No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, ET AL., *Petitioners*,

v.

CITY OF BOSTON, MASSACHUSETTS, ET AL.

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

**BRIEF FOR
PROTECT THE FIRST FOUNDATION
AS *AMICUS CURIAE*
SUPPORTING PETITIONERS**

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

This case presents a simple question: After allowing over two hundred private individuals and groups to hoist flags on a City Hall flag pole, with no prior review of those flags, may the government exclude a religious viewpoint on the ground that all along it was the government, and not the private actors, that was speaking? The answer to that question is no.

But this case also highlights tensions between the government-speech doctrine, as currently understood, and the First Amendment itself: By reducing the amount of protection speech receives as governmental regulation of that speech increases, the courts have turned the First Amendment on its head. And the current government-speech doctrine is constitutionally problematic because it permits the government to compel support for viewpoint-based speech on matters of significant public importance.

These issues are of special interest to *amicus* Protect the First Foundation ("PT1F"), a non-profit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1F is concerned about all facets of the First Amendment and advocates on behalf of people across the ideological spectrum and people who may not even agree with the organization's views. PT1F respectfully asks this Court to reverse the First Circuit's

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

erroneous decision, and to reconsider and refine the government-speech doctrine in light of the First Amendment's protection of citizens against government censorship and compelled speech.

STATEMENT

Boston has designated several of its properties, including a flag pole near City Hall Plaza, to be available to private persons and groups for events. Pet. Br. 4-5. For twelve years, it seems Boston never saw reason to reject an application for flag raising. From 2005 to 2017, Boston approved 284 flag raising events, including flags from other countries, a gay pride flag, and a Bunker Hill Flag. Pet. Br. 8-10. A number of these flags contained religious words or imagery, as does Boston's own flag, which bears the inscription "SICUT PATRIBUS, SIT DEUS NOBIS," which means "God be with us as he was with our fathers." *Ibid.* The city employee responsible for reviewing flag-raising applications approved the raising of all such flags without looking at them. Pet. Br. 12.

But Boston's permissive review of flag-raising applications came to a screeching halt when Camp Constitution, a group whose mission is 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," applied to raise a flag bearing a Christian cross on the City Hall Plaza. Pet. Br. 2, 13-15. Citing the Establishment Clause, a city employee rejected Camp Constitution's application because Boston purportedly "maintains a policy and practice of

respectfully refraining from flying non-secular flags on the City Hall flagpoles." Pet. Br. 14-16.

SUMMARY OF ARGUMENT

This Court should reverse the First Circuit's decision because it wrongly held that the private flag raisings Boston authorized on City Hall flag poles were government speech. But this case also highlights two potential problems with the government-speech doctrine.

First, if lower courts can extend this Court's holdings that the government speaks when it "effectively controls" private messages to any case in which the government limits access to a government resource, then the government will be permitted to evade First Amendment protections by more heavily regulating speech. Protections for free speech ought to be at their apex, not their nadir, when the government uses the heavy hand of regulation and censorship. Yet here, the First Circuit held that the government, not private actors, was the speaker—merely because Boston reserved to itself the right to impose viewpoint-based limits on access to a government-sponsored public forum. That holding is not compelled by this Court's precedent, and it should be reversed.

Second, and more generally, when the government expresses its viewpoint on issues of political and social importance, it compels individuals to support that speech through their taxes. The government-speech doctrine thus runs contrary to the well-developed principle that, when the government compels individuals to support speech with which they disagree, such compulsion is subject to First Amendment scrutiny. While

government certainly has a freer hand to compel support for conduct, speech is different, as evidenced by the very existence of the First Amendment. Any prior holdings of this Court that allow such a result should be reconsidered: Permissible government speech, properly understood, should be limited to objective information that is integral to government functioning, and should not include viewpoint-based *advocacy* that cannot otherwise survive heightened First Amendment scrutiny.

ARGUMENT

The First Circuit's holding that private messages were transformed into government speech because Boston restricted access to a government resource subverts the First Amendment by reducing constitutional protection in proportion to more heavy government regulation. Moreover, if it becomes necessary to reach the issue, the government-speech doctrine is itself constitutionally problematic because insulating government speech from First Amendment protection effectively sanctions compelled taxpayer support for viewpoint-based speech on political questions.

I. Reducing Constitutional Protection For Speech That Is More Heavily Regulated Turns the First Amendment On Its Head.

Amicus agrees with Petitioners that the First Circuit erred in finding government speech based on minimal government control over access to an otherwise public forum. Pet. Br. 57-61. As noted, until Camp Constitution applied to raise its flag, Boston approved all flag raisings without even looking at the flags first. Pet. Br. 12. Such negligible control cannot establish that the government, rather than a private individual or group, is speaking.

1. But the First Circuit's inquiry as to "whether the City maintains control over the messages conveyed by third-party flags," Pet. App. 22a, highlights a significant issue with the government-speech doctrine. This Court has on multiple occasions held that messages are government speech when the government has "effectively controlled" their content. See *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 210 (2015); *Pleasant Grove City, Utah* v. *Summum,* 555 U.S. 460, 473 (2009); *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). At the same time, the Court has also cautioned that the government-speech doctrine "is susceptible to dangerous misuse. 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. *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017).

Accordingly, the Court has recognized the need to "exercise great caution" before considering something

government speech. *Ibid.* This Court should reverse the First Circuit's decision to make clear that the government may not evade the Free Speech Clause by engaging in precisely the kind of censorship that clause was enacted to prevent.

Moreover, when the government opens up its property for private speech, it creates a public forum, and government restrictions on speech in that public forum are subject to strict scrutiny. See*, e.g.*, *Summum*, 555 U.S. at 469-470. The proper inquiry for whether the government has created a public forum is whether the forum it has opened to private speech is public-facing or private-facing. One can reasonably expect that, when the government permits private speech in public-facing fora like parks, flag poles, or broadcast channels, the government may not exclude viewpoints it dislikes. See *id.*, at 469. By contrast, in a private-facing forum like a meeting in the mayor's office, there is no reasonable expectation that a public forum has been created in which all viewpoints must be given equal access.

2. The First Circuit's holding ignores the crucial distinction and, if affirmed, could eliminate crucial First Amendment protections. Indeed, the decision created a standard by which all traditional public fora, designated public fora, or limited-use public fora can be eviscerated if the government simply chooses to censor speech with a sufficiently heavy hand, or even just reserves the *option* to do so. If the government can evade the First Amendment by claiming a mere veto over what messages are put on a form of government property made available as a forum, nothing prevents it from doing the same with protests or other speech in

any forum nominally owned by the government. A city could "effectively control" the messages sent by protests in the park by exercising "final approval authority" over what protests receive permits, see *Summum*, 555 U.S. at 469, and then exclude protests critical of the government's actions.

The First Amendment demands better: If speech is to be government speech, it ought to be affirmatively generated or directed by the government and essentially have the government's byline. But the First Circuit held that the flags raised by private individuals and groups were government speech because Boston "limits physical access to the flagpole" and has "final approval authority" as to which flags are flown. Pet. App. 23a. This approach allows the government to evade strict scrutiny by claiming it was really the government, not the private actors, speaking all along.

But such *negative* control over otherwise private content is indistinguishable from censorship. And immunizing such a restrictive approach from First Amendment scrutiny is plainly inconsistent with this Court's precedent. If mere "final approval authority" transformed a private message into government speech, then any system of government registration, in which the government necessarily exercises final approval authority, would transform private messages into government speech. As this Court has correctly held, private speech does not become government speech simply because the government exerts approval authority. See *Tam*, 137 S. Ct. at 1759.

The First Circuit's decision also is not supported by *Walker* ("which likely marks the outer bounds of the

government-speech doctrine," *Tam*, 137 S. Ct. at 1760), *Summum*, or *Johanns*. Here the flags raised did not bear the government's imprimatur, unlike the specialty license plates in *Walker*, nor did Boston have control "over the design, typeface, [or] color" or "own[] the designs on" the flags. See *Walker*, 576 U.S. at 212-213. Nor was the *Summum* Court presented "with any examples of public parks that had been thrown open for private groups or individuals to put up whatever monuments they desired." *Walker*, 576 U.S. at 222 (Alito, J., dissenting).

The Court today, however, is presented with just such a circumstance: Until Camp Constitution sought to raise its flag, Boston had left City Hall Plaza open for private groups and individuals to raise any flag, including those that bore religious imagery. Pet. Br. 9-12. The flag raisings were also temporary, unlike the permanent monuments in *Summum*, 555 U.S. at 470, thus posing far less of a problem of permanent association with, or attribution of the speech to, the government. A temporary flag raising is far more akin to a city-sponsored soapbox, onto which speakers may temporarily step, give their messages, and descend, than to a permanent monument.

The lack of permanence of the flag raisings is particularly important here because City Hall Plaza is a traditional public forum for "the delivery of speeches and the holding of marches and demonstrations" by private individuals and groups. See *Walker*, 576 U.S. at 214. And the messages set out in the flag raisings were determined by the private groups, unlike the message set out in beef promotions that were "from

beginning to end the message established by the Federal Government." *Johanns*, 544 U.S. at 560.

The First Circuit's holding to the contrary is inconsistent with the First Amendment. This Court has made clear in other First Amendment contexts that government may not exclude religious viewpoints from access to state resources. See *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017). If the government may not prohibit religious speakers from accessing what essentially amounts to a monetary public forum, it stands to reason that it also may not prohibit them from participating in a public forum like the flag pole at issue here. And, as this Court has recognized in the Establishment Clause context, the government may not "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Van Orden* v. *Perry*, 545 U.S. 677, 684 (2005).

3. The First Circuit's holding would also lead to dangerous consequences. If private messages somehow become government speech when the government more heavily regulates those messages, the government can hide its hand while manipulating public discussion. It can open up a public forum and allow private entities to present messages under their own names, allowing the government to escape criticism for the ideas presented because it appears the private actor, not the government, is speaking. See generally *Summum*, 555 U.S. at 470. But if the First Circuit is correct, when the government exercises sufficient control over access to the forum, even merely behind the scenes, it can turn around and evade strict scrutiny by claiming it was really the government, not the private

actors, speaking all along. Such censorship allows the government to manipulate what information is available in the marketplace of ideas on the one hand, while hiding the fact that it is really the government doing the speaking on the other.

In this case, Boston cannot exclude religious flags because it has not "effectively controlled" the messages conveyed on the flag pole. Pet. Br. 57-61. But imagine a case in which Boston had exercised more control. For example, what if city employees had carefully reviewed each flag raising application, approving some flags and excluding others based on the viewpoint conveyed therein? Surely Boston could not open its flag poles to private flag raisings but then limit participation only to groups that seek to raise Catholic flags, or flags for groups affiliated with the Democratic Party, or only the flags of groups that donated to the mayor's campaign. But if a public forum becomes government speech simply because the government has "effectively controlled" the message, and government speech is not subject to the Free Speech Clause, what stands to prevent Boston from such exclusionary practices?

Nor would the application of this erroneous principle be limited to parks or flag poles. Under this conception of the government-speech doctrine, it is unclear what prevents the government from claiming ownership of the airwaves and regulating the viewpoints broadcast on radio and television to allow only favored positions, or from heavily regulating the Internet and prohibiting the posting of disfavored viewpoints.

Simply put, the government ought not to be able to limit access to government-sponsored or funded fora

only to favored viewpoints. But that is precisely what Boston did here. It "reject[ed] one of the messages that members of a private group wanted to [raise on a flag pole] because [Boston] thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination." See *Walker*, 576 U.S. at 222 (Alito, J., dissenting).

II. The Court's Prior Holding That All Government Speech Falls Outside The Free Speech Clause Should Be Revisited.

This Court should not permit the First Circuit's dangerous expansion of the government-speech doctrine to stand. But if this Court takes a broader view of government speech, then *amicus* also asks the Court to reconsider its prior holdings that government speech falls outside the Free Speech Clause's protection. This Court need not do so to rule in Petitioners' favor because it is clear under current precedent that Boston did not engage in government speech when it allowed private groups to raise flags on city flagpoles. Pet. Br. 44-54. And *amicus* agrees with Petitioners that Boston's exclusion of the Camp Constitution flag from the City Hall flag poles solely because the flag was Christian constitutes unconstitutional viewpoint discrimination.[2] Pet. Br. 33-34, 39.

But if Boston's censorship does fall within the government-speech doctrine as currently recognized, *amicus* urges the Court to reconsider that doctrine. When the government uses public resources to support viewpoint-based speech on political and social matters of public importance, it unconstitutionally compels individuals who disagree with those viewpoints to

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[2] *Amicus* also notes that the First Amendment "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993)). Evidence that Boston acted with animosity to religion would suggest it violated the Free Exercise Clause by excluding religious viewpoints from a forum that was otherwise open to the public. See *ibid.*

subsidize that speech. And, contrary to this Court's prior holdings, a carte blanche carve-out of government speech from the First Amendment's protection does not follow from the government's greater freedom to regulate or support *conduct*, and is not necessary to ensure a functioning government. The government may speak by providing incidental information necessary to administer its policies and programs without treading into the dangerous territory of viewpoint-based speech. And even if the Court declines to reconsider the government-speech doctrine here, such concerns weigh in favor of a narrow reading of the doctrine.

A. In General, Viewpoint-Based Government Speech is Constitutionally Suspect.

Anytime the government engages in viewpoint-based speech, it compels taxpayers to subsidize that speech, often on "matters of substantial public concern."[3] See *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018). Yet this Court has held that government speech is beyond the First Amendment's ambit. See *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). *Amicus* respectfully urges the Court to

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[3] Government *employees* may, of course, express viewpoints and engage in other First Amendment expression. See *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2471 (2018) ("when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected"). The constitutional problem arises only when government employees use taxpayer funds and their official capacities to express viewpoints on behalf of the government, rather than using their own resources to speak on behalf of themselves.

reconsider and refine that holding. In instances of viewpoint-based government speech, no less than in instances of coercion to engage in private speech, "[f]undamental free speech rights are at stake." *Janus,* 138 S. Ct. at 2460.

1. Allowing viewpoint-based government speech is in tension with this Court's recognition of the dangers of compelled speech. The Court first recognized that danger in the realm of public, not private, coercion: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). Thus, freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus*, 138 S. Ct. at 2463 (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977)).

This freedom from coercion has been recognized since the Founding. Thomas Jefferson, for example, once wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted). In recognition of that principle, this Court has held that "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." *Janus*, 138 S. Ct. at 2464.

2. Yet this Court, through the government-speech line of cases, has carved out a monumental exception to the First Amendment's protection against compelled support for speech. By using public funds to express a viewpoint on matters of controversy, the government forces many taxpayers to pay to advance viewpoints with which they disagree on political and social questions.

The problems posed by such compelled speech are particularly stark in the context of partisan messages. If in 2020 the White House had hoisted a flag proclaiming "Trump 2020—Keep America Great," it would have been clear that the government was using taxpayer-funded property to express a political message. Likewise, the Commonwealth of Virginia surely could not use state funds to erect a giant billboard reading "Virginia Says Keep Our State Blue!" Such compelled support for overtly partisan political speech cannot possibly be squared with the First Amendment.

Free speech concerns are not only implicated where government speech is clearly partisan, however. Those concerns also arise when government uses taxpayer funds to express *ideological* viewpoints or positions on political questions. For example, could the federal government plaster the nation with billboards reading "Build the Wall," thus compelling taxpayers who favor open borders and amnesty to support what they may view as an anti-immigration message? Could the government run commercials on every radio and television station in the country stating that "Climate change deniers are destroying the planet"? Could it distribute leaflets stating that "Abortion is Murder" or, conversely, "Her Body, Her Choice"? Surely not.

Such efforts have the self-evident goal of using the compelled funding and machinery of the State to manipulate public opinion. Viewpoint-based government speech on ideological issues is, simply put, a taxpayer-funded propaganda campaign.

These examples may seem outrageous. But the difference between examples such as these and the kind of government speech courts regularly deem acceptable is a difference of degree, not of kind. Any time the government uses its property, officials, and funds to engage in viewpoint-based advocacy, it compels all taxpayers to speak.

3. Given this reality, the Court was incorrect to suggest that "the democratic electoral process" provides an adequate check on viewpoint-based government speech. See *Walker*, 576 U.S. at 207. Because citizens may "influence the choices of a government," the argument goes, they do not need First Amendment protection from government speech that runs counter to their political, social, or religious beliefs. See *ibid.* Such an argument proves too much, however, and could be applied to all infringements of the First Amendment.

Moreover, the First Amendment was adopted precisely because the Founders "recogniz[ed] the occasional tyrannies of governing majorities." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). It is poor comfort to tell a disfavored minority that they may take to the ballot box or to public protests to influence the government to change the viewpoints it favors—particularly given the very real danger that government may, as here, exclude that minority from a

seemingly public forum like a protest or a parade under the guise of government speech. So long as the members of the minority remain politically weak, they will be coerced to support speech with which they fundamentally disagree.[4] The First Amendment cannot stand for this.

B. The Government-Speech Doctrine Should Be Limited to Speech That Is Necessary or Intrinsic to a Legitimate Government Function.

Despite the coercion inherently involved in viewpoint-based government speech, this Court has held that such speech "is exempt from First Amendment scrutiny." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). This aberration from normal constitutional protections against compelled speech is supposedly necessary because otherwise, government "would not work." *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Not so. Of

[4] *Amicus* does not contend that the First Amendment prohibits the government from compelling behaviors. Laws may require citizens to pay taxes, parents to send their children to school, hunters to obtain licenses—the U.S. Code, the Code of Federal Regulations, and the codes of the 50 states contain a nearly endless list of behaviors the government requires of individuals. But *speech is different*, and the First Amendment was adopted precisely to ensure it would be protected to a greater degree than conduct. Perhaps there may be an exception for government agents who advocate on behalf of the United States in international affairs, such as in advocacy at the United Nations or through diplomacy in foreign nations. But viewpoint-based advocacy in such an instance would be permissible not because the First Amendment does not apply to it, but because such collective speech is necessary to conduct international affairs and thus would likely survive even heightened scrutiny.

course, the government must engage in informational speech to administer its various programs. But in doing so, it need not engage in direct advocacy of particular viewpoints in matters of public importance.

Take, for example, this Court's concern that applying First Amendment scrutiny to government speech would mean the government could not administer a program designed to encourage vaccinations. *Walker*, 576 U.S at 208. Governmental bodies may create and advertise a vaccination program, conduct that program on government property, and advertise the availability of that program. They could also provide objective scientific information about the efficacy of the vaccine and the risks and benefits associated with it. And they could disseminate such information regarding the vaccination program without including "the perspective of those who oppose this type of immunization." See *ibid.* Such speech, tied closely to legitimate government conduct, would generally survive ordinary First Amendment scrutiny. What the government need not do to administer such a program, and cannot do without engaging in coercion, is express viewpoints on political, religious, or social questions concerning vaccination. Such viewpoint-based advocacy likely would not and should not survive First Amendment scrutiny.

Likewise with the Court's concern regarding the government's ability to administer a recycling program. See *Walker*, 576 U.S. at 207. The government may create such a program and even require householders to recycle cans and bottles without taking broader stances on environmental issues that are subject to public controversy. Regulating conduct is

generally subject to rational basis review; but compelling support for viewpoint-discriminatory speech is subject to heightened scrutiny. See *Janus*, 138 S. Ct. at 2464 (2018) (applying heightened scrutiny to compelled support for speech, while not deciding whether the higher standard of strict scrutiny might apply); *Williamson* v. *Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (rational basis review).

There will be difficult line-drawing problems, to be sure. But this Court should not allow the most difficult borderline cases to justify government coercion of all taxpayers to support its viewpoint-based speech on a host of political and social questions—particularly questions that are highly controversial and divisive. Doing so allows those in power to wield the influence of the state to mold public opinion and to do so using taxpayer dollars. This is neither necessary for government functioning nor consistent with the First Amendment's protections against compelled speech. It is public opinion that must direct government action. Government compulsion cannot be allowed to manipulate public speech and thereby attempt to direct public opinion.

CONCLUSION

The First Circuit erred in holding that Boston's flagpole raising was government speech, and that Boston could thus permissibly exclude the Camp Constitution flag from the City Hall flag pole. The Court should reverse that ruling to make clear that the government may not convert a public forum into government speech simply by exercising censorial control with a sufficiently heavy hand. And, if necessary, *amicus* also urges this Court to reconsider its prior holding that government speech does not fall within the realm of the Free Speech Clause

Respectfully submitted,

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