main factors discussed above demonstrates that the temporary flags are *not* government speech. First, although "governments have used flags throughout history to communicate messages and ideas," *Shurtleff*, 986 F.3d at 88, so have private parties. *See Stromberg v. California*, 283 U.S. 359, 369 (1931) (striking down a California law that prohibited the display of a red flag "as a sign, symbol or emblem of opposition to organized government"); *Texas v. Johnson*, 491 U.S. 397 (1989). Thus, the parties can agree 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). But they dispute who is speaking through the private flags on the third flagpole. As the Federal Circuit has recognized, flags are government speech only if they belong to the government: "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." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (emphasis added). Whether *Camp Constitution's private flag* is government speech, though, must be determined based on the other factors, which serve to narrow and cabin the government speech doctrine.

When applying the second factor, the First Circuit immediately considered "whether an observer would attribute the message of a third-party flag on the City's third flagpole to the City." 986 F.3d at 88. In so doing, the First Circuit

overlooked this Court's concern with the nature and function of such temporary flags. Unlike permanent monuments in public parks or government IDs, the temporary flags on the third flagpole allow a variety of private groups to express their views and, in the process, to "foster diversity and build and strengthen connections among Boston's many communities." App. 143a. The fact that two of the flagpoles contain government flags and never change while one flies private flags that do change informs observers that the third flagpole is different, that the temporary third-party flags do not convey a message on behalf of the property owner and should not be viewed in "symbolic unity" with the other permanent, government-owned flags. 986 F.3d at 89. Whereas it is clear the United States, Commonwealth of Massachusetts, and City of Boston flags belong to the government, the private flags have no markings or words indicating that they belong to or speak on behalf of the City. The private groups convey their *own* messages on and through their *own* flags.

Moreover, there is no basis for the First Circuit's claim that "[i]t … strains credulity to believe that an observer would partition such a coordinated three-flag display … into a series of separate yet simultaneous messages (two that the government endorses and another as to which the government disclaims any relation)." *Id*. Observers frequently understand and attribute different messages expressed on or through government property to different speakers. License plates provide one such example. Standard issue plates, such as "First in Flight" in North Carolina, are "from beginning to end the message established

by the" State issuing the plate. *Johanns*, 544 U.S. at 560. The State owns the plates, creates and approves their design (*e.g.*, "First in Flight" centered across the top, "NORTH CAROLINA" centered on the bottom, and the Wright Brother's plane in flight over the North Carolina dunes in the background), and requires that a vehicle owner display the standard issue plate (unless the owner qualifies for or selects a different plate). Although Ohio may disagree with the claim, the message is that of North Carolina.

North Carolina, like all other States, also permits owners to customize their standard issue (and specialty) plates by selecting the string of numbers and/or letters that appear in the middle of the plate. When driving behind a car with a "First in Flight" license plate that has "L8 AGN," "MMMBACON," or "VEGAN" across the middle, an observer immediately attributes the phrase to the vehicle's owner—even though "First in Flight" is North Carolina's message. The vehicle owner is expressing her views on her habitual tardiness or food preferences; she is not articulating the State's position on the pace of governmental functions or health policy. The same is true when a vehicle owner personalizes a specialty plate. Under *Walker*, specialty plates are government speech, so the interlocking Carolina blue "N" and "C" (for the University of North Carolina) on a "First in Flight" college specialty plate sends at least two distinct state messages—the Wright Brothers first flew in North Carolina and UNC Chapel Hill is a school to be celebrated. But a personalized message on that plate, such as "H8 DOOK," is the expression of the vehicle's owner, who selected (and paid for) the

message. As a result, one seeing this plate can—and does—attribute three different messages to two different speakers even though the messages are all on the same state-owned license plate. Under *Walker*, First in Flight and UNC are government speech, while the not too flattering view of Duke University (or at least Duke basketball) is that of the owner.

To take another example, consider Virginia's "KIDS FIRST" specialty plate, which has the State's name across the top in capital letters, "KIDS FIRST" across the bottom, and two red hand prints on the left side. A clever (or devious) vehicle owner personalized the plate with "EATTHE" in the middle of the plate, giving rise to "Virginia Eat The Kids First" if read from top to bottom. There is no observer—reasonable or otherwise—who would attribute eating children first to Virginia. Yet even if a viewer erroneously did, such attribution would not convert the private expression ("EATTHE") into government speech. If it did, States would be "babbling prodigiously and incoherently" through expression over which they had no control (the personal selection being left to the vehicle owners). *Matal*, 137 S. Ct. at 1758. States would send a host of inconsistent messages, supporting colleges (through a UNC specialty plate) while also saying that the State does not like those schools (through a "H8 UNC" vanity plate) or providing contradictory dietary advice ("MMMBACON" and "VEGAN") or, as in Virginia, championing children while recommending that those same kids be eaten first. Vanity plates, therefore, are not government speech.

The flags at issue in *Shurtleff*, however, are much more like vanity plates than specialty plates. With vanity plates, the vehicle owner selects the combination of letters and numbers that will serve as the unique identifier for that vehicle. These privately selected sequences convey the message of the owner, not the State, even if an observer cannot readily understand or decipher that message (*e.g.*, "SRYOFCR" on a Ferrari[2]). While the personalized message is displayed on a government-owned ID with the State's name in large letters, there is no history of the government's using the *owner-selected* sequence of letters and numbers to convey its own message. Rather, although "issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated,' " *Walker*, 576 U.S. at 212 (quoting *Summum*, 555 U.S. at 471), States have done just that through their vanity plate programs, allowing owners to convey their personalized expression ("4 HIM," "FRM MYX," "ANTI GOV," or "SWIM MOM") on state-owned property for a fee. In so doing, States relinquished "direct control over the messages conveyed on [the vanity] plates." *Id.* at 213. Although some States have attempted to impose restrictions on the personalized messages, precluding vanity plates that "carry connotations offensive to good taste and decency" or "refer, in any language, to a … religion" or "deity," lower courts have struck down such restrictions as viewpoint-based discrimination in a nonpublic forum. *See*, *e.g.*, *Ogilvie v. Gordon*, 2020 WL 10963945 (N.D. Cal. 2020); *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010).

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[2] "Sorry Officer."

This Court should do the same here. Boston has not demonstrated any type of "selective receptivity" to applications to fly private flags on the City's third flagpole. While groups are required to fill out an application and receive approval, 986 F.3d at 90, that does not transform the expression into government speech. If it did, *Capitol Square* would have turned out differently. 515 U.S. at 757-58. Until this case, the City approved applications as a matter of course (284 approvals and no prior denials), frequently without ever viewing the flags at issue and without making any suggested changes to the proposed flags. The City played no role in the design of the private flags, did not take ownership of the flags, and had no control over their content. Such perfunctory review and approval is a far cry from *Johanns* where "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government," 544 U.S. at 560, or the city's "effective control" and "final approval authority" over the permanent monuments in *Summum*. Approving an application to fly a private flag after determining that there is no scheduling conflict, health or safety threat, or procedural defect, App. 136a-140a, exercises no control over the content of the expression; it merely sets minimum conditions on the use of government property that has been opened up to private speakers. *See Capitol Square*, 515 U.S. at 758 (noting that access to the government's open forum was based on "several criteria, which concern primarily safety, sanitation, and non-interference with other uses of the square, and which are neutral as to the speech content of the proposed event"). As a result, the private flags

on the City's third flagpole are not government speech.

II. This Court's forum analysis serves as another limiting principle on the government speech doctrine and reinforces that the private flags are private speech.

In addition to applying the government speech factors, this Court also has considered whether the forum doctrine would be inconsistent with the expression at issue: "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Summum*, 555 U.S. at 480; *Walker*, 576 U.S. at 215 ("But forum analysis is misplaced here."). This "forum" check provides another means of guaranteeing that officials do not use the government speech doctrine to discriminate against viewpoints with which they disagree.

Unlike *Summum* and *Walker*, though, "public forum principles … are [not] out of place in the context" of temporary private flags on a city-owned flagpole. *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion). In *Summum*, a forum analysis was inappropriate because public parks could "accommodate only a limited number of permanent monuments" given the limited amount of space and the "endur[ing]" nature of permanent monuments. *Id* at 479. Viewpoint neutrality in that context would force government officials to "either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments." *Id*. Having "accepted a donated war memorial," a

local government would have "to provide equal treatment for a donated monument questioning the cause for which the veterans fought." *Id.* at 480. The same would be true for any other displayed monument, leaving parks with "little choice but to refuse all such donations." *Id.*

Similarly, in *Walker*, having " 'looked to the policy and practice of the government' and to 'the nature of the property and its compatibility with expressive activity,' " the majority concluded that Texas's specialty license plates constituted neither a designated limited forum nor a nonpublic forum. 576 U.S. at 215-16 (quoting *Cornelius*, 473 U.S. at 802). A finding of a designated open forum was foreclosed by Texas's "exercis[ing] final authority over each specialty license plate design," "tak[ing] ownership of each specialty plate design," and "hav[ing] … used [specialty plates] as a form of government ID [that] bear[s] the State's name." *Id.* at 216. Specialty plates also were not nonpublic fora given "the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process." *Id.*

The private flags that fly on Boston's third flagpole are markedly different. The City's flagpole presents a "situation[] in which government-owned property or a government program [is] capable of accommodating a large number of public speakers without defeating the essential function of the land or program." *Summum*, 555 U.S. at 478. According to the City, the purpose of the flag raising events on the third flagpole is "to create an environment in the City where everyone feels

included, and is treated with respect… Our goal is to foster diversity and build and strengthen connections among Boston's many communities." App. 143a. The Guidelines that are incorporated into the application also state 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." App. 136a-140a. In this way, the City has opened its third flagpole "to encourage a diversity of views from private speakers," not "itself speak or subsidize transmittal of a message it favors." *Rosenberger*, 515 U.S. at 834.

Furthermore, the City does not exercise the type of ownership and control over the flags that the Court took to preclude application of the forum doctrine in *Walker*. 576 U.S. at 216. While the Commissioner has the authority to review a request, there is no policy or history of the City's exercising control over the content or design of a private flag. Accordingly, Boston does not have to "either 'brace […] for an influx of clutter' or face the pressure to remove longstanding and cherished" flags. *Summum*, 555 U.S. at 479. The City could fly 365 different private flags per year (if it received that many applications), or it could open the flagpole to private flags only on specific days of the week, month, or year (if it wanted to fly its own flag on specific days).

Because the Court's forum doctrine is completely at home in the context of private flags on the City's flagpole, this Court's forum cases, not the government speech doctrine, govern the City's discriminatory regulation of access to that flagpole. *See*, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 274-75

(1981) (holding that a public university's classrooms were a designated open forum because, among other things, they could provide meeting space for hundreds of student groups); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983) (finding that a school's internal mail system was a nonpublic forum that could support the transmission of numerous messages between and among teachers and administrators); *Cornelius*, 473 U.S. at 804-05 (concluding that the Combined Federal Campaign was a nonpublic forum permitting hundreds of groups to solicit donations from federal employees); and *Rosenberger*, 515 U.S. at 825 (explaining that UVA created a "metaphysical forum" by allowing student activity funds to be used by many student groups for various campus activities, including publishing costs for student run publications).

The present case, therefore, is much more like *Capitol Square* than *Summum* or *Walker*. In *Capitol Square*, a private organization, the Ku Klux Klan, filled out an application to display for 16 days a cross on a public square surrounding the statehouse in Columbus, Ohio, which the government had opened up "for use by the public … for free discussion of public questions, or for activities of a broad public purpose." 515 U.S. at 757 (citation omitted). Private groups had to submit an application, but the government did not control or dictate the form or content of the display, determining only whether the proposed display met certain speech-neutral criteria related to safety, sanitation, and non-interference with others. *Id*. at 758.

Although the government had allowed similar temporary displays, such as a Christmas tree and a menorah, it denied the application, citing Establishment Clause concerns. *Id.* at 759. The Court concluded that the plaza was a designated open forum and that Ohio lacked a compelling Establishment Clause defense because Ohio "did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.* at 763; *id.* (noting that " 'an open forum … does not confer any imprimatur of state approval on religious sects or practices' ") (quoting *Widmar*, 454 U.S. at 274). The plurality went on to explain that "given an open forum and private sponsorship, erroneous conclusions do not count." *Id.* at 765. That is, contrary to the First Circuit's concern that a passerby would attribute a religious flag to the government, the plurality rejected (as a "proposition [that] cannot be accepted") the view that an observer's wrongly attributing private religious speech in a forum to the government creates an Establishment Clause problem. *Id.* at 766. According to the plurality, "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement." *Id.* at 768.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), confirmed that the analysis is the same for a nonpublic forum: "even if school property during off-hours was not a public

forum, the school district violated an applicant's free-speech rights by denying it use of the facilities solely because of the religious viewpoint of the program it wished to present." *Capitol Square*, 515 U.S. at 762. Given that "the school property was open to a wide variety of uses, the district was not directly sponsoring the religious group's activity, and 'any benefit to religion or to the Church would have been no more than incidental,' " the Court rejected the school district's Establishment Clause concerns. *Id.* (quoting *Lamb's Chapel*, 508 U.S. at 395).

The same analysis applies to the City's third flagpole. To see why, consider a variation on *Capitol Square*. Suppose that Ohio sets aside a half acre (of the 10-acre plaza) immediately next to the statehouse and divides it into three roughly equal parcels. On one parcel, the State erects a permanent display to the United States. On the second parcel, Ohio erects a permanent display relating to the State of Ohio, and on the third section of land, Ohio sets up a temporary display about the City of Columbus. Assume also that Ohio government officials allow third parties to apply to display their own temporary exhibits on the third parcel. Only one display is permitted at a time on the third piece of land. The Columbus display is designed so that it can be moved and stored easily when third parties exhibit their own temporary displays on the third parcel. As in *Capitol Square*, the City does not take ownership of the temporary displays and does not have any input into their design or construction. The City of Columbus generally approves all applications (unless there is a conflict with a previously

approved display or there is a concern about safety, sanitation, or non-interference with other uses of the square). Assume that over the last decade, government officials have approved more than 250 applications for private displays and rejected none.

The forum doctrine controls this fact pattern, not the government speech doctrine. The government has opened its property for private parties to use on a temporary basis and with minimal governmental oversight or regulation. If a private party applies to exhibit a temporary religious display on the third parcel, the religious expression remains the speech of that party; it is not transformed into the government's speech simply because the speech occurs on a parcel of land next to the statehouse. *See Capitol Square*, 515 U.S. at 766 (rejecting the petitioners claim that the "distinction [between government speech endorsing religion and private speech endorsing religion] disappears when the private speech is conducted too close to the symbols of government"). Accordingly, if a group submits an application to set up a temporary display, which includes a cross, "to commemorate the historical and civic and social contributions of the Christian community to the City of [Columbus]," that display remains private expression.

That the group calls the display the "Christian display" does not change the analysis. Consider vanity plates once again. In *Byrne v. Rutledge*, Vermont permitted residents to select personalized messages on a wide range of topics provided the string of letters and numbers did not exceed seven and the combination was not previously assigned to another vehicle. *Id*. at 49. Vermont also precluded

"any 'combination[] of letters or numbers that refer, in any language, to a … religion' or 'deity.' " *Id.* at 49. An applicant, Shawn Byrne, sought to have "JN36TN" on his license plate, which referred to the well-known Biblical verse, John 3:16 ("For God so loved the world…."). Vermont denied Byrne's application because the requested phrase referred to religion in violation of state law, which was meant "to avoid the 'distraction and disruption [that would] result[] from controversial speech' and to 'disassociat[e] the State from speech' it does not endorse." *Id.* at 50.

The Second Circuit held that vanity plates constitute a nonpublic forum because such plates " 'are a highly limited and extremely constrained means of expression,' … [and] Vermont had not created a public forum by permitting the discourse possible on vanity plates." *Id.* at 54 (quoting *Perry v. McDonald*, 280 F.3d 159, 168-69 (2d Cir. 2001)). As a result, any restriction had to be reasonable and viewpoint neutral: "once the government has permitted *some* comment on a particular subject matter or topic, it may not then 'regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " *Id.* at 55 (quoting *Lamb's Chapel*, 508 U.S. at 394). Drawing on *Lamb's Chapel*, *Rosenberger*, and *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001), the Second Circuit concluded that Vermont's religion-based exclusion constituted viewpoint-based discrimination because it "distinguish[ed] between those who seek to express secular and religious views *on the same subjects*." *Id.* at 56-57. While permitting secular perspectives on philosophy, beliefs, and values, Vermont prohibited religious

ones. Byrne's proposed "JN36TN" vanity plate expressed a position on self-identity (as a Christian) or on "love, respect, and inspiration from a religious viewpoint." *Id.* at 57. And Vermont rejected the plate because of that perspective. If Byrne had provided a secular meaning to the plate (*e.g.*, "I am John, I am 36 years old, and I am from Tennessee"), Vermont would have approved the personalized message. This Vermont could not do. *See Good News Club*, 533 U.S. at 111 (noting that "for purposes of the Free Speech Clause," there is "no logical difference in kind between" one group's "invocation of [religion]" and a secular group's "invocation of teamwork, loyalty, or patriotism" as a "foundation for" discussions on different topics); *Rosenberger*, 515 U.S. at 831 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.").

Vermont's discriminatory treatment of religious vanity plates is analogous to the City's rejection of Camp Constitution's "Christian flag" application. Once the City permitted some flags to address a specific topic, it could not then "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel*, 508 U.S. at 394. But that is exactly what the City did. It allowed private flags on the third flagpole from groups that had unique perspectives on history and social issues (such as the Bunker Hill Association, National Juneteenth Observance Foundation, and Boston Pride) while precluding the self-described "Christian" flag of a group that wanted to discuss and commemorate the historical civic and social

contributions of the Christian community to the City of Boston. Camp Constitution's event, like those held by other private groups, would have promoted diversity and strengthened the connections among Boston's many communities by providing a religious perspective on Boston's history and communities. Despite having permitted secular events related to those topics, Boston prohibited expression on those issues from a religious perspective. *Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

As the Second Circuit explained when analyzing Vermont's ban on vanity plates making "any refer[ence] to … a religion," prohibiting a message characterized as religious "operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*." *Byrne*, 623 F.3d at 56-57. A flag described as secular is permitted while a "Christian" (or other religious) flag is not—even though some of the "secular" flags included religious images. Given that the City made the flagpole available to all applicants, Camp Constitution's subjective characterization of its flag as "Christian" provided no basis for denying its application. The City discriminated against Camp Constitution based on its Christian viewpoint.

Moreover, the City's policy is not even reasonable. Reasonableness is based on the "purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. While

the restriction on expression "need not be the most reasonable or the only reasonable limitation," *id*. at 808, it must be "consistent with … [a] legitimate [governmental] interest." *Perry Educ. Ass'n*, 460 U.S. at 50. Boston's limitation on religiously named flags is not. The City offers no explanation why the Bunker Hill flag, which to many contains the same religious reference (a cross in the upper left corner), does not raise establishment concerns while Camp Constitution's does. No one outside the application process knew what Camp Constitution called its flag, and the Commissioner said he would have approved the flag if the group called it the "Camp Constitution flag." Reliance on the subjective meaning of a private party has no relation to the government's alleged interests, which is why the Second Circuit concluded that Vermont's ban on religious vanity plates was unreasonable: "Vermont would have approved that *very same* combination [JN36TN] had Byrne implied a secular meaning for it" instead of a religious one. *Byrne*, 623 F.3d at 60. This Court, therefore, should reject the City's discriminatory and unreasonable policy and permit Camp Constitution and other religious groups to have equal access to the third flagpole. *See Lamb's Chapel*, 508 U.S. at 395 (describing how "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed" by allowing a group to show a religious film series where the school's "property has repeatedly been used by a wide variety of private organizations"); *Widmar*, 454 U.S. at 274 (explaining that "an open forum in a public university does not confer any

imprimatur of state approval on religious sects or practices"); *Capitol Square*, 515 U.S. at 763-64 ("We find it peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy.").

CONCLUSION

The government speech doctrine is "essential." *Matal*, 137 S. Ct. at 1758. But keeping that doctrine properly limited to situations where the government actually is speaking protects an equally important interest—the open and robust exchange of views in the marketplace of ideas. This Court, therefore, should "exercise great caution before extending [its] government-speech precedents" in order to safeguard "disfavored viewpoints" from government discrimination. *Matal*, 137 S. Ct. at 1758.

Respectfully submitted,

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November 22, 2021