No. 20-1800

IN THE

Supreme Court of the United States

HAROLD SHURTLEFF, *et al.*,

Petitioners,

v.

CITY OF BOSTON, MASSACHUSETTS, *et al.*,

Respondents.

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

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND CENTER FOR INQUIRY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The Freedom From Religion Foundation ("FFRF") is a national educational nonprofit organization based in Madison, Wisconsin. FFRF is the largest association of freethinkers in the United States, representing more than 35,000 atheists, agnostics, and other nonreligious Americans, including more than 700 members in Massachusetts. FFRF has 21 local and regional chapters across the country. Founded nationally in 1978, FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional principle of separation between state and church.

The Center For Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics. CFI advocates for public policy rooted in science, evidence, and objective trust, and works to protect the freedom of inquiry that is vital to a free society.

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1. All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

The Amici Curiae, Freedom From Religion Foundation and Center For Inquiry, agree that the Court of Appeals correctly concluded that flags displayed on a government flagpole constitute government speech. The Court's conclusion that a religious flag on a municipal flagpole will be viewed as government speech is fully consistent with the mandate of the Establishment Clause that prohibits religious endorsement. Because the Petitioners, Harold Shurtleff and Camp Constitution (hereinafter "Petitioners"), argue that the Court should have applied a forum analysis to this case, however, the Amici address that issue for the Supreme Court's benefit, if the display of a religious flag is otherwise deemed not to be government speech.

The City of Boston's government flagpole should properly be considered a nonpublic forum, if it is a forum at all. The discretion of government officials and bodies to limit speech in a nonpublic forum is significantly greater than the latitude for a traditional public forum or a designated public forum. The restrictions on permitted speech in a nonpublic forum are not subject to strict scrutiny or the requirement of a compelling government interest. A nonpublic forum must only be reasonable and viewpoint neutral.

The Petitioners' emphasis on forum analysis rather than government speech is a red herring. If the flagpole at issue in this case is deemed a forum, it is certainly not a traditional public forum, nor is it a designated forum coextensive with a traditional public forum. The Boston flagpole, as a nonpublic forum, is subject to reasonable

limitations on use. Reasonableness is a deferential standard that is satisfied in this case.

Boston's concern not to give the appearance of endorsement in violation of the Establishment Clause is a reasonable justification for not approving the display of religious flags on a government flagpole. The appearance of endorsement is a legitimate basis upon which to act. As the First Circuit Court of Appeals recognized, in the context of a government flagpole, the appearance of endorsement cannot be gainsaid. Government flagpoles are so intimately and inherently identified with the government as speaker/sponsor that the appearance of religious endorsement cannot be obviated.

The exclusion of ceremonial religious displays from a nonpublic forum is not proscribed by the Free Speech Clause of the First Amendment. Nor do the Religion Clauses require that religious displays be allowed in a nonpublic forum. The question presented by this case, therefore, is not a novel matter of law, but rather one of reasonableness that does not require the Supreme Court to announce any new doctrine of law. In effect, the Petitioners seek merely for this Court to engage in alleged error correcting, but even as to that limited issue, the First Circuit's decision should not be reversed. Boston's refusal to approve the Christian flag for display on a government flagpole was reasonable in context. Inclusion of religious displays in a nonpublic forum is not mandated by the Constitution.[2]

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2. This particular flag, moreover, is the same Christian flag that was carried by insurrectionists onto the Senate floor on January 6, 2021.

ARGUMENT

I. Restrictions on access to a nonpublic forum need only be reasonable and viewpoint neutral.

When the government exercises the right to speak for itself, it can freely select the views that it wants to express. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125 (2009). The Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech. *Id*.

In this case, the Court of Appeals concluded that flags flown on a government flagpole should be classified as government speech. The Court applied factors considered by the Supreme Court to differentiate government speech from private speech, including the historic use of flagpoles as government means of communication, the appearance of sponsorship and endorsement, and government control of the messages approved. The Court of Appeals did not also perform a forum analysis.

The Petitioners contend that the Court of Appeals erred by applying the factors used by the Supreme Court to identify government speech. They contend that the Court should have conducted a forum analysis. Applying forum analysis, however, does not affect the outcome in this case.

Not all forums evaluated under the Free Speech Clause are the same. The extent to which the government can control access to government property depends upon the nature of the relevant forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788,

800, 105 S.Ct. 3439 (1985). On one end of the spectrum, this Court has recognized traditional public forums, which include public streets and parks that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948 (1983). Content-based speech restrictions in traditional public forums are subject to strict scrutiny, which means the government must show a compelling state interest and narrow tailoring of measures to achieve that interest, including the absence of less restrictive alternatives.

In the middle of the spectrum, this Court has recognized designated public forums. These are properties that have "not traditionally been regarded as a public forum [but are] intentionally opened up for that purpose." *Summum*, 555 U.S. at 469. As with traditional public forums, content-based restrictions get strict scrutiny.

A final category of forum has been labeled a nonpublic forum. A nonpublic forum enjoys the least protection under the First Amendment. Content-based restrictions are valid as long as they are reasonable and viewpoint neutral. *Id.* at 470; *Cornelius*, 473 U.S. at 800. And, unlike with strict scrutiny, nonpublic forums do not require narrow tailoring or the absence of less restrictive alternatives. The government's decision to restrict access need only be reasonable; it need not be the most reasonable or the only reasonable limitation. *Id.* at 808. The government has "much more flexibility to craft rules limiting speech" in a nonpublic forum than in any other kind of forum. *Minnesota Voters Alliance v. Mansky*, 200 U.S. 321, 138 S.Ct. 1876, 1885 (2018).

Both content and viewpoint discrimination are prohibited in traditional and designated public forums. Only viewpoint discrimination is prohibited with respect to nonpublic forums. A regulation of speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 2227 (2015). Viewpoint discrimination is "an egregious form of content discrimination that occurs 'when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the regulation.'" *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510 (1995).

II. Boston's flagpole is a nonpublic forum subject to reasonable restrictions.

The Petitioners unpersuasively argue that the flagpole at issue is a designated public forum. But the Petitioners do not contend that the flagpole is a traditional public forum like a town square or park, where unrestricted speech may take place, including public debate, argument and political rallying. The flagpole, in fact, has not traditionally been regarded as a public forum, and the government has not intentionally opened it up for that purpose in this case. *See Summum*, 555 U.S. at 469–70. In fact, to the contrary, Boston has utilized the flagpole primarily to fly the City's flag. On occasion, the City has used it for the purpose of commemorating different nations or publicly recognized days of observance. One can conclude with great certainty, therefore, that the government flagpole at issue is not a designated public forum coextensive with a traditional public forum.

Instead, the flagpole is correctly deemed a nonpublic forum, if a forum at all. The flagpole is restricted by content to commemorative displays, including the display of various national flags alongside official government flags. In the context of a nonpublic forum, such content restrictions are not prohibited.

Refusal to approve religious flags for display on a government flagpole, moreover, does not constitute viewpoint discrimination. A "content-based regulation either explicitly or implicitly presumes to regulate speech on the basis of the message," while a "viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH §3:9 (2019). To distinguish between viewpoint and content discrimination, therefore, one must determine whether the speech restriction was based on the specific motivating ideology or particular position of the speaker, or the substance more generally.

The Petitioners argue that their request to display a religious flag on Boston's government flagpole was denied because of the religious perspective of their speech, which they allege makes the decision viewpoint discrimination. Boston's generalized refusal to approve any religious flags, however, was not based on the Petitioners' particular religious viewpoint. Nor do the Petitioners claim, for example, that Christian flags were prohibited but Jewish, Muslim, or anti-religious flags would have been allowed, which would present an obvious case of viewpoint discrimination. That is not the case in the present matter. There is no indication that Boston intended to discourage

one viewpoint and advance another. It is more accurate to characterize Boston's access policy as based on the general identity of the speaker. Such distinctions are permissible in a nonpublic forum where the touchstone for evaluating distinctions is whether they are reasonable. *Perry v. Perry Local Educators' Assn.*, 460 U.S. 37, 49, 103 S.Ct. 948 (1983).

Boston's refusal to authorize religious flags was not based on hostility to the viewpoint of religion as applied to permitted speech-related topics such as morality or civic instruction, etc. In cases like *Rosenberger*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S.Ct. 2141 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093 (2001), by contrast, challenged restrictions on speech operated to exclude religious viewpoints on otherwise includable topics. *See Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314, 326 (D.C. Cir. 2018). In *Rosenberger*, 515 U.S. at 831, for example, the Supreme Court concluded that "the prohibited perspective, not the general subject matter, resulted in the refusal to make third party payments." Likewise in *Lamb's Chapel*, 508 U.S. 393–94, the Court addressed a restriction on religious speech about child rearing and family values, which perspective otherwise was permitted. Similarly, in *Good News Club*, 533 U.S. at 107–08, the Court considered a restriction on teaching moral and character development in children from a religious perspective.

The present case does not include a restriction on religious flags because of religious perspective, ideology, or orthodoxy. Boston's practice, instead, is to exclude all

religious flags from its government flagpole in order to prevent the appearance of religious endorsement. Such a generally applicable restriction does not constitute viewpoint discrimination, but rather it is a permissible content restriction.

The Petitioners' understanding of viewpoint discrimination would prohibit almost any restriction in a nonpublic forum. In effect, the Petitioners conflate content and viewpoint in such a way as to eliminate the well-recognized distinction that exists in the Supreme Court's precedents. The D.C. Court of Appeals noted the sweeping implication of this argument in *Archdiocese of Washington*, 897 F.3d at 325:

> The Archdiocese's position would eliminate the governments' prerogative to exclude religion as a subject matter in any nonpublic forum. It contends Supreme Court precedent prohibits governments from banning religion as a subject matter, and that Guideline 12 is unconstitutional for that reason. Not only is this position contrary to the Supreme Court's recognition that governments retain the prerogative to exclude religion as a subject matter, *see Rosenberger*, 515 U.S. at 831, 115 S.Ct. 2510, it would also undermine the forum doctrine because the Archdiocese offers no principled reason for excepting religion from the general proposition that governments may exclude subjects in their nonpublic forums. Although religious speech might be an exception either because it is highly valuable or because it receives specific protection in the First Amendment, the

> same can be said of political speech on which the Supreme Court has upheld bans against constitutional challenges. *See, e.g., Arkansas Educ. Television Comm'n*, 523 U.S. at 669, 119 S.Ct. 1633; *Corneluis*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567. The Archdiocese's position could have sweeping implications for what speech a government may be compelled to allow once it allows any at all, even forcing a choice between opening nonpublic forums to almost any private speech or to none, which the Supreme Court acknowledged in *Arkansas Educational Television Commission*, 523 U.S. at 680, 118 S.Ct. 1633, was not merely hypothetical.

III. Boston's restriction on religious flags is reasonable.

Because Boston's restriction on religious flags does not constitute viewpoint discrimination, the remaining question is whether the content restriction is reasonable, which is not a demanding inquiry, but rather is a "forgiving test." *Minnesota Voters Alliance*, 138 S.Ct. at 1888. In this case, concern to avoid the appearance of religious endorsement in violation of the Establishment Clause is a reasonable basis for Boston's policy and practice.

A government body's interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based restrictions. *Widmar v. Vincent*, 454 U.S. 263, 271, 102 S.Ct. 269 (1981); *see also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 761–62, 115 S.Ct. 2440 (1995). Similarly, the Supreme Court has recognized

that avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. *See Greer v. Spock*, 424 U.S. 828, 839, 96 S.Ct. 1211 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 94 S.Ct. 2714 (1974). Compliance with the Constitution, therefore, is well-recognized as a reasonable basis for a speech restriction in a nonpublic forum.

In this case, approval of a religious flag would offend the Establishment Clause if it conveys the appearance of endorsing religion, under circumstances as viewed by a reasonable observer. Boston's concern that religious flags on a government flagpole would give such appearance of endorsement was a reasonable and not merely hypothetical apprehension.

The Court of Appeals decision in this case well explains the reasonable basis for Boston's concern. The Court found it likely that an observer would attribute the message of a third-party flag on Boston's third flagpole to the city, stating as follows:

> As we previously noted, an observer would arrive in front of City Hall, "the entrance to Boston's seat of government." *Id.* at 174. She would then see a city employee replace the city flag with a third-party flag and turn the crank until the third-party flag joins the United States flag and the Massachusetts flag, both "powerful governmental symbols," in the sky (eighty-three feet above the ground). *Id.* A faraway observer (one without a view of the plaza) would see those three flags waiving in unison, side-by-side, from matching flagpoles.

> That the third-party flag is part of a broader display cannot be understated. As the *Summum* Court explained, the manner in which speech is presented, including the incorporation of other monuments in the vicinity, changes the message communicated. *See* 555 U.S. at 477. Here, the three flags are meant to be – and in fact are – viewed together. The sky-high City Hall display of three flags flying in close proximity communicates the symbolic unity of the three flags. It therefore strains credulity to believe that an observer would partition such a coordinated three-flag display (or a four-flag display if one counts the POW/MIA flag) into a series of separate yet simultaneous messages (two that the government endorses and another as to which the government disclaims any relation).

Shurtleff v. City of Boston, 986 F.3d 78, 88–89 (1st Cir. 2021).

The Court of Appeals' conclusion that religious flags on a government flagpole, in context, would give the appearance of religious endorsement is supported in principle by reference to other contexts in which speech is invariably likely to be perceived as religious endorsement. For example, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573, 595, 109 S.Ct. 3086 (1989), the Supreme Court held that the display of a crèche on the interior grand staircase of a courthouse was unconstitutional because the display had the impermissible effect of indicating government endorsement of religion in violation of the

Establishment Clause. In *Berry v. Department of Social Services*, 447 F.3d 642, 652 (9th Cir. 2006), the Ninth Circuit Court of Appeals concluded that "the government's need to avoid an appearance of endorsement of religion outweighs the curtailment on Mr. Berry's ability to display religious items in his cubicle, which is frequented by the Department's clients." In *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, 1362 (N.D. Ga. 2002), the district court concluded that "the display of a Confederate flag, flown from a tall, permanent flagpole, could suggest to the public that the City was holding itself out as a Confederate cemetery or that it was aligned with the viewpoint of the Confederacy." A Ten Commandments poster in a federal district court also has been held to violate the Establishment Clause despite a claim to be private speech protected by the Free Speech Clause. *See American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011).

Boston's concern to avoid conveying the appearance of religious endorsement is reasonable in the context of a nonpublic forum. In this context, reasonableness is the applicable standard, rather than proof of a compelling government interest narrowly tailored to affect a close fit between ends and means. Reasonableness is also supported in this case by the substantial alternative channels that remain open for Petitioners to display their flag. The Petitioners are not otherwise precluded from flying their flag or otherwise promoting themselves. The reasonableness of Boston's restriction on religious flags on a government flagpole is appropriately supported by considering the many and substantial alternative channels that remain open for the Petitioners' communication to take place. *See Perry*, 460 U.S. at 53.

CONCLUSION

The Supreme Court should affirm the decision of the Court of Appeals. The City of Boston's refusal to approve religious flags on a government flagpole does not violate the Free Speech Clause of the First Amendment. The Court of Appeals' holding is correct, whether evaluated as government speech or as a reasonable restriction in a nonpublic forum. The Petitioners' emphasis on forum analysis misapprehends that a nonpublic forum is hereby implicated, in which a government's interest in avoiding the appearance of religious endorsement is reasonable.

Respectfully submitted,

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