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 OF *AMICUS CURIAE* NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY INITIATIVE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Notre Dame Law School Religious Liberty Initiative promotes and defends religious freedom for people of all faiths through scholarship, events, and the Law School's Religious Liberty Clinic. The Religious Liberty Initiative protects not only the freedom for individuals to *hold* religious beliefs but also their right to *exercise* and *express* those beliefs and to live according to them. In only its first year of operation, the Religious Liberty Initiative has represented individuals and organizations from an array of faith traditions to defend the right to religious worship, to preserve sacred lands from destruction, to promote the freedom to select religious ministers, and to prevent discrimination against religious schools and families.

In addition to defending religious exercise wherever it is curtailed, the Religious Liberty Initiative advances and advocates for the critical presence of religious expression, religious institutions, and religious believers in public life. The Religious Liberty Initiative therefore seeks to ensure that government actors, like the City of Boston, may not create benefits, opportunities, or platforms that exclude religious believers.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties filed blanket consents to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Invoking the specious rationale of "government speech," the City of Boston unconstitutionally singled out religious expression for hostile treatment. By lumping speech based on "religion" together with speech deemed "inappropriate," "offensive," "discrimin[atory]," or "prejudice[d]," Pet.App.20, the City adopted the increasingly common view that promoting our Nation's vibrant pluralism requires the exclusion of religious perspectives from the public square. But that view is antithetical to the Founders' conception of religion as central—not peripheral—to our national order. And it is incompatible with this Court's First Amendment jurisprudence.

Based on a patent misreading of the Establishment Clause, governmental bodies increasingly have moved to exclude religious voices from public discourse. From speech codes at public universities to advertising policies for public transportation, governments have adopted rules that explicitly disfavor religious speech. Far from being required, these policies blatantly violate the First Amendment. As decades of decisions from this Court make clear, our Nation's laws have always respected the fundamental role of religion in promoting civic virtue and mutual affection. The First Amendment's Religion Clauses do not negate that central premise of our Republic. And the government speech doctrine cannot be used to immunize explicit and unconstitutional hostility to religious speech.

On the contrary, this Court's precedents affirm the First Amendment's demand that all—including the

religious—retain their right to speak in public fora. While the government may choose what to say (or not to say) when it actually speaks, a modicum of control over a public forum does not transform everything said in that forum into government speech. If the government erects a stage, that does not make the private speeches delivered from that stage the government's own. Nor does the government's ownership of the stage allow it to prohibit disfavored speakers from gaining access to the platform.

A view of "government speech" that embraces all perspectives except religious ones is anathema to our Constitution. "[T]he First Amendment requires governments to protect religious viewpoints, not single them out for silencing." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1200 (2020) (Gorsuch, J., dissenting from denial of cert.). The Court should accordingly reverse the decision below and reject the City's hostility to religious speech.

ARGUMENT

I. Governments Have Shown Increasing Hostility Toward Religious Speakers In The Public Square.

Boston's exclusion of Petitioners' religious speech is unfortunately no outlier. Rather, it is consistent with a growing trend of governments excluding religion from the public sphere. Public institutions across the country have attempted to relegate religion to the outskirts of society by prohibiting religious speech on college campuses, in schools, and on public transportation. And the courts have increasingly been called on to resolve claims by religious speakers who

have been publicly silenced by officials who deem religious expression to be the equivalent of rude or discriminatory speech.

Just last year, this Court heard a case in which a public college prevented a student from engaging in conversations and distributing written materials about his Christian faith. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). Chike Uzuegbunam wanted to share his Christian beliefs on campus, but campus authorities prevented him from doing so, "stating that Uzuegbunam's discussion of his religion arguably rose to the level of 'fighting words.'" *Id.* at 797 (citation omitted). While the college ultimately relented, giving rise to the standing and mootness issues presented to this Court, *see id.*, the case illustrates the prevalent and unfortunate hostility toward religious expression on public campuses.

Other examples abound. For instance, in 2018, the University of Iowa officially deregistered InterVarsity Graduate Christian Fellowship "for requiring their leaders to affirm statements of faith." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa,* 5 F.4th 855, 861 (8th Cir. 2021). But "[t]he University's fervor dissipated . . . once they finished with religious [organizations]," and it allowed exemptions from the Human Rights Policy for sororities and fraternities. *Id.* at 864. The Eighth Circuit held that this was unconstitutional discrimination. *Id.*

In another example, Florida State University ousted a student from the school's student senate over personal religious views he shared in private text conversations with other students. FSU administrators and student senate officials

"repeatedly failed to address" this unconstitutional retaliation.[2] Eventually, the student was reinstated only after he reached a settlement with the University.[3]

Unfortunately, this antipathy toward religion is not limited to our universities. Consider Wesley Bush, a kindergartener in the Philadelphia area, who asked his mother to read from the Bible as part of "All About Me" week in his classroom. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 92 (3d Cir. 2009). The assignment "left the subject matter . . . open-ended" and "encouraged discussion of the 'child's family, hobbies, and interests.'" *Id.* at 104 (Hardiman, J., dissenting). But a school official forbade Wesley's mother from reading from the Bible, claiming it was impermissible "proselytiz[ing]" and promoting of a "specific religious point of view." *Id.* at 98. Over a dissent from Judge Hardiman, the Third Circuit held that the school's exclusion of this view did not violate the Constitution. *Id.* at 101.

More recently, Bremerton High School in Washington State instructed its longtime football coach, Joe Kennedy, to stop his practice of kneeling and praying silently on the field after football games. When he chose to continue exercising his religious freedom, the school district gave him a poor performance evaluation and advised against rehiring him. Pet. for Writ of Cert. at 10, *Kennedy v. Bremerton*

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[2] *Exclusive: Florida State University Settles Discrimination Suit with Student Senate President Ousted For Criticizing BLM,* The Free Press (May 25, 2021), https://bit.ly/3kULav7.

[3] *Id.*

Sch. Dist., 991 F.3d 1004 (9th Cir. 2021) (No. 21-418). Bremerton High School concluded that this activity was not permitted under their "Religious-Related Activities and Practices" policy and deemed it an unwelcome injection of religion into the school environment. *Id.* at 6. Taken to its logical conclusion, the school's reasoning can "be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of cert.). Nevertheless, the Ninth Circuit found no constitutional error. *Kennedy,* 991 F.3d 1004. There is now a pending certiorari petition before this Court.

Religious speech has also been marginalized in other aspects of public life. In 2018, the Washington, D.C., Metro system rejected a holiday advertising campaign from the Catholic Church that "depicted the silhouette of three shepherds and sheep accompanied by the simple text: 'Find the Perfect Gift.'" Pet. for Writ of Cert. at i, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (2019) (No. 18-1455). The D.C. Metro system decided that only secular references to Christmas were allowed to be featured on advertising materials. *Id.* at 1. Thus, "the government opened a forum to discussion of a particular subject but then sought to ban discussion of that subject from a religious viewpoint." *Archdiocese of Wash.*, 140 S. Ct. at 1199 (Gorsuch, J., dissenting from denial of cert.).

Young Israel of Tampa, an Orthodox Jewish synagogue, received a similar response when it sought

to advertise an event called "Chanukah on Ice" on a public bus route. Compl. at 9, *Young Israel of Tampa v. Hillsborough Area Reg'l Transit Auth.*, No. 21-cv-00294 (M.D. Fla. Feb. 5, 2021). The local transit authority refused the ad because its policy placed religion in a "prohibited category along with ads containing or promoting alcohol, tobacco, illicit drugs[,] discrimination . . . or libel." *Id.* at 2. The transit authority said that, to comply with this policy, Young Israel would have to delete "all references to the menorah," *id.* at 16, which, of course, "is a central aspect of the Orthodox Jewish celebration of Chanukah," *id.* at 17.

This Court should not countenance this concerning trend. Excluding religious speech from the public sphere is not required by our Constitution. To the contrary, it is antithetical to our country's traditions and the protections secured by the First Amendment.

II. The First Amendment Forbids Governments From Disfavoring Religious Viewpoints Or Excluding Them From The Public Square.

Regrettably, the growing hostility toward religion in the public square often stems from a basic misunderstanding of the Establishment Clause. Rather than barring religious speech in public fora, this Court's precedents emphatically reject an extreme interpretation of the Establishment Clause that would confine religious speech to private quarters. In fact, banishing religious expression from public or civic discourse would be antithetical to the First Amendment's Free Speech and Free Exercise Clauses. Those clauses protect the fundamental rights of religious expression and religious exercise

both in private *and* in the public square. They do not merely promise believers the simple right to "whisper their thoughts in the recesses of their own homes." *Obergefell v. Hodges*, 576 U.S. 644, 741 (Alito, J., dissenting).

Dating back to the Founding, our country has long welcomed religious speakers from all sects and denominations. Indeed, for many Founders, our fundamental rights and conceptions of justice were *predicated* on the "self-evident" belief in "their Creator." *See* Declaration of Independence. And, in the many years since, "this Court has repeatedly held [that] governmental discrimination against religion—in particular, discrimination against . . . religious speech—violates the Constitution." *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring). Thus, from the Founding era through today, the First Amendment has been understood to mean that the government must welcome religious viewpoints in public on the same terms as all others.

A. Since The Founding, America Has Allowed Religious Speech In The Public Square.

Our nation has a "long tradition of allowing religious adherents to participate on equal terms in neutral government programs." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring). Even while offering sanctuary to a diverse array of religious groups, the United States has from its Founding embraced a diversity of public religious observance, to promote civic virtue and engender unity and mutual affection. Within that range of public religious expression,

government should stand as neutral toward all and partisan of none.

The Founders were aware of the conflicts that religious pluralism could produce. As James Madison noted, attempts to "extinguish religious discord, by proscribing all difference in Religious opinion" have produced "[t]orrents of blood." James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in The Sacred Rights of Conscience* 312 (Daniel L. Dreisbach & Mark David Hall eds., 2009). But their solution was not to relegate religion to the private sphere in order to avoid those conflicts. Rather, they understood that granting freedom to engage in public religious expression, regardless of viewpoint, was the best antidote to acrimonious sectarianism. Those expressive values undergird the Free Exercise and Establishment Clauses, which together place believers of all sects on equal footing—both with each other and with nonbelievers—before the government. The "Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

The Founders encouraged this diversity of religious expression because they "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400–01 (1993) (Scalia, J., concurring). Because the force of law alone could not promote the virtues necessary to sustain republican government, the Founders relied on religion and moral teaching to form responsible citizens. *See* Michael W. McConnell,

Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2195 (2003). In his Farewell Address, George Washington named "religion and morality" as the "indispensable supports" of "political prosperity." George Washington, Farewell Address, Sept. 19, 1796, *reprinted in The Sacred Rights of Conscience*, *supra*, at 468; *see also From George Washington to the Hebrew Congregation in Newport, Rhode Island* (Aug. 1790), *reprinted in id.* 464. Similarly, John Adams wrote that "Religion and Morality alone . . . can establish the Principles upon which Freedom can securely stand." Letter from John Adams to Zabdiel Adams (June 21, 1776), *reprinted in Adams Family Correspondence, vol. 2, June 1776–March 1778* (L. H. Butterfield ed., 1963).

Similarly, Alexis de Tocqueville observed of the American experience that "[l]iberty regards religion as its companion in all its battles and triumphs, — as the cradle of its infancy, and the divine source of its claims." *Democracy in America* 55 (Francis Bowen ed., Henry Reeve trans., 3d. ed. 1863). And John Witherspoon, president of Princeton University, noted in the year after the Declaration of Independence:

> A good form of government may hold the rotten materials together for some time, but beyond a certain pitch, even the best constitution will be ineffectual. On the other hand . . . when true religion and internal principles maintain their vigour, the attempts of the most powerful enemies to oppress them are commonly baffled and disappointed.

John Witherspoon, *The Dominion of Providence over the Passions of Men: A Sermon Preached at Princeton, on the 17th of May, 1776*, at 33 (2d ed. 1777); *see also* Thomas Cooley, *A Treatise on the Constitutional Limitations* 578 (6th ed. 1890) (noting the importance of "religious worship and religious institutions" in "preserv[ing] the public order").

Rather than sowing division, the Founders understood that the public expression of a variety of religious viewpoints would act as a "unifying mechanism." *Lee v. Weisman*, 505 U.S. 577, 646 (Scalia, J., dissenting). Consistent with that neutrality, the religious proclamations of our first Presidents often invoked generalized religious beliefs—of a common bond with the Creator—rather than specific religious dogma. *See, e.g.*, George Washington, The First Inaugural Address, Apr. 30, 1789, *reprinted in The Sacred Rights of Conscience* 446–47 (calling for "pious gratitude along with a humble anticipation of the future blessing"); John Adams, Proclamation for a National Fast, March 6, 1799, *reprinted in id.* at 455–56 (proclaiming a "day of solemn humiliation, fasting, and prayer . . . offer[ing] their devout addresses to the Father of mercies"); James Madison, First Inaugural Address, Mar. 4, 1809, *reprinted in id.* 452–53 (appealing to the confidence "which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being"). Without elevating one sect over another, these proclamations promoted gratitude and reverence among all Americans in their common cause of liberty. *See Lee*, 505 U.S. at 646 (Scalia, J., dissenting).

B. This Court's Precedents Protect And Affirm The Important Position Of Religious Speech In The Public Square.

The increasing diversity of religious observance in America in the two centuries since the Founding has not diminished the place of religion and religious expression in public life. If anything, the growth in religious pluralism has enhanced the position of religious expression in the public square, as this Court's precedents make clear.

Indeed, this Court has consistently approved of public—and even government-affiliated—religious expression. As the Court observed in upholding a municipal Christmas display, America's history is replete with "evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none." *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). Accordingly, the accommodation of individuals of all faiths "'follow[s] the best of our traditions' and 'respect[s] the religious nature of our people.'" *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

More recently, in *Town of Greece v. Galloway*, this Court observed that ceremonial prayers before public events "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." 572 U.S. 565, 584 (2014). That is so even when the specific religious expression is sectarian in nature, for "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* Particularly "[a]s our society becomes more and more religiously diverse, a community may preserve [religious] monuments,

symbols, and practices for . . . their place in a common cultural heritage." *Am. Legion*, 139 S. Ct. at 2083. Such practices simply continue a long and "honest endeavor," beginning with our First Congress, "to achieve inclusivity and nondiscrimination" and to recognize "the important role that religion plays in the lives of many Americans." *Id.* at 2089.

Just as the government itself may affiliate, on a neutral basis, with religious messages, so too must government-created opportunities be made available to religious and non-religious individuals alike. This Court has made that abundantly clear in the particular context of this case: state-created platforms for private expression. It is bedrock First Amendment law that where, as here, a government establishes a public forum for expression or debate on certain subjects, it must open that forum for *all*. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). Thus, where a person seeks access to use the forum to present a religiously grounded message, that message must be allowed on the same terms that a non-religious message would be permitted. Indeed, "[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Rosenberger*, 515 U.S. at 831. "Withholding access [to religious believers] would leave an impermissible perception that religious activities are disfavored . . . ." *Id.* at 846 (O'Connor, J., concurring). Accordingly, this Court has long and consistently upheld the rights of religious speakers to participate in limited public fora on the same terms as everyone else. *See, e.g.*, *id.* at 839

(majority op.); *Lamb's Chapel*, 508 U.S. at 393–94; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

Most recently, this Court has reiterated and reinvigorated these foundational anti-discrimination principles in the related context of the First Amendment's Free Exercise Clause. In both *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Court ruled that the government may not offer a public benefit to all but the religious. The Chief Justice, writing for the Court in *Trinity Lutheran*, explained that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand." *Id.* at 2025. And, in *Espinoza*, the Chief Justice wrote for the Court that although "[a] State need not subsidize private education, . . . once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 140 S. Ct. at 2261.

These recent cases reflect our Nation's "long tradition of allowing religious adherents to participate on equal terms in neutral government programs." *Rosenberger*, 515 U.S. at 852–53 (Thomas, J., concurring). In doing so, they reflect the Founders' view that to properly "respect[] the religious nature of our people," the government must "accommodate . . . their spiritual needs." *Zorach*, 343 U.S. at 314. When the government opens a public forum, it must therefore open it to religious groups and not treat them with "callous indifference." *Id.*; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

C. Boston Cannot Constitutionally Exclude Petitioners' Religious Speech From The Public Square.

These core First Amendment principles lead to a straightforward answer in this case. Because Boston has offered a platform for its citizens to display a diverse array of private messages, that opportunity must be available to religious and non-religious speakers alike. Neither the Establishment Clause nor the City's invocation of the "government speech" doctrine can shield it from that conclusion.

There should be no doubt that Boston has opened a public forum by allowing private groups to raise their flags on the City Hall flag pole. The purpose behind Boston's flag policy is clear: The City hopes to "create an environment in the City where everyone feels included . . . [and to] foster diversity and strengthen connections among Boston's many communities." Pet.App.143. The City has, in other words, "open[ed] a forum for speech and to support various [civic] enterprises . . . in recognition of the diversity" of its community. *Rosenberger*, 515 U.S. at 840. Accordingly, the City may not "discriminate against an entire class of viewpoints" simply because they are religious. *Id.* at 831. Indeed, by making the City Hall flagpoles open to the use of every group who asked—except Petitioners—the City "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. And, because "an open forum . . . does not confer any imprimatur of state approval on religious sects or practices," as long as "the forum is available to a broad class of nonreligious as well as religious"

groups, the secular purpose of the forum remains. *Id.* at 274. Once the government opens such a forum, exclusion of speech simply "based on its religious nature . . . constitutes viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 107 (2001); *see also Rosenberger*, 515 U.S. at 830–44; *Lamb's Chapel*, 508 U.S. at 393–94; *Widmar*, 454 U.S. at 267.

The thin reed of "government speech" cannot sustain the City's exclusion of Petitioners' speech. Government speech applies only when the government itself is expressing its own message—not, as here, when it has allowed 284 other groups to express theirs. Because "[v]ital First Amendment speech principles are at stake," this Court has carefully limited the application of the government speech exception to a few clear instances. *Rosenberger*, 515 U.S. at 835. The key question is whether the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834. On its face, that is the express purpose of the City's policy here.

This Court has squarely held that the government cannot circumvent the First Amendment by simply deeming a public forum government speech. On the contrary, "the government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469. And where the speech is in a forum "which the State has opened for use by the public as a place for expressive activity"—such as the flagpoles where 284 other flags have been raised on private request—the government is not expressing its

own message but inviting others to do so. *Perry Educ. Ass'n*, 460 U.S. at 45. When the government extends that invitation, it must offer it to religious speech as well, under the same neutral principles required since the Founding.

Nor does the Establishment Clause justify the City's discrimination. City officials apparently fear that they might run afoul of that Clause if the City allows Petitioners to fly their flag like everyone else. *See* Pet.App.153–54. But, in *Rosenberger*, it did not "violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities." 515 U.S. at 842. So too in *Lamb's Chapel*. *See* 508 U.S. at 393–94. Clearly, granting access to a flagpole on a religion-neutral basis to a wide spectrum of interest groups poses no greater threat under the Establishment Clause. In fact, the City of Boston has long flown flags that bear religious symbols. Indeed, even if the flag program at issue were to be shut down, the City would still presumably fly its own flag, which bears the inscription, *Sicut Patribus Sit Deus Nobis*, "God be with us as he was with our fathers." City of Boston, *Symbols of the City of Boston* (last visited Nov. 22, 2021), https://bit.ly/3nFUCV1. Speech is no less religious when written in Latin.

As the Court has repeatedly made clear, no reasonable interpretation of the Establishment Clause alters the fundamental principles described above. Indeed, "indifference to 'religion in general' is *not* what [this Court's] cases, both old and recent, demand." *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J.

concurring) (citing *Zorach*, 343 U.S. 306; *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664 (1970); *Lynch*, 465 U.S. 668; *Marsh v. Chambers*, 463 U.S. 783 (1983); and *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987)). Rather, the Establishment Clause is "respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. "Withholding access," in contrast, "would leave an impermissible perception that religious activities are disfavored." *Id.* at 846 (O'Connor, J., concurring).

In the end, Boston's exclusion of religious viewpoints from its public forum invites all the problems that the First Amendment was adopted to avoid. By disfavoring *religious* speech and lumping it together with *offensive* or *inappropriate* speech, Boston encourages acrimony and division, not tolerance and unity. This Court's precedents require government regulations to "place religious organizations in the favored or exempt category," not to single them out for second-class treatment. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., concurring). And "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" render a policy constitutionally infirm. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). Here, there is much more than a "slight suspicion" that Boston disfavored religious voices. The City's hostility to religious viewpoints was explicit. By seeking to

banish religious speech from the public square, Boston's policy "corrodes the civic virtues that underlie the First Amendment." *Kennedy*, 4 F.4th at 936 (O'Scannlain, J., statement respecting denial of rehearing en banc).

Far from requiring the City's discriminatory policy, the Constitution forbids it. This Court should therefore reverse the decision below and reaffirm the bedrock principle that governments may not disfavor religious viewpoints within a public forum.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be reversed.

Respectfully submitted,

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