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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the City of Boston's practice of occasionally replacing the City of Boston flag, atop a City-owned flagpole outside the entrance to City Hall and alongside the flags of the United States and the Commonwealth of Massachusetts, in connection with the City's message of celebrating the ethnic and cultural diversity of the City's communities, and in connection with a handful of officially recognized days of remembrance, constituted government speech under this Court's established precedent.

2. Whether the City of Boston intentionally made its City-owned flagpole outside the entrance to City Hall that ordinarily flies the City's flag alongside the flags of the United States and the Commonwealth of Massachusetts a designated public forum, when the City occasionally replaced the City's flag with a limited number of flags from other countries and regions in connection with the City's message of celebrating the ethnic and cultural diversity of the City's communities, and in connection with a handful of publicly recognized days of observance.

PARTIES TO THE PROCEEDING

Petitioners are Harold Shurtleff and Camp Constitution, the plaintiffs-appellants below. Respondents are the City of Boston and Robert Melvin, in his official capacity as Commissioner of the City of Boston Property Management Department. Commissioner Melvin is successor in office to Gregory T. Rooney, who was originally sued by petitioners in his official capacity as Commissioner of the Property Management Department. Pursuant to S. Ct. R. 35.3, Commissioner Melvin is automatically substituted for former Commissioner Rooney as a party.

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INTRODUCTION

It is evident from petitioners' brief that their case depends on purported facts bearing little resemblance to the actual record. Petitioners' claim is premised on the surprising assertion that the City of Boston (City) intentionally converted one of the three towering flagpoles standing immediately in front of the entrance to City Hall, and on which the vast majority of time the City flag flies alongside those of the United States and Commonwealth of Massachusetts, into a designated "public forum" on which any member of the public may fly any flag of its choosing, carrying any message of its choosing, on any date of its choosing, subject only to neutral time, place, and manner restrictions. To the contrary, the flagpole that stands prominently at the City's seat of government is a means by which the City communicates its own message, and has not simply

been turned over to private parties as a forum to pronounce their own messages, including those antithetical to the City's.

As with other government flagpoles at other public buildings, the City Hall Flag Poles are used overwhelmingly to project the presence in the City of the three levels of government—Federal, State, and Local. To be sure, the City occasionally raises in place of its own flag another banner honoring some day of observance (*e.g.*, Veterans Day, C.A. App. 550), public institution (*e.g.*, Military branches, C.A. App. 410, 420, 432, 444), or moment of civic pride (*e.g.*, the "all female football team that recently won the National Title," C.A. App. 434). And the City invited communities of different ethnicities or national origins to request that flags of "the many countries and cultures around the world" be flown on the City Hall flagpole as part of the City's message to "foster diversity and build and strengthen connections among Boston's many communities." Pet. App. 143a. In other words, the City used the "bully pulpit" of its flagpole to engage in precisely the kind of civic promotion that is central to the governmental function.

Given the quintessentially governmental character of the forum and nature of the speech for which the City used it, one would imagine petitioners would present clear and unmistakable evidence for their assertion that the City converted the City's flagpole into a "public forum" open equally to "all comers"—but the opposite is true. Petitioners' argument relies on distorted readings of the City's written documents and equally distorted views of the City's historical flag-raising practices.

Petitioners' quotation of the relevant policy (Pet. Br. 5) omits with ellipses a key word. The policy lists six "locations" where public events can be held, including "*at* the City Hall Flag Poles." Pet. App. 133a (emphasis added). Of the six, only this one is preceded by the word "at," underscoring that the area "at" the base of the flagpoles is available for public use, not the flagpoles themselves. *Ibid.*; see also *id.* at 136a (printed application guidelines using "at" with reference to all six locations). Tellingly, when petitioners quote the policy as stating, "These locations include * * * the City Hall Flag Poles" (Br. 5 (citing Pet. App. 133a)), they omit the word "at," thereby giving the misimpression that raising a flag "on" the flagpoles is governed by the same time, place, and manner restrictions as is holding an event "at" the base of those flagpoles. Thereafter, petitioners (Br. 20) simply assert that document reflects "the City's express policy designating the City Hall Flag Poles a public forum for the private speech of all comers." Not so.

Petitioners' characterization of the City's flag-raising practice is similarly untethered from the actual facts. Petitioners (Br. 8) repeat in talismanic fashion that "the City approved 284 flag raising events, with no record of a denial." See also Pet. Br. i, 21, 27, 28, 30, 37, 44, 46, 49, 51 n.11, 59. In fact, over 90% of those flag raisings were of national flags pursuant to a specific City policy: "Our goal * * * to foster diversity" by "commemorat[ing] flags from many countries and communities" within the City. Pet. App. 143a. Petitioners point to a list that, in addition to these national flag-raisings, includes only *eight* other flag-raising events (some held on multiple occasions), each associated with a publicly recognized day of observance. If the

City flagpole had truly been designated "a public forum for the private speech of all comers," Pet. Br. 20, one would expect petitioners to point to scores of truly private events, requested for purely private reasons, similar to the full range of purely private speech—wedding proposals, birthday wishes, advertisement of new businesses, or promotion of political candidates or causes—that surely occur in the true public forums around City Hall. But petitioners point to not one single example of the kind of "all comers" practice they ascribe to the City's flag-raising program.

The court of appeals correctly applied this Court's established government speech doctrine to conclude that the City's flag-raising program on the City's flagpole did not convert that flagpole into a public forum open to any and all messages, including those antithetical to the City's. This Court should affirm.

OPINIONS BELOW

The opinion of the district court (Pet. App. 41a-59a) is reported at 2020 WL 555248. The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 986 F.3d 78.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2021. The petition for a writ of certiorari was filed on June 21, 2021, and granted on September 30, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

I. BACKGROUND

A. The City Hall Flag Poles and City Hall Plaza

This case concerns flags raised on one of a set of three approximately 83-foot-tall flagpoles standing prominently in front of the entrance to Boston City Hall, the seat of government in Boston, the capital of the Commonwealth of Massachusetts. Pet. App. 141a. On the first, the City flies the United States flag and (below it) the National League of Families POW/MIA flag. *Id.* at 141a-142a. On the second, the City flies the Massachusetts flag. *Ibid.* On the third, the City almost always flies the City flag. *Ibid.*

The flagpoles sit on a small portion of City Hall Plaza. The Plaza, which covers over 200,000 square feet surrounding City Hall, comprises several discrete locations, including the North Stage, and the area at the base of the flagpoles, C.A. App. 138, as shown in this picture:

Pet. App. 161a.

B. Public Events Near City Hall

City Hall Plaza, and several nearby City-owned properties, are public forums open to public events. See, *e.g.*, Pet. App. 133a-141a. The public is able to hold events in any of these "locations": "Faneuil Hall; Sam Adams Park; City Hall Plaza; the lobby of City Hall; *at* the City Hall Flag Poles; and the North Stage." *Id.* at 133a-135a (emphasis added). Only one of these—"the City Hall Flag Poles"—is preceded by a preposition. The use of the word "at," rather than "on," makes clear that the "location" designated as a public forum is the area "at" the base of the flagpoles. See, *e.g.*, C.A. App. 137-139.

Those seeking to hold events at these "locations" are required to submit applications to the City. Pet. App. 133a-136a. Both the online and printable applications allow applicants to select any of these public "Location[s]." *Id.* at 135a-136a. The printable application also incorporates written guidelines stating 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." *Id.* at 136a-140a. The guidelines further state that the "application applies to any public event proposed to take place *at* Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles." *Id.* at 136a (emphasis added). Neither the applications nor event guidelines refer to a private party's ability to raise its own flag in place of the City flag on the City flagpoles.

The City reserves the right to deny applications to use these specified public forums if (for example) the events involve illegal or dangerous activities, or if ap-

plicants lack insurance certification, lie, have histories of damaging City property or failing to pay City fees, or fail to comply with other administrative requirements. Pet. App. 136a-140a.

Over time, private groups have held a full range of events, including numerous religious events, on the Plaza. See, *e.g.*, Pet. App. 141a.

C. The City's Policies and Practices Regarding Raising Flags on the City Flagpole

Prior to this Court's grant of certiorari[1], the City had a flag-raising program not referenced in its public event application or guidelines. Under this program, the City occasionally temporarily lowered the City flag and raised a different flag to fly alongside the United States and Massachusetts flags. Pet. App. 142a, 149a.

1. *City Flag Raisings From 2005 to 2017*

The parties' Joint Statement of Undisputed Facts (Joint Statement) relies primarily on a list of flag raisings from 2005 through 2017 compiled by the City to assess petitioners' requests. See Pet. App. 142a-143a, 173a-187a (Flag Raising List); C.A. App. 184-185.[2] According to that Joint Statement, during that period, the

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[1] On October 19, 2021, following this Court's grant of certiorari, the City announced that it had ceased its flag-raising program until further notice. See City of Boston, *How To Hold An Event Near City Hall* (Oct. 19, 2021), https://www.boston.gov/departments/property-management/how-hold-event-near-city-hall.

[2] Other documents produced during discovery reference other flag raisings, see, *e.g.*, C.A. App. 371-373, including those occurring in 2018, *id.* at 392-393. Petitioners have not relied on those as supporting their case.

City approved 284 flag-raising events. Pet. App. 142a-143a. Most were annual, with the City raising the same flag each year. See *ibid.*; *id.* at 173a-187a.

The Flag Raising List indicates that, during this period, approximately 50 unique flags were raised. Pet App. 173a-187a.[3] Of these, approximately 90% were flags representing other nations, territories, ethnicities or multinational entities (collectively "national flags"), typically raised annually in celebration of "ethnic and other cultural celebrations, the arrival of dignitaries from other countries, [and] the commemoration of independence or other historic events in other countries." *Id.* at 142a, 173a-187a.[4]

The only instances identified in the Flag Raising List from 2005 (the first year included) to 2014 on which the City flew a non-national flag were on Columbus Day (2005), on Veterans Day (2008 and 2011), and when the City flew the "Pride flag," to celebrate "gay pride." Pet. App. 142a-143a, 177a-187a. The record

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[3] Occasionally the list references contact names, rather than national flags. For example, "Frank Chin" is identified on nearly the same dates in 2012 and 2011 as those on which in prior years (*e.g.*, 2010 and 2009) he was associated with a "Chinese Flag Raising." "Lloyd Pertiver" is identified in 2007 for near the same date as, in other years, the Ukrainian flag was raised. Pet. App. 173a-187a. (Documents produced in discovery indicate "Vsevolod Petriv (Lody)" submitted other requests for Ukrainian flag raisings.)

[4] This includes the United Nations flag, flown almost every year on either April 7 (International Day of Reflection on the Genocide in Rwanda) or October 22 (United Nations Day), and the Pan-African flag, flown in 2017 on the birthdate of Marcus Garvey, the flag's originator.

does not indicate for how long before 2005 Boston had raised different national flags, nor when Boston first raised a Pride flag, though it is well known that Massachusetts had, in 2004, been the first state to extend civil marriage to same-sex couples. See *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (issued November 2003 but stayed for 180 days). Every year since 2005, the City has raised the Pride flag on or around the beginning of June. Pet. App. 173a-187a.

According to the Flag Raising List, from 2015 to 2017, in addition to national flags and the Pride flag, the City raised flags in connection with five official dates of observance:

- the EMS flag (three times), in connection with National EMS Week (officially recognized by the City, Boston City Council Resolution, May 20, 2015, https://meetingrecords.cityofboston.gov/sirepub/cache/2/35ufdn24ey0jyscnosyv0loh/137101121420210503084 3.PDF);
- a flag in remembrance of victims of violence and murder (twice), raised following the annual Mother's Day Walk for Peace (officially recognized by the City, Boston City Council Resolution, May 12, 2013, https://meetingrecords.cityofboston.gov/sirepub/cache/2/35ufdn24ey0jyscnosyv0loh/721311214202104511547 6.PDF);
- a flag commemorating the Battle of Bunker Hill (twice), in connection with Bunker Hill Day (a Suffolk County legal holiday, see Mass. Gen. Laws Ann. ch. 4, § 7);
- a flag honoring Malcolm X, in connection with Malcolm X Day (proclaimed by the Boston City Council on May 17, 2017, to honor Malcolm X's

connections to Boston, Tr. of Boston City Council Meeting, May 17, 2017, https://www.boston.gov/sites/default/files/file/document_files/2017/05/bcc_2017-5-17.pdf); and

a flag commemorating (twice) Juneteenth (officially recognized as day of observance in Massachusetts and Boston, Mass. Gen. Laws Ann. ch. 6, § 15BBBBB (2007); Boston City Council Resolution, June 19, 2017, https://meetingrecords.cityofboston.gov/sirepub/cache/2/35ufdn24ey0jyscnosyv0loh/213641121420210515042 96.PDF).

Apart from national flags, the Flag Raising List does not identify a single instance during the period from 2005-2017 in which the City raised another flag in place of the City flag not in connection with a publicly recognized day of observance.[5]

[5] As noted above, note 3, *supra*, the record included references to flag raisings beyond the Flag Raising List compiled for Commissioner Rooney in 2017. Petitioners do not rely on these other events—and for good reason, because they further confirm the City's use of the City's flagpole to communicate the City's own message. For example, following requests from the City's Office of Veteran Services, the flags of the U.S. military branches were raised to celebrate their respective birthdays. See, *e.g.*, C.A. App. 420, 421, 432, 441, 444. In 2018, at the City Council's request, the City raised the flag of the Boston Renegades, "an all female football team that recently won the National Title." *Id.* at 434; Boston City Council Resolution, Sept. 26, 2018, https://meetingrecords.cityofboston.gov/sirepub/cache/2/35ufdn24ey0jyscnosyv0loh/25928912142021052545441.PDF.

2. *The City's Explanation of Its Flag-Raising Program*

The City's stated program goals were to "commemorate flags from many countries and communities at Boston City Hall Plaza during the year," "create an environment in the City where everyone feels included, and is treated with respect," "raise awareness in Greater Boston and beyond about the many countries and cultures around the world," and "foster diversity and build and strengthen connections among Boston's many communities." Pet. App. 143a. As reflected in these goals, the City uses flag-raisings to instill civic pride in the City's extensive racial and ethnic diversity.

As noted, the application for using the public forums around City Hall contained boxes identifying the "Location" where the requestor wished to hold an event, but did not reference an opportunity for an applicant to request some other flag be flown in place of the City's flag on the City flagpoles. Pet. App. at 133a-140a. To make such a request, Petitioner Shurtleff telephoned Lisa Menino, the City's senior special events coordinator, who directed petitioner to send an email with details about the request. *Id.* at 131a-132a.

The Commissioner of Property Management (Gregory Rooney at the time of petitioners' request) "evaluate[d] flag-raising requests for approval in a different manner than" requests to use City public forums. Pet. App. 140a-141a.[6] Specifically, if the City re-

[6] Petitioners chose not to take a Rule 30(b)(6) deposition. Commissioner Rooney, who had held his position for less than a year before petitioners' request, was the only witness deposed, and testified only in his personal capacity.

ceived a request from an outside party for a flag raising, he reviewed the request and determined whether the proposed flag was "consistent with the City's message, policies, and practices." *Id.* at 149a. As part of his review, Commissioner Rooney looked at details about the proposed event included in the request. C.A. App. 198-199. If a request failed to describe the flag to be raised or reason for seeking to hold the flag raising, he typically requested more information. *Id.* at 199. Many of the requests Commissioner Rooney received were related to "national celebrations that had been going on for years." See, *e.g.*, *id.* at 210. During the approximately 11 months between his start date in August 2016 and July 2017, when petitioners submitted their request, Commissioner Rooney had not denied a flag-raising request, Pet. App. 149a, because none violated the City's policies, see, *e.g.*, C.A. App. 152.[7]

City employees (from the Property Management Department) were present for each flag-raising event. C.A. App. 228-229. If an event was held on a weekend and no City employees were working, the City paid overtime to ensure City employees were present. *Ibid.* The City also retained control of the hand-crank required to lower the City's flag and raise another. Pet. App. 143a; C.A. App. 226.

Before October 2018, the City's flag-raising policy was not memorialized in writing. Approximately one month before petitioners' request, prompted by an in-

[7] The only 2017 flag raisings that had not occurred in 2016 were in connection with Malcolm X Day, the Pan-African Flag on Marcus Garvey's birthdate, the Uruguay Flag, and the Southern Cameroon Flag. See Pet. App. 173a-176a.

quiry from another town interested in establishing a similar program, the City began to consider memorializing it. C.A. App. 141-142, 179-180. The City promulgated a written Flag Raising Policy, reflecting and memorializing the City's past policy and practice, in October 2018. Pet. App. 159a.

This policy reserves to the Commissioner sole discretion to deny or approve requests. Pet. App. 159a. The policy also includes seven "Flag Raising Rules," the first of which is "[a]t no time will the City of Boston display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." *Id.* at 159a-160a.

The City's website contains an affirmative statement summarizing "the City's goals for flag raising events" and the messages which the City wishes to express, which in full reads:

> *We commemorate* flags from many countries and communities at Boston City Hall Plaza during the year.
>
> *We want* to create an environment in the City where everyone feels included and is treated with respect. *We also want* to raise awareness in Greater Boston and beyond about the many countries and cultures around the world. *Our goal* is to foster diversity and build and strengthen connections among Boston's many communities.

Pet. App. 143a (emphases added).

D. The City's Denial of Flag-Raising Requests by Petitioners and a Second Organization as Inconsistent With Boston's Policy

On July 28, 2017, Petitioner Shurtleff, as Director and co-founder of Petitioner Camp Constitution, submitted an email (at Ms. Menino's instruction) requesting a flag-raising event. The email proposed "rais[ing] the Christian flag on City Hall Plaza." Pet. App. 131a. The request was made "[i]n connection with * * * Constitution Day and Citizenship Day." *Id.* at 130a. The event was intended "to commemorate the civic and social contributions of the Christian community to the City, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution." *Id.* at 130a-131a. Ms. Menino forwarded the email to Commissioner Rooney. *Id.* at 132a.

During his 11 months in his position, Commissioner Rooney had never received a request to fly a flag attributed to a particular religion. C.A. App. 132-133; Pet. App. 150a-151a. Concerned about whether it would be appropriate for the City to do so, he decided to "inquire a little bit more," seeking input from others in his department, reviewing a year's worth of past flag-raising requests, and consulting with the City's Law Department. Pet. App. 150a-152a; C.A. App. 133. After confirming the City had never approved a request to raise a religious flag, Rooney denied petitioners' request. Pet. App. 151a-152a.

Despite being a member of a Roman Catholic parish, Commissioner Rooney worried that raising a religious flag would "be projected as an endorsement by the [C]ity of a particular religion," contrary to the concept of "separation of church and state or the constitu-

tion's establishment clause." C.A. App. 111, 136-137, 143-144, 279-282; Pet. App. 157a. Rooney further testified he would have approved raising a secular Camp Constitution flag in connection with Constitution Day, if that had been proposed. Pet. App. 154a-155a; C.A. App. 144.

In a follow-up email, petitioners requested an official reason for the denial. Pet. App. 152a. Commissioner Rooney responded that the City "maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." *Id.* at 153a; C.A. App. 170. By "non-secular flag," he was referring to "a religious flag that was promoting a specific religion." C.A. App. 171-172; Pet. App. 154a-155a. He also noted that "[t]he City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one." Pet. App. 154a. Further, he wrote, the City's decision was "consistent with well-established First Amendment jurisprudence prohibiting a local government from respecting an establishment of religion * * * [and] with the City's legal authority to choose how a limited government resource, like the City Hall flagpoles, is used." *Ibid.*; C.A. App. 172.

On September 13, 2017, Petitioner Shurtleff submitted a second request, for an event titled "Camp Constitution Christian Flag Raising." Pet. App. 157a-158a. The submission described the event as a celebration and recognition of "the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth." *Ibid.* The request described the "Christian flag" as "an important symbol of our country's Judeo-Christian heritage." *Ibid.* The City did not respond because Commissioner Rooney determined he had already suffi-

ciently explained to Mr. Shurtleff why the City would not approve the flag raising. *Id.* at 158a.

In April 2019, Commissioner Rooney denied another flag-raising request, from "Super Happy Fun America," to raise what it called the "Straight Pride" flag, explaining that "[d]ecisions on the raising of flags on the City Hall Flag Poles are at the City's sole and complete discretion." Pet. App. 160a. That group was still permitted to hold a parade and speeches at City Hall Plaza, which is a public forum. See Super Happy Fun Am., *Boston Straight Pride Parade* (Aug. 31, 2019), https://superhappyfunamerica.org/straight-pride/.

II. Procedural History

On July 6, 2018, petitioners sued the City, seeking injunctive and declaratory relief and damages. Petitioners argued that the City's denial of their flag raising request violated petitioners' right to free speech under the First Amendment, as well as the Establishment Clause and Fourteenth Amendment's Equal Protection Clause. Pet. App. 46a-47a. Petitioners moved for a preliminary injunction, which the district court denied, *id.* at 103a, and the First Circuit affirmed, *id.* at 60a. While that appeal was pending, respondents moved for judgment on the pleadings, which was denied. *Id.* at 83a.

Following the close of discovery, the parties filed cross-motions for summary judgment on the basis of the Joint Statement. Pet. App. 47a. The court denied petitioners' motion and granted the City's motion. The court found the City's flag-raising program was government speech consistent with this Court's precedent in *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009), and *Walker* v. *Sons of Confederate Veterans*,

Inc., 576 U.S. 200 (2015). Pet. App. 42a, 48a-55a. The court did not reach the City's alternative argument that, even if the flag-raising program were a public forum, the City could define the program to exclude religious speech in order to avoid Establishment Clause concerns. *Id.* at 54a-55a n.2.

On appeal, the City argued only that the flag-raising program was government speech. The City did not renew its argument that the City could, in light of the Establishment Clause, exclude religious speech from the program even if the City had created a designated public forum. The First Circuit affirmed, holding, as the district court had, that the City's flag-raising program was government speech under the analysis identified by this Court in *Summum* and *Walker*, and, as such, is not subject to the First Amendment's Free Speech clause. Pet. App. 27a. The court rejected petitioners' suggestion that the Establishment Clause required the City to speak on religious topics if it chose to speak on non-religious topics, observing that the City's choice to refrain from religious topics in the City's own speech was a permissible accommodation of First Amendment principles. *Id.* at 35a-36a.

Petitioners sought a writ of certiorari, presenting three questions, each focused on whether the flag-raising program was government speech or, instead, the City had designated the City flagpole as a public forum. Pet. App. ii-iii. The petition raised the Establishment Clause only to argue it could not be cited as a basis to discriminate against "private speech in a public forum open to all comers." *Id.* at ii. The petition did not argue that the flagpole had become a "limited public forum" or that the City must include religious messages in its own, governmental speech. In opposition, the

City defended only on the basis of the First Circuit's ruling—that the flag-raising program was government speech. As before the court of appeals, the City did not argue it was permitted to exclude private speech of a religious (or any other) character from the program if the flagpole had become a public forum. On September 30, 2021, this Court granted review.

SUMMARY OF ARGUMENT

Petitioners' Free Speech claim rises or falls based on the classification of the speech—here, the City's occasional flying of flags in place of the City flag on a City-owned flagpole outside the entrance to City Hall and alongside the United States and Massachusetts flags. As the First Circuit found, this flag-raising program meets the three non-exclusive factors this Court focused on in *Summum*, *Walker*, and *Matal* to establish that communication constitutes government speech. Under those precedents, the City's flag-raising practice is government speech—and the First Amendment's Free Speech Clause does not apply. See, *e.g.*, *Summum*, 555 U.S. at 467. The City never intended to, and did not, designate the City flagpole set aside for the City's own flag as a public forum open to "all comers."

In a democratic system like ours, it is critically important that governments retain the right and ability to speak on behalf of their constituents and take positions and privilege certain viewpoints when doing so. The factors this Court focused on in *Summum*, *Walker*, and *Matal* to determine what is and is not government speech effectively balance the interests of governments and the public, and ensure that governments can continue to speak for themselves while the public remains free to express whatever messages it wishes in public

forums. On the facts of this case, those factors compelled the court of appeals' conclusion that the flag-raising program was the City's own speech.

First, there is no dispute that flags and flagpoles are a quintessential means governments have historically used to communicate their own messages. That historical tradition is especially apt here, where the flagpole in question is a towering structure, standing at the entrance to the seat of government, announcing its presence for all to see.

Second, there is little question that the City's decision to occasionally lower the City flag and raise another in its place to fly alongside the United States and Massachusetts flags would be seen in the public mind as government speech. That impression would only be cemented if that observer knew that 90% of the times another flag was raised it was pursuant to a specific policy to celebrate the diverse national heritage of the City's population by flying other national flags on their days of independence and celebration, and the few exceptions petitioners point to were instances when another flag was raised in connection with some publicly designated date of observance.

Third, when, as part of the flag-raising program, the City occasionally replaced the City flag with other flags, the City exercised control over what flags it flew. Most were national flags representing the parts of the globe from which Boston's residents came, consistent with the City's specific policy of flying such flags. Further, the City required and reviewed requests to ensure they complied with its policies and practices.

Petitioners' arguments are premised on inaccurate characterizations of the central facts relating to the

flag-raising program. For example, the City's policies, which refer to the locations where public events can occur within City-owned property, identify the space "*at*" (and not "*on*") the City Hall Flag Poles within City Hall Plaza as one such "location." While the area around (*i.e.*, "at") those flagpoles is indeed maintained as a public forum, open to all comers, the flagpoles themselves are not designated in the City's documents as a public forum for "all applicants" to raise flags bearing their messages of choice.

Petitioners similarly overstate the scope of the flag-raising program. Most notably, petitioners cannot point to *any* instance of a person or group raising the kind of purely private message on a topic and date of their choice, as one would expect to see in a genuinely public forum. Of course, the overwhelming majority of the time, the City flies its own flag alongside the United States and Massachusetts flags. Contrary to petitioners' assertion, the City did not fly hundreds of flags from other organizations; instead, the City over the years flew approximately 50 flags—all but eight of them national flags flown in commemoration of national days of celebration for the diverse communities within the City. The eight others were flown in connection with other publicly recognized days of observance.

Because the speech in question was the City's own, the City was free not to promote petitioners' message, whatever its content, simply because it was not the message the City wished to convey. All of the flags the City flew met with the City's policies, including that the City would refrain from speaking about religion. Petitioners' request was the first the City ever received to fly an overtly religious flag, and—as that did not fit within the City's policy—the City respectfully

declined to lend its imprimatur to petitioners' flag by raising it in place of the City's own.

Petitioners' arguments, if adopted, will constrain governments' ability to speak. Representative governments must remain free to communicate the messages their constituents elected them to avow. Sometimes, as in the case of the City's policy celebrating the ethnic and national origin diversity of the City's communities, that message can most effectively be communicated by inviting constituents to take part—making their stories part of the quilt the City is stitching together. As this Court held in *Summum* and *Walker*, when citizens dislike the government's message, the proper course is for them to elect new leaders, not insist that the elected government accompany its message with opponents' counter-messages. The necessary consequence of petitioners' argument is that the cost to the City of promoting its message of ethnic diversity and inclusion in this manner would be to open the City flagpole to (among others) messages of intolerance and division.

The City has, in fact, already halted its flag-raising program to ensure it cannot be compelled to use its City flagpole to publicize messages antithetical to its own. If it did, unintentionally, convert the flagpole into a public forum, then it has withdrawn that forum, at least until the Court sets forth the permissible scope of a program limited to government speech.

ARGUMENT

I. BOSTON'S PROGRAM TO RAISE FLAGS REPRESENTING THE CITY'S ETHNIC DIVERSITY AND IN CONNECTION WITH A HANDFUL OF PUBLIC OBSERVANCES WAS GOVERNMENT SPEECH, AND THE CITY MAY THEREFORE CHOOSE ITS MESSAGE, INCLUDING CHOOSING NOT TO SPEAK ON RELIGIOUS ISSUES

"The Free Speech Clause restricts government regulation of private speech," and "does not regulate government speech." *Summum*, 555 U.S. at 467. Petitioners' claim thus rises or falls on whether the speech—the occasional flying of flags in place of the City flag, alongside United States and Massachusetts flags, on City-owned flagpoles outside the entrance to City Hall—constitutes government speech. When "the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." *Walker*, 576 U.S. at 215. Because, as the court of appeals held, under the factors this Court identified in *Summum*, *Walker*, and *Matal*, the City's flag-raising events *are* government speech, the City is free to choose its own message—and to choose *not* to speak about religion.

A. The Selection and Presentation of Flags on the City Flagpole Outside of the Seat of City Government Constitutes Government Speech

This Court has repeatedly focused on three non-exhaustive factors when determining what constitutes government speech: (1) whether governments have historically used the medium to convey a government message; (2) whether "the public mind" closely identi-

fies a medium with the government; and (3) whether the government maintains direct control over the messages conveyed through the medium. See *Matal* v. *Tam*, 137 S. Ct. 1744, 1757-1760 (2017) (citing *Walker*, 576 U.S. at 212; *Summum*, 555 U.S. at 472). As the court of appeals correctly concluded, viewed through the lens of these criteria, the facts here demonstrate the City's flag-raising events are government speech.

1. *Flags have been historically used to convey government messages*

This Court's analysis typically, and understandably, starts with the nature of the speech and whether governments have historically used a medium to convey government messages. See, *e.g.*, *Matal*, 137 S. Ct. at 1757-1760. The speech here is the flying of flags on a towering, government-owned flagpole immediately outside City Hall. It is hard to imagine a context more traditionally associated with government speech.

Governments have long used flags to communicate messages. As the court of appeals found, "[t]hat a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable." Pet. App. 17a. Flags are useful to convey messages precisely because they can "symbolize some system, idea, institution, or personality, [as] a short cut from mind to mind." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943). That is especially so for governments marking public buildings. As Chief Justice Rehnquist observed, the American flag "symbolizes the Nation in peace as well as in war" and is used to "signif[y] our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county

courthouses *and city halls* throughout the country." *Texas* v. *Johnson*, 491 U.S. 397, 426 (1989) (Rehnquist, C.J., dissenting) (emphasis added).

Control over what flag flies at the seat of government, or similar facilities central to government sovereignty, is especially laden with meaning. Famously, the Queen of England's Royal Standard flies above the palace where she is resident, projecting the monarchy's presence. Royal Household, *Personal Flags*, https://www.royal.uk/personal-flags. The national anthem, the *Star Spangled Banner*, takes as its premise that continuing control of Fort McHenry by the United States was demonstrated by the fact that "our flag was still there." Had the British prevailed, their first act would have been to lower the American flag and replace it with their own.

Governments not only convey messages through *which* flags are flown, but also *how* they are flown. "Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials 'as a mark of respect to their memory.'" *Johnson*, 491 U.S. at 427 (Rehnquist, C.J., dissenting) (quoting 36 U.S.C. 175(m) (current version at 4 U.S.C. 7(m))). Boston does the same. See C.A. App. 550.

It is traditional for governments to convey messages by choosing to fly other flags. As the court of appeals observed, "when a visiting dignitary comes to Washington for a state or official visit, Blair House (the President's guest house) flies the flag of the dignitary's country." Pet. App. 72a (citing Mary Mel French, *United States Protocol* 298 (2010)). But the government's ability to communicate *its* message through the

choice to fly *other* flags in place of its own depends precisely on the fact that it is the government's choice to do so. And when other parties seek to have the government fly their flags from government flagpoles, on public property, it is undoubtedly the benefit of that association they are seeking. As the Federal Circuit Court of Appeals observed in connection with the decision whether to fly a Confederate Flag at a national cemetery where Confederate soldiers were buried, "[w]e 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. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (2002).

The court of appeals' analysis with respect to the City's flag and choice to temporarily replace it on the City flagpole comports entirely with this Court's analysis of the same factor in *Summum*. There, this Court noted that "[g]overnments have long used monuments to speak to the public" and that, "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." 555 U.S. at 470. So too with the flags the City chooses to raise through its flag-raising program. As this Court made clear in *Summum*, moreover, where the monuments in question were designed, created, and donated by private parties, see *id.* at 472, that the government incorporates private materials (such as flags) into its speech does not make it any less *government* speech, *id.* at 468 ("A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."). As in *Summum*,

it is the broader historical context against which the government speech in question takes place that informs the analysis.

Petitioners and their amici seek to avoid the heavy weight the first factor plays in the City's favor by asserting the Court should not look to the broader historical use by governments of flags and government-owned flagpoles, but instead look only to the facts concerning the *specific* forum. See, *e.g.*, Pet. Br. 58 (citing *Leake* v. *Drinkard*, 14 F.4th 1242 (11th Cir. 2021)). The United States, for example, argues (Br. 17-18) the Court should disregard the tradition concerning "flags and government-owned flagpoles in general," and instead assess this factor on the basis of "a flagpole deliberately made available for public use under" a program "specifically designed to allow private groups to raise their chosen flags in connection with privately sponsored events on the plaza below." But that approach turns the first factor into one that simply assumes an adverse answer to the overarching inquiry.

This Court's approach in *Summum* was very different from what petitioners suggest. There, the Court did not start with the city's deliberate decision to make the park available for private groups to place their own monuments. Rather, to understand what was *really* going on in Pleasant Grove, the Court started with the broader historical background relating to similar monuments. *Summum*, 555 U.S. at 464-465, 470. Here, likewise, to understand the City's program and its intentions behind it, it is important first to appreciate the strong historical connection between a government and the flagpole at its government seat, which then illuminates why the City would deem it a powerful message *by the City* to fly on special days of celebration the flags

associated with the diverse nationalities from which Boston's residents come. The message is not that of any individual community, but instead *the City's* message of celebrating diversity by flying *all* those flags at different times through the year.

Given the strong historical association between a government and the flagpole at its seat of government flying its official flag, the Court should demand an especially strong showing from petitioners to overcome the natural conclusion that the City's flying of a flag from that flagpole is City speech.

2. *A reasonable observer would attribute the message of a flag on the City's flagpole to the City*

The second factor this Court has focused on in determining the nature of speech, whether "the public mind" closely identifies a medium with the government, see, *e.g.*, *Matal*, 137 S. Ct. at 1759-1760, likewise demonstrates that the speech here was the City's own. Like the monuments in *Summum* and license plates in *Walker*, the flags flying on the City flagpole are "often closely identified in the public mind" with the City. *Summum*, 576 U.S. at 472. As Chief Justice Rehnquist observed, flying flags at "public buildings" including "thousands of county courthouses and city halls throughout the country" is a testament to the City's authority. *Johnson*, 491 U.S. at 426 (Rehnquist, C.J., dissenting).

In stark contrast to the public forum that is City Hall Plaza, including the ground around the base of the flagpoles, where one expects to find private speech, including speech critical of the City government, one *expects* the City, and *only* the City to speak from the City

flagpole itself. One would not be surprised in the slightest to see an anarchist flag being held aloft by protestors gathered outside the seat of government. But it would be shocking to see the City flag lowered and an anarchist flag raised in its place. Harkening back to the *Star Spangled Banner*, the observer would rightly wonder if City government were under assault.

Unlike in *Matal*, where this Court observed that "it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means," 137 S. Ct. at 1759, the public surely understands that the City owns and controls the 83-foot flagpoles in front of City Hall flying the United States, Massachusetts, and City flags. Cf. *Summum*, 555 at 471-472 ("Public parks are often closely identified in the public mind with the government unit that owns the land" which is why "there is little chance that observers will fail to appreciate the identity of the speaker" as the government when they see a monument in the public park.). That the City occasionally replaces its own flag with another marking something the City wishes to highlight, such as Malcolm X Day, C.A. App. 402, only increases the likelihood that a reasonable observer would presume the temporary flag also reflects the City's message.

Petitioners are wrong that the court of appeals in determining what constitutes government speech should have considered what would have been understood by a "reasonable and informed observer" with very specific knowledge that amounts to Petitioners' distorted view of the facts but does not fairly describe the actual policy. See Pet. Br. 59-60.

To begin, petitioners' proposed standard is not that adopted by this Court in *Summum*, which emphasized that reasonable observers of messages emanating from property "routinely * * * interpret them as conveying some message on the property owner's behalf." 555 U.S. at 471. Even taking petitioners' view of the facts at face value, petitioners impute an unreasonable amount of "knowledge" to their preferred "informed" observer, including facts obtained by petitioners only through extensive discovery, such as the "intricacies of the administrative process leading up to [a third-party flag's] display," and the "decisionmaking trends of a specific government employee." Pet. App. 19a, 22a n.2. *Summum* never suggested requiring such knowledge beyond the reach of even well-informed citizens.

In any event, if the Court were to adopt petitioners' approach (or the "fully informed" standard urged by Justice Souter in his *Summum* concurrence, but not adopted by the majority, 555 U.S. at 487), the "fully informed" observer would know the *accurate* facts, not the mischaracterized partial recounting petitioners offer. The observer would see a trio of 83-foot tall flagpoles, with a flag display including the United States and Massachusetts flags standing directly in front of a building emblazoned with the words "Boston City Hall," and almost always displaying the City flag on the third flagpole. A fully informed observer would know that: (1) the City's public event applications for public forums say events may be held at public forum "locations" including "at" the flagpoles, and that there is no specific reference to raising a flag in place of the City's flag or how to request it; (2) requests to fly other flags were analyzed in a different manner; (3) over 90% of flag-raisings over a thirteen year period, and over 80%

of distinctive flags raised, were the flags of nations, pan-national groups, or ethnicities, pursuant to the City's *own* goal to "commemorate flags from many countries and communities" and "foster diversity and build and strengthen connections among Boston's many communities"; (4) the eight non-national flag raisings on the City flagpole were in connection with publicly recognized days of remembrance, such as Veterans Day, Columbus Day, Pride Month, EMS Week, Mother's Day, Bunker Hill Day, Juneteenth, and Malcolm X Day; (5) the City asserted the absolute right to decide whether to raise a flag other than the City flag and controlled the crank necessary to do so; (6) the City had never flown a purely private flag on a random day at the request of "any and all comers"; (7) the City had, by contrast, approved use of the area "at" the flagpoles and elsewhere in City Hall Plaza for "any and all comers" for any message, including protests against the City, and religious celebrations; (8) the City's policy was not to speak about religion at *all*—either in favor or against—on its flagpoles; and (9) no prior flag-raising applications violated the City's policy, but Camp Constitution's did, because it was the first request ever to seek to raise a flag in support of a religion. See, *e.g.*, pp. 5-16, *supra*.

The Court should reject petitioners' attempt to turn the second factor into a game where the hypothetical observer knows just enough selective facts to give a misimpression that the governmental entity had opened its flagpole (or other property) to private speech by "any and all comers" on any topic of their choice.

3. *The City maintains direct and effective control over the flagpoles and messages conveyed through its flag raisings*

The third factor this Court has focused on in determining the nature of speech, whether government maintains direct control over the messages conveyed through the medium, see, *e.g.*, *Matal*, 137 S. Ct. at 1757-1760, further demonstrates that the speech here was government speech.

This Court has equated "effective[] control" with "exercising 'final approval authority.'" *Summum*, 555 U.S. at 473. The Court also considered that

> [t]he City has *selected 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; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the *City has now expressly set forth the criteria it will use in making future selections.*

Ibid. (emphases added). Boston has done the same, explicitly laying out its goals for the program and exercising final approval.

Here, the City maintained direct and effective control by: (1) specifying on its website its goals for and what messages it intends to convey through the flag-raising program, Pet. App. 143a; (2) requiring that third parties submit requests for flag-raising events, *id.* at 140a-141a; (3) actually reviewing those requests to ensure the messages the City was sending complied with the City's goals and intentions, as well as the poli-

cies and criteria governing the program, *id.* at 149a, 159a-160a; and (4) maintaining control of the hand crank and having City personnel attend the flag-raisings, *id.* at 143a; C.A. App. 226, 228-229.

As discussed previously, the City has laid out its intentions and the City's goals for the flag-raising program in a way that, at least in general terms, specifies what the program should and should not contain. See *supra* pp. 11-13. In *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550, 560-561 (2005), this Court held that advertisements promoting the sale of beef products constituted government speech because the government established the program and specified in general terms what the campaigns should and should not contain. That is exactly what the City's published intentions and goals do here.

The City has also adopted a more specific written Flag Raising Policy memorializing the criteria for a flag-raising event.[8] As relevant here, that policy included seven "Flag Raising Rules," the first of which is that "[a]t no time will the City of Boston display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." Pet. App. 159a-160a. As that rule makes

[8] The City began memorializing its flag-raising policy before receiving petitioners' flag-raising request, after another town's inquiry regarding whether the City's policy was in written form. C.A. App. 141-142, 179-180. In *Summum*, this Court recognized that "putting [a] policy into writing," even after the fact, that "expressly set[s] forth the criteria [government] will use in making future selections" evidences government has "effectively controlled" messages sent by its display of monuments donated by private entities. 555 U.S. at 465, 473. So too here.

clear, the City here did not engage in *any* speech either in support of or against particular religions (the latter proscribed by the ban on discrimination or prejudice). The Rules also reserved to the Commissioner the sole discretion to deny or approve a request. *Id.* at 159a.[9]

Second, the City also required that third parties submit requests for the City to review and approve, to ensure the flag-raising program met the City's goals and intentions and complied with the City's Flag Raising Policy. Pet. App. 140a-141a, 149a, 159a-160a.

Third, the City in fact reviewed and approved requests to ensure the messages it was sending complied with its goals and intentions, as well as the policies and criteria governing the program, which have been memorialized in writing. Pet. App. 140a-141a, 149a, 159a-160a. By maintaining final approval authority over any flag raising requests, the City "'effectively controlled' the messages conveyed" on its flagpoles. *Walker*, 576 U.S. at 213 (quoting *Johanns*, 544 U.S. at 560-561).

Fourth, though the City does not own the third-party flags it chooses to fly, the City owns and controls its flagpoles and restricts access to them. The City must provide a crank to raise any flag, and City employees are present at all flag-raising events to assist

[9] Commissioner Rooney testified that he did not regard any religious symbolism on national flags as contrary to the policy, because those flags were raised as national flags. C.A. App. 208-210. See also *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2084 (2019) (noting that religious symbols "can become embedded features of a community's landscape and identity," divorced from "their religious roots").

with lowering the City's flag and raising another. Pet. App. 143a; C.A. App. 226, 228-229.

Petitioners' assertion (Br. 49) that the City cannot have been asserting control over the program because it had never, prior to petitioners' application, rejected a flag-raising application is mistaken. To begin, the evidence shows only that Mr. Rooney, from his 11-month tenure, had no knowledge of a denial. See Pet. App. 149a. Regardless, it is unsurprising that none of the other flags on the Flag Raising List was denied, because petitioners have identified none that was inconsistent with the City's policies. That the City raised flags that complied with its policy hardly establishes that the City relinquished control over which flags were flown.

Here, over 90% of the flag raisings were of national flags, which were flown as part of the City's express message—"to raise awareness in Greater Boston and beyond about the many countries and cultures around the world[, and] to foster diversity and build and strengthen connections among Boston's many communities." Pet. App. 143a. That message could only be conveyed by the national flag raisings as a group, not individually.[10] As this Court recognized in *Summum*, that some speech may have originated with private groups which might have had their own messages does

[10] Petitioners' attempt to cast the City's flying of national flags as a "crime" (Br. 53 (citing Mass. Gen. Laws ch. 264, § 8)) relies on a strained reading of the law prohibiting displaying foreign flags "upon" city buildings. "Upon" means "on." *Upon*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/upon. The City Hall Flag Poles are in front of—not on, or in contact with—City Hall.

not defeat the governmental nature of the government entities' own speech. 555 U.S. at 468. Similarly, this Court observed that accepting a third-party's communicative emblem does not necessarily mean that the government is adopting the message that group ascribes to the emblem. *Id.* at 476-477. And raising flags in connection with days already publicly noted for observation, as occurred in a few instances, meant the City could rely on the message associated with the day in question.

Petitioners have pointed to no prior flag raising wholly unconnected with either the City's diversity message or some other day or cause the City or Commonwealth had already endorsed. Such a purely private flag raising—for the private proponent's own, purely private message, that might even include protest or other speech antithetical to the government's message—is precisely what one would expect to see if, as petitioners contend, the City had given up control over flag raisings. But petitioners point to no such event. That silence speaks volumes.

The facts here are far better for the City than were those in *Walker*, where this Court found the government was speaking through specialty license plates designed by third-party organizations. 576 U.S. at 205. Texas law allowed the state to refuse to approve a design for a number of reasons, including "if the design might be offensive to any member of the public." *Ibid.* Texas had approved a host of messages, including arguably conflicting messages, and statements unlikely to be viewed as government speech, such as "Get it sold with RE/MAX." See *ibid.* This Court found that, nonetheless, the license plates constituted government speech, and that the raw number of mes-

sages "does not mean that the messages conveyed are not [the government]'s own." *Id.* at 217 (citing *Summum*, 555 U.S. at 471-472 (monuments, of which there were 52, were nonetheless government speech)). In contrast to *Walker*, here the speech took place not on private property (*i.e.*, the car of any citizen who liked the license plate design), but instead on the City's flagpole, outside of the entrance of City Hall. Moreover, the speech here consists of far fewer distinct messages than were expressed on the Texas license plates. See *id.* at 236 (appendix to the Court's decision including a sampling of 58 specialty license plates); *id.* at 233 (Alito, J., dissenting) (Texas offered "more than 350 varieties" of specialty plates).

Petitioners are also wrong that the City lacked effective control because Commissioner Rooney had not previously reviewed the flags themselves. In fact, Commissioner Rooney testified that, if an application did not describe the flag the third party wanted the City to raise, he asked for more information. C.A. App. 199. Again, most requested flags were national flags he would have been familiar with, for events that had been approved in prior years, or both. *Id.* at 210. As the court of appeals noted, "[t]here is nothing remarkable about the fact that some flag descriptions may trigger further review, while others do not." Pet. App 26a. When petitioners' application, with the request to fly "the Christian flag," came across his desk, Commissioner Rooney investigated further. Pet. App. 150a-151a. That he investigated when he did not fully understand an application shows *control*—not lack of it.

In short, as the court of appeals correctly found, the City maintains direct and effective control over its

flagpole and the messages conveyed through its flag raisings.

B. The Government Speech Doctrine Protects Elected Officials' Ability to Decide the Topics on Which the Government Will Speak, Including Choosing Not to Speak on Religion

While the Court has noted the "legitimate concern" that the government speech doctrine "not be used as a subterfuge for favoring certain private speakers over others based on viewpoint," *Summum*, 555 U.S. at 473, that is not an issue here. That would, indeed, be a problem if the government were seemingly spreading its cloak over purely private speech in a traditional public forum to shield discrimination. But, here, the City is speaking through a traditional outlet for government speech. Moreover, the space "at" the flagpole *is* a designated public forum where any speech by "all applicants" is tolerated. The City "has made no effort to abridge the traditional free speech rights—the right to speak, distribute leaflets, etc.—that may be exercised" by petitioners and others in City Hall Plaza. See *Summum*, 555 U.S. at 474. It is only the government's own flagpole, where the City's flag traditionally flies next to the United States and Massachusetts flags, that is being reserved for government speech.

The concern here is instead that the Court could chill governments from making the types of public statements their constituents elect them to make. As the Court noted, a government entity is "entitled" to "select the views that it wants to express." *Summum*, 555 U.S. at 467-468 (citing *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) and *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991)). It follows that

the government has the prerogative *not* to convey a message it does not wish to. See *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). As this Court has explained, a city government could not "create a successful recycling program" if "when writing householders asking them to recycle cans and bottles" it "had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary." *Walker*, 576 U.S. at 207. Likewise, during the Second World War, the federal government's "produc[tion] and distribut[ion of] millions of posters to promote the war effort" did not obligate it to "balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities." *Matal*, 137 S. Ct. at 1758.

In *Walker*, Texas had the right to refrain from including speech about the Confederate flag in its specialty license plate program, notwithstanding that private persons could propose designs, select which one to include on their license plates, and affix those plates to their cars. 576 U.S. at 219-220. And, in *Rust* v. *Sullivan*, 500 U.S. 173, 199-200 (1991), the United States was free to refrain from speaking about abortion services, and insist that persons carrying out the government's message refrain from such speech within the context of the government's program. So too here.

Not only would a requirement to carry contradictory (or even simply random) messages dilute and undermine the effectiveness of government speech, it would likely *deter* speech, if the government were not willing to risk being required to broadcast offensive speech, hurtful to its residents, from seemingly official sources. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-257 (1974) (rejecting "right of reply"

as an undue burden on a newspaper's choice to publish in favor of a candidate).

Of course, as this Court has recognized, the City will still be held accountable for its speech—including its decision not to speak about religion on its flagpoles—by the political process. If the citizens of Boston disagree with the City's flag-raising policy or approach to celebrating diversity, they may elect new public officials. After all, "it is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207 (citation omitted); see also *Summum*, 555 U.S. at 468-469 ("If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

To be sure, "government speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468. But that does not mean that every time the government speaks it must also speak about religious topics. Indeed, in *Summum*, the government chose to speak on *one* religious topic but refrain from speaking on *another*. See *id.* at 465. Petitioners themselves acknowledge that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." See Pet. Br. 37, 43 (citation omitted). In other words, petitioners' invocation of the Establishment Clause functions merely as an extension of their argument (which the City is not contesting) that the City could not exclude private religious speech from a public forum. But the City is not arguing (and did not argue in the court of appeals) that it may engage in viewpoint discrimination against religious speech if the City accidentally created a designated

public forum on the City flagpole. Rather, the City is arguing that in fashioning its own speech, the City may decline to speak, at least in a particular context, about religion. At the very least, *Summum*, in which the Court upheld the town's ability to decline a monument to the "Aphorisms of Summum" (after accepting a monument to the Ten Commandments), 555 U.S. at 481, establishes that.

II. The City Of Boston Did Not Intend To, And Did Not, Create A Public Forum On City-Owned And -Controlled Flagpoles Outside City Hall

Petitioners' contention that the City made its flagpoles into a designated public forum is, to a large extent, the flip side of their assertion that flying other flags was private speech rather than the City's own, and fails for the same reasons. However, because petitioners repeatedly assert, without basis, that the City "expressly designated the flagpole a public forum open to all applicants"—even taking that as the faulty premise of each of the three questions presented, Pet. Br. ii—we address that contention separately.

A. Petitioners' arguments, and those of their amici, proceed from inaccurate factual premises

Petitioners never dispute that, if the City's flag-raising program constitutes government speech, the City could reject petitioners' request. Instead, petitioners insist that the City converted the City flagpole into a designated public forum. But petitioners' argument rests on inaccurate factual premises and mischaracterizations of the evidence that both lower courts properly rejected. This Court will not typically reverse

factual findings on which both lower courts agreed. *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

First, petitioners are wrong that language in the event applications and accompanying guidelines suggests the City follows an "all-comers" approach. Petitioners point to language in the guidelines stating that the City "seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums," coupled with the application listing various public forums. Pet. App. 136a-139a. But the application lists "the City Hall Flag Poles" as a "location," and says nothing about removing the City flag and replacing it with one of the applicant's own choosing. *Id.* at 135a. And the "Guidelines" specify that it "applies to any public event proposed to take place *at*" one of the locations, including "the City Hall Flag Poles." *Id.* at 136a (emphasis added). The "at"—which is not "on"—is important. The area at the base of the flagpoles—"at" the flagpoles—is indeed a public forum, and the City treats it as such. *Id.* at 133a-135a. That area, like the "North Stage," which is also listed on the application form, is simply one of several separate locations in City Hall Plaza where public events may be held.[11] *Ibid.* And, of course, many events occur "*at*" the flagpoles without any flag-raising, see *id.* at 133a-136a; speaking at that location, and speaking on the flagpoles themselves, are not the same thing. This is further confirmed by the "online policies," which identify the six "locations" where public events can be held as including "at" the flagpoles. *Id.* at 133a. This online policy is even more

[11] Of course, applicants can request to use the entire City Hall Plaza as a "location" for their event.

instructive, because it uses the preposition "at" only before "the City Hall Flag Poles," presumably to underscore that the application covers only holding an event in the area around the base of the flagpoles, not lowering the City's flag and hoisting another. Petitioners (Br. 5) simply omit with ellipses the "at" from their quotation of the policy—but that does not change what those policies actually say.[12]

Petitioners' presumption that holding an event "at" a location includes removing other City property already there is even more stunning if applied to "the lobby of City Hall," another public forum identified on the application. See Pet. App. 133a. While groups may use that space, that does not mean that they can come in, take the City's pictures and notices off the walls, and replace them with their own.

Second, petitioners (Br. 27) mischaracterize the City's goals for its flag-raising program stated on its website as "document[ing] the City's intentionally open policy." Not so. Instead, as discussed previously, the website "states *the City's* goals for flag raising events" and the messages *the City* wishes to express. See Pet. App. 143a (emphasis added); pp. 11-13, *supra*.

Third, as also discussed previously, petitioners rely on a misleading characterization of the scope of the flag-raising program, the number of flags the City chose to raise in the years preceding petitioners' application, and the nature of those flags. See pp. 1-4, 7-10, 20-21, *supra*. Before petitioners' application, the City

[12] Petitioners' Complaint similarly omitted the word "at" before "The City Hall Flag Poles" from a block quote of the City's online policy. See C.A. App. 18-19.

had never before received a request to fly a flag that violated City policies. That there is no record of a denial of an application in those years shows only that the flag-raising applications the City received were consistent with the City's policies and goals—not that the City accepted "all comers."

B. The City's decision to fly national flags to represent the City's diverse population and fly non-City flags in association with publicly recognized days of observance does not reflect an intent on the City's part to make the flagpole a public forum

Critically, as the record demonstrates, the City never intended to create a designated public forum on the City flagpole. Where the inquiry concerns "government property that has not traditionally been regarded as a public forum," a designated public forum is created only when it "is *intentionally* opened up for that purpose." *Summum*, 555 U.S. at 469 (emphasis added). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). "'[T]o ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum,' this Court 'has looked to [1] the policy and practice of the government' and [2] to 'the nature of the property and its compatibility with expressive activity.'" *Walker*, 576 U.S. at 215-216 (quoting *Cornelius*, 473 U.S. at 802). Here, the City's policy and practice and nature of the property demonstrate the City did *not* intend to open up a nontraditional public forum for flag raisings on the City flagpole.

1. *The City's policy and practice do not demonstrate an intent to designate the City's flagpole a public forum*

As discussed above, the City's policies (including the City's event applications and guidelines and the City's memorialized Flag Raising Policy) do not designate any of the three City Hall Flag Poles a public forum. Although the City maintains the area "at" the flagpoles, along with other locations around City Hall, as public forums, the flagpoles themselves are not. Indeed, before the memorialization of the written flag-raising policy, the application and accompanying guidelines did not reference flag-raising events at all.

None of the City's policies expressly open up any of the City's flagpoles to "all comers," as petitioners claim. Even if the City's policies are open to alternative readings, inartful wording fails to establish the requisite intent under *Cornelius*, to open up its flagpoles as a public forum, especially where doing so would defeat the "essential nature" of the forum itself, as discussed below at pages 44-46, *infra*.

Nor do the City's practices establish the requisite intent. As discussed above, see pp. 1-4, 7-10, 20-21, *supra*, petitioners (and their amici) vastly overstate the scope of the City's flag-raising program. On this factual record, the City's policies and practice highlight its lack of intent to designate the City's flagpoles as a public form.

2. *The nature of the City flagpole and its essential function is not compatible with unfettered private speech*

The essential function of the City flagpole is to display the City flag outside of City Hall, alongside the

United States and Massachusetts flags. See Pet. App. 141a-142a. Requiring the City to raise any and all flags brought to it by third parties would "defeat[]" this "essential function." See *Summum*, 555 U.S. at 478. The flagpole's role in the trio of flagpoles in front of City Hall renders the display incompatible with unfettered private speech.

That flying a third-party flag is temporary (where, in contrast, the monuments in *Summum* are permanent) does not demonstrate otherwise. As this Court correctly observed in *Walker*, permanence is not a prerequisite for finding government speech. See *Walker*, 576 U.S. at 213 ("That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were 'permanent' * * * ."). Numerous courts of appeals agree. See, *e.g.*, *Wandering Dago, Inc.* v. *Destito*, 879 F.3d 20, 35 (2d Cir. 2018); *Vista-Graphics, Inc.* v. *Virginia Dep't of Transp.*, 682 Fed. Appx. 231, 236 n.5 (4th Cir. 2017) (citing *Walker*, 135 S. Ct. at 2249-2250); *Freedom from Religion Found., Inc.* v. *City of Warren*, 707 F.3d 686, 698 (6th Cir. 2013) (citing *Summum*, 555 U.S. at 478).

Regardless, petitioners' emphasis on permanence mischaracterizes the relevant issue. "Permanence" in *Summum* was shorthand for a limited resource. As this Court explained, "[t]he forum doctrine has been applied in situations in which government-owned property or a government program *was capable* of accommodating a large number of public speakers without defeating the essential function of the land or the program." 555 U.S. at 478 (emphasis added). Here, the raising of a private party's flag entails lowering the City's flag, thereby reducing (and ultimately eliminat-

ing) the flagpole's essential purpose. To maintain that essential nature, the City would be forced to shutter the program, rather than extend it to "all comers." As this Court observed, "where the application of forum analysis would lead almost inexorably to the closing of the forum, it is obvious that forum analysis is out of place." *Id.* at 480.

Taken together, consideration of the City's policy and practice as well as how unfettered private speech would destroy the flagpole's essential function demonstrate the City never intended to, and did not, create a designated public forum on the City's flagpole.

C. To the extent the City inadvertently converted the flagpole into a public forum, it is permitted to remove that designation and create a new program

Should the Court find that, despite the City's intentions, it accidentally converted the City's flagpole into a designated public form, it should reaffirm the City's ability to remove that designation. The City has already halted the flag-raising program in view of this case. If the Court finds against the City, the City intends to create a new flag-raising program, following this Court's guidance, to ensure there is no question that it is engaged in government speech. The City could, if necessary, adopt one of the restrictions proposed by the United States (Br. 30-31)—requiring a city official to "sponsor" a flag raising, or limiting the program specifically to flags of sovereign states.

This Court has repeatedly alluded to a government's ability to close a nontraditional public forum. For example, in *Perry Education Association* v. *Perry Local Educators' Association*, this Court observed

that, "[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." 460 U.S. 37, 46 (1983); see also *International Soc'y for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.").

Several Circuits have explicitly held that government may close nontraditional public forums. See, *e.g.*, *Ridley* v. *Massachusetts Bay Transp. Auth*, 390 F.3d 65, 77 (1st Cir. 2004) ("[T]he government is free to change the nature of any nontraditional forum as it wishes."); see also *Currier* v. *Porter*, 379 F. 3d 716, 728 (9th Cir. 2004) (government may close nontraditional public forum "whenever it wants"); *Make the Road by Walking, Inc.* v. *Turner*, 378 F.3d 133, 143 (2d Cir. 2004) ("government may decide to close a designated public forum"); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 173 (4th Cir. 1989) (assuming housing areas were designated public forums, Commanding General could close them); *United States* v. *Bjerke*, 796 F.2d 643, 647 (3d Cir. 1986) ("[O]fficials may choose to close such a designated public forum at any time.").

In *Ridley*, the First Circuit noted that the decision to close a forum must be made in "good faith," such as where the government "acted in response to expressed constitutional concerns about its prior guidelines, and cannot be faulted for trying to adhere more closely to the constitutional line." 390 F.3d at 77. The Ninth Circuit adopted a similar standard. See *United States* v.

Griefen, 200 F.3d 1256, 1262 (2000) ("If a closure of a public forum is for a valid rather than a disguised impermissible purpose, the potential for self-imposed or government censorship * * * does not exist.").

Here, in denying Camp Constitution's application, the City was motivated by its legitimate concerns about adhering to the City's policies to refrain in its own speech (in the context of the flag-raising program) from seemingly endorsing a religious view, rather than animus to any particular private expression regarding religion. Pet. App. 152a-154a. As the court of appeals found, "the record does not give rise to any suggestion that the City created the flag-raising program with the goal of inhibiting religion." *Id.* at 33a (citing *Rosenberger*, 515 U.S. at 840). The court of appeals went on to note that, "[i]n fact, the City went the extra mile: to help avoid any such impression" offering petitioners "the option of hosting an event alongside the flagpoles so as to permit [petitioners] to continue to practice and share their religion * * * . Under these circumstances, the City's conduct simply cannot be construed to suggest the disparagement of the plaintiffs' religion." *Id.* at 33a-34a (citation omitted).

D. Petitioners' Argument Concerning a Limited Public Forum Is Not Preserved, But is Inapposite in Any Event

Petitioners assert (Br. 39-40) the City flagpole is a "limited public forum," but that argument appears nowhere in the Petition and thus is waived. See Sup. Ct. R. 14.1(a); see also, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 388 (1994). Even if the argument were preserved, it is inapposite. The City did not argue before the court of appeals or in its opposition brief that it had a suffi-

ciently compelling interest to exclude private speech on a religious topic if the flag-raising program were deemed a designated public forum. The City's entire basis for declining the proposed flag raising was that it was the City's own speech. That is why Mr. Rooney invoked the Establishment Clause, which would be irrelevant if the speech were private speech.

III. Even If The Court Determines The City Was Not Entitled To Prevail On Summary Judgment, Petitioners Are Not Themselves Entitled To Judgment As A Matter Of Law

If this Court concludes the City was not entitled to summary judgment on the basis of the record before the district court, the case should be remanded for further proceedings; viewing the facts in the light most favorable to the City, the parties' Joint Statement does not carry petitioners' burden to prove the City created a designated public forum.

Where, as here, parties file cross-motions for summary judgment, appellate courts must determine whether *either* party is entitled to judgment, with respect to each motion viewing the facts in the light most favorable to the non-moving party. See, *e.g.*, *Ricci* v. *DeStefano*, 557 U.S. 557, 563, 592 (2009). Even if the Court concludes the court of appeals erred in affirming the district court's grant of summary judgment for the City, petitioners are certainly not entitled to judgment, because the facts, viewed in the light most favorable to the City, with all reasonable inferences drawn in the City's favor, do not establish that the City created a public forum on the City flagpoles.

For example, petitioners (Br. 48-49) would have the Court infer the flag raising events largely took

place without participation of City officials but the record does not support that inference. Especially where petitioners have the burden of proof, the Court cannot assume these other events were not conducted with the participation of those officials. *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) ("Summary judgment in favor of the party with the burden of persuasion [] is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."). If the Court does not affirm the grant of summary judgment, the record on remand could be supplemented with evidence of such participation, including, for example, public proclamations of a foreign country's independence day, or participation by the mayor or other city officials in the event.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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