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

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BRIEF OF ADVANCING AMERICAN FREEDOM AND FAITH & FREEDOM COALITION AS AMICI CURIAE SUPPORTING PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and religion. AAF believes that a person's freedom of speech and religion are among the most fundamental of individual rights and that the Constitution does not permit the government to discriminate against or disfavor religious points of view.[1]

Faith & Freedom Coalition was founded in 2009 as a nonpartisan, non-profit, tax-exempt, social welfare organization as defined by I.R.C. section 501(c)(4). Its mission is to educate, equip, and mobilize people of faith and like-minded individuals to be effective citizens and to enact public policy that strengthens families, protects individuals, promotes time-honored values, protects the dignity of life and marriage, lowers the tax burden on small business and families, and

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than amici curiae made any monetary contribution intended to fund the preparation or submission of this brief.

requires government to live within its means. Today, it has grown to over 2.5 million members nationwide. Faith & Freedom Coalition is a leader at the state and federal level in advocating for the rights of individuals to freely exercise their religion as well as for the equal treatment of all religious adherents. Faith & Freedom Coalition is concerned that these rights are being steadily eroded and faithful Christians, in particular, are being systematically excluded from the public square.

SUMMARY OF THE ARGUMENT

The First Amendment enshrines the foundational principle that government cannot discriminate against religious speech and religious points of view. Yet that is precisely what the City of Boston did in this case—and what the First Circuit erroneously held that government is permitted to do.

For more than a decade, the City of Boston operated one of three flag poles located in front of Boston's City Hall as a public forum on which private civic organizations could fly flags. During that time, 284 applications were filed to raise flags, and all were approved. Yet when the civic organization Camp Constitution applied to fly a flag on Constitution Day, Boston denied its application on the sole and express grounds that the application described the flag as "Christian." The city subsequently explained that the denial was based on a previously unwritten rule that civic organizations could fly any flags they wished other than ones that are offensive, prejudicial, discriminatory—or religious.

Our Constitution does not permit such overt hostility to religion. To the contrary, our nation cherishes religious expression, and the First Amendment to our Constitution expressly protects

it. This Court should reverse the First Circuit and hold that Boston acted unconstitutionally when it singled out religious points of view for exclusion from a declared public forum.

ARGUMENT

I. The First Circuit's Broad Holding Curtails the Protected First Amendment Rights of Individuals and Organizations to Engage in Personal Religious Speech or Expression in Nontraditional Public Forums

When "the government seeks to place [restrictions] on the use of its property," this Court applies a "forum based" approach to assess the constitutionality of restrictions affecting speech or expression. *Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1885 (2018). This Court has recognized three different types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. *Id.* In both traditional and designated public forums, any restrictions on speech must satisfy strict scrutiny, and viewpoint discrimination is prohibited. *Id.* In nonpublic forums, by contrast, the government "may reserve the forum for its intended purpose . . . as long as the regulation on speech is reasonable," although even in nonpublic forums the government

may not "suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn. v. Perry Local Educators' Assn*, 460 U.S. 37, 46 (1983).

The First Circuit's erroneous decision in this case would impermissibly permit the government to discriminate against the expression of religious points of view in designated and nonpublic forums.

The City of Boston owns three flag poles in front of City Hall. Boston typically flies the United States flag and the POW/MIA flag on one pole, the flag for the Commonwealth of Massachusetts on another pole, and its own city flag on the third pole. After receipt and approval of a request from an organization, however, Boston will from time-to-time and for a limited duration replace its flag with the flag of the approved organization. *Shurtleff v. City of Boston*, 986 F.3d 78, 82-83 (1st Cir. 2021). From June 2005 through June 2017, Boston approved 284 applications for private organization flag raisings, without ever issuing a single denial. *Id*. at 83 and 93.

Boston's application for flag raisings at the City Hall Flag Poles expressly incorporated Guidelines explicitly referring to the City Hall Flag Poles as a "public forum[]." Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 6-7.

Boston's written policies governing flag raisings provided several "content-neutral reasons for denying an application, including incompleteness, capacity to contract, unpaid debt to the City, illegality, danger to health or safety, and misrepresentations or prior malfeasance." *Id.* at 6.

Camp Constitution, an organization founded "to enhance understanding of the country's Judeo-Christian heritage, the American heritage of courage and ingenuity, the genius of the United States Constitution, and free enterprise," *id.* at 2, sought to commemorate Constitution Day and Citizenship Day "by hosting an event at Boston's City Hall Plaza to feature short speeches by some local clergy focusing on Boston's history and to raise the Christian Flag on one of Boston's City Hall Flag Poles," *id.* at 3 (internal quotations omitted). Boston ultimately denied Camp Constitution's application for the flag raising because the city was "concerned" that the organization's flag was "related to a religious flag" since it was called a "Christian" flag on the application and Boston did not have a practice of flying non-secular flags. *Id.* at 14, 15, and 17.

After Camp Constitution's application was denied for the sole and express reason that its flag's name expressed a religious point of view, Camp Constitution filed suit. Notwithstanding

Boston's express policy designating the City Hall Flag Poles as a public forum, and longstanding practice of treating the flag poles as a public forum, the First Circuit declined to apply a standard public forum analysis. Instead, the First Circuit determined that the flags flying on the poles were a form of government speech, thus rendering the flag poles not public forums. *Shurtleff*, 986 F.3d at 94. On that basis, the First Circuit upheld the constitutionality of Boston's decision to engage in religious viewpoint discrimination.

A. Boston's Practices and Policies Concerning the Flag Raisings at the City Hall Flag Poles Demonstrate its Intent to Create a Public Forum

In reaching its decision, the First Circuit failed to properly consider Boston's express written designation of the City Hall Flag Poles as a public forum. Instead of first considering the nature of the forum as the necessary starting point of its analysis, the First Circuit instead skipped directly to applying the government speech doctrine. *See id.* at 86-92. The court only addressed the forum question ***after*** it concluded that the flag raisings constituted government speech, and then used its government speech conclusion to justify its finding that Boston did not designate a public forum. *See id.* at 93 ("We previously rejected [Club

Constitution's claim that the government speech doctrine is inappropriate] because a conclusion that the City [of Boston] has designated the flagpole as a public forum is precluded by our government-speech finding.") (internal quotations omitted).

This approach gets the analysis precisely backwards. Had the First Circuit started its analysis with the forum question, it should have concluded that—as Boston had expressly stated in writing—Boston intended the City Hall Flag Poles to constitute a public forum. Both Boston's practices and policies concerning flag raisings dictate that result. The appropriate conclusion that the flag poles were a public forum would then have precluded any finding that flags flown on them by private organizations constituted public speech.

First, Boston's paper application for the City Hall Flag Poles explicitly indicated Boston's intent to create a public forum. The application stated

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

> general public, access to these forums must be regulated.

Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 8 (emphasis omitted). If Boston did not intend to create a public forum at the City Hall Flag Poles, it would be nonsensical for it to unambiguously identify the area as a public forum on the application.

Second, Boston's practice of approving 284 flag raisings over twelve years – without a single denial – demonstrates that the city intended to create a public forum. Quite unlike the cases the First Circuit principally relied upon, Boston never actually exercised any editorial discretion over past flag raisings. To the contrary, the long history of approvals without a single denial provides further evidence of the city's intent to create a forum.[2] *See*

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[2] The First Circuit also justified its conclusion that the City Hall Flag Poles were not a public forum on the grounds (1) that the city retained control of "which third-party flags are flown" and (2) that the city's "permission procedures evince selective access" to the flagpole. *Shurtleff*, 986 F.3d at 93. If accepted, this analysis would effectively eliminate virtually all nonpublic forums. *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) ("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

Pleasant Grove City v. Summum, 555 U.S. 460, 471-72 (2009) ("But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity. . . . Across the country, municipalities generally exercise editorial control over donated monuments[.]"); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2249 (2015) ("And the Board and its predecessor have

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of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents."). This Court has long recognized that even in public forums, the government is traditionally permitted some "flexibility to craft rules limiting speech." Mansky, 138 S. Ct. at 1885. The restrictions that Boston had historically established, its initial content-neutral written policies for flag raising applicants and applications, – capacity to contract, unpaid debt to the City, illegality, danger to health or safety, incompleteness, and misrepresentations or prior malfeasance, Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 6, – fit this description. Under the First Circuit's approach, however, the imposition of such traditional content-neutral restrictions would convert all speech in the forum into government speech, thus empowering the government to apply and enforce a wider variety of viewpoint restrictions that fly in the face of the requirements of the First Amendment. *See Shurtleff*, 986 F.3d at 93-94 ("The City's restrictions demonstrate an intent antithetic to the designation of a public forum, and those restrictions adequately support the conclusion that the City's flagpole is not a public forum.").

actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs.").

Based upon Boston's policies and practices, it is clear that the city expressly designated the flag poles a public forum and consistently treated them as such—until the day that it denied Camp Constitution's flag raising application on the sole grounds that its chosen flag expressed a religious point of view.

B. Boston Unconstitutionally Discriminated Against Religious Viewpoints When It Denied Club Constitution's Flag Raising at the City Hall Flag Poles

Boston was not required in the first instance to designate its flag poles as a public forum. Once the city created the public forum, however, the First Amendment prohibited Boston from discriminating against flag raising applicants based on their religious viewpoint. Yet that is precisely what the city did: it denied Camp Constitution the right to raise its flag in the expressly designated public forum, solely because its chosen flag was described as a "Christian" flag on the flag raising application. This action was manifestly unconstitutional because it (1) violated the rules under which the

public forum had been operated for over ten years, and (2) uniquely disfavored religious viewpoints.

Boston's written policies indicated several content-neutral reasons the city could deny the flying of an organization's flag. These reasons – incompleteness, capacity to contract, unpaid debt to the City, illegality, danger to health or safety, and misrepresentations or prior malfeasance – were not cited as justification for denying Club Constitution's Flag. Instead, a city official admitted that the flag was denied out of "concern for the so-called separation of church and state of the constitution's establishment clause." Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 16-17 (quoting the deposition of a city official). In other words, Boston "pointed to nothing but the religious views of [Club Constitution] as the rationale for excluding its message[.]" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995).

This Court has repeatedly held that once the government creates a public forum – even a nontraditional public forum – it cannot "discriminate against speech on the basis of viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *see Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination. . . . These

principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation."). It has also concluded on at least three separate occasions that in nontraditional forums, the government cannot discriminate against religious viewpoints. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (finding that in a nonpublic forum "[t]he principle . . . that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others" prohibits it from discriminating on the basis of a religious viewpoint) (internal quotations and citations omitted); *Rosenberger*, 515 U.S. at 828-37; *Good News Club*, 533 U.S. at 112 n. 4 ("Religion is the viewpoint from which ideas are conveyed. . . . And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys."); *see also Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("Here [the university] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."). In sum, once the government declares that a public forum exists, it cannot deny a private citizen or organization access

to that forum on the grounds that they wish to express a religious point of view.

That is precisely what Boston has done in this case. It denied Club Constitution's request to raise and fly its flag on the City Hall Flag Poles solely because the application described the flag as "Christian." The record further reflects that if Club Constitution had titled its flag as the "Club Constitution" flag in its application, the flag raising would have been approved, even though the flag's design would have been identical in every respect to the flag that was disapproved. Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 17 ("[A city official] was concerned Camp Constitution's flag was a flag that was promoting a specific religion . . . . . His concern was not with the flag itself, but that on the application it was called a Christian flag. [The city official] would not have been concerned if the same flag was called the Camp Constitution flag because then it would have been the flag of the organization and not a religious symbol.") (internal quotations and emphasis omitted). This outcome—that an organization denominating its flag as "Christian" is rejected, but that an organization requesting to fly an ***identical*** flag but using a nonreligious description would be permitted to fly it—clearly illustrates Boston's overt hostility to religious viewpoints. *See Good*

News Club, 533 U.S. at 112 ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); *Lamb's Chapel*, 508 U.S. at 393 (concluding that the government "discriminates on the basis of viewpoint" when it permits government property to be used for presentations about family issues and child-rearing except for those presentations that would "deal[] with the subject matter from a religious standpoint.").

The First Circuit's animosity toward religion is further evident in its description of the organizations whose flags have been approved. The court repeatedly notes that "each [approved] flag represents a county, civic organization, or secular cause." *Shurtleff*, 986 F.3d at 91; *see also id*. at 84, 92, and 93. The First Circuit fails to consider, however, that Club Constitution's status as a religious organization is by no means incompatible with its functioning as a civic organization. Indeed, Club Constitution's mission of enhancing the "understanding of the country's Judeo-Christian heritage, the American heritage . . . the genius of the United States Constitution, and free enterprise," Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 2, is very similar to the mission of many commonly

recognized civic organizations, *see e.g.*, National Constitution Center, About the National Constitution Center, *available at* https://constitutioncenter.org/about (describing the purpose of the Constitution Center as "bring[ing] [] people . . . [together] to learn about . . . and celebrate the greatest vision of human freedom in history, the U.S. Constitution"). Further, this Court has already concluded that religious entities may engage in the same civic responsibilities as other non-religious organizations. *See, e.g., Lamb's Chapel*, 508 U.S. at 393-94; *Rosenberger*, 515 U.S. at 832 ("The church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purposes.").

II. Boston's Written Flag Policy Unconstitutionally Discriminates Against Religious Speech

In 2018, Boston adopted a written flag policy that purported to represent its past practice. Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 19. This policy incorporated several Flag Raising Rules, including a rule that explicitly forbade the "display [of] flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." *Id.* at 20. Far from improving the city's claim that its decision to deny

Camp Constitution's flag raising application was constitutional, the new written policy made absolutely clear that in denying the application Boston was overtly impermissibly discriminating against religious viewpoints. Indeed, the new written policy made clear the city's overt hostility toward religion by equating religious viewpoints with those that are offensive, prejudicial, and discriminatory.

This Court has repeatedly held that the government cannot categorically treat religious speech as a disfavored subject. *See Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (government cannot discriminate against the faithful "solely because of their religious character[.]"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) (finding that Montana's program expressly discriminated against religion). Yet that is precisely how Boston treated religious viewpoints when it denied Camp Constitution's application.

CONCLUSION

The First Circuit erred when it permitted Boston to discriminate against religious viewpoints. The Court should reverse the First Circuit and should hold that Boston's denial of Camp Constitution's flag raising application on the

sole and express grounds that it described its flag as "Christian" violated the First Amendment.

Respectfully submitted,

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