

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

**BRIEF FOR ANTI-DEFAMATION LEAGUE AS
AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

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INTEREST OF AMICUS CURIAE

Founded in 1913 in response to an escalating climate of antisemitism and bigotry, the Anti-Defamation League (ADL) is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment to all. Today, ADL continues to fight all forms of hate with the same vigor and passion. A global leader in exposing extremism, delivering anti-bias education, and fighting hate online, ADL's ultimate goal is a world in which no group or individual suffers from bias, discrimination, or hate.

ADL submits this brief to address why the display of a flag at Boston City Hall is quintessential government speech, and how a ruling by this Court that Boston may not control the viewpoint expressed from its flagpoles creates a serious risk that the public will misperceive purely private speech as having government endorsement. In addition, ADL addresses the risk that actors whose messages are antithetical to Boston's own views—including, for example, white supremacist, antisemitic, and other hate groups—will use the unique opportunity to fly a banner over a seat of government as a propaganda opportunity and recruitment tool.¹

¹ The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, ADL states that no counsel for a party authored any part of the brief, and no person or entity other than ADL and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

When it raises the flags of the United States, Massachusetts, and the City of Boston in front of City Hall, Boston unquestionably engages in government speech. Under this Court's precedents, Boston also engages in government speech when it occasionally raises a substitute flag in lieu of the City flag.

This Court's government speech decisions identify several non-exclusive factors that are relevant to distinguishing government speech from private speech, including the history and tradition of how governments express themselves; whether the public would reasonably associate the speech with the government; and the government's control over the speech in question. Each of those factors weighs in favor of a finding that Boston has engaged in government speech and against a finding that its flag-raising program created a public forum in which its flagpole must be open to all comers.

Governments have long used flags as a means of communication, and Boston itself has done so. There can be little serious doubt that the tens of thousands of people who cross City Hall Plaza on a typical day would reasonably understand that a flag flying from Boston's 83-foot-tall flagpole in front of the seat of government and next to the U.S. and Massachusetts flags is there because it conveys something Boston wants to communicate. Even if a private speech event happens to be going on at the same time—and nothing in the record suggests that a substitute flag flies only during private events—a passerby who sees a substitute flag may or may not be aware of that event, and a reasonable observer would still understand that the message of any flag flying on Boston's flagpole is

Boston's message. And the record shows that Boston exercises control over which flags it is willing to fly on its flagpoles. Boston's practice of flying only flags that are consistent with its flag-raising policy and purposes demonstrates the City's control over the message conveyed. Petitioners' contrary assertions are based on a misreading of the record.

The consequence of a finding that Boston's City Hall flagpoles are a public forum would be that anyone could express any viewpoint from them, subject only to reasonable time, place, and manner restrictions. Such a decision would have serious, real-world ramifications precisely because flying a flag from a government flagpole is prototypical government speech.

First, because the public is likely to understand that a flag flying in front of City Hall from the City's flagpole and next to the U.S. and Massachusetts flags conveys the City's message, private speakers would be drawn to the City Hall flagpoles. Finding a free speech right for any member of the public to fly any flag on Boston's City Hall flagpoles would give private speakers the ability to falsely present their own message as government approved.

Second, certain groups would view the unilateral right to fly the flag of their choice high over Boston City Hall as a publicity and recruitment coup. The rising tide of white nationalism, antisemitism, and other extremism depends on recruitment. The value to such groups of the "photo op" of a Nazi flag, the Confederate flag, or some other white supremacist banner flying over Boston City Hall should not be underestimated.

The Christian flag Camp Constitution asked the City to fly is in no way analogous to the vile speech of hate groups. But free speech is free for everyone. The ruling Petitioners seek would force Boston either to accept any and all proffered flags—including messages or propaganda that are antithetical to Boston’s own views—or refuse to fly any citizen-suggested flag, thereby stifling one of the ways in which the City speaks to its residents and visitors.

ADL respectfully urges the Court to affirm the decision below.

ARGUMENT

I. THE FLAGS BOSTON FLIES ON ITS CITY HALL FLAGPOLES ARE GOVERNMENT SPEECH.

A. Background.

The City of Boston has erected, owns, and controls three 83-foot flagpoles in City Hall Plaza—the area immediately in front of Boston City Hall, the seat of Boston’s government. *Shurtleff v. City of Boston*, 986 F.3d 78, 82 (1st Cir. 2021). On most days, a City employee raises on the City’s three flagpoles, respectively, the flags of the United States of America (above the smaller National League of Families POW/MIA flag), the Commonwealth of Massachusetts, and the City of Boston. *Id.*

This case focuses on the City’s third flagpole. From time to time, Boston replaces its City flag with another flag, often—but not always—at the request of a private party. *See id.* at 82–83; *see also* Appendix to Petition for Writ of Certiorari (“Pet. App.”) at 4a

(stating that private party requests to raise a substitute flag are “typically” made “in connection with an event taking place within the immediate area of the flagpoles”). Private party requests to fly a substitute flag are frequently—but again, not always—made in connection with private events on the Plaza. 986 F.3d at 83; *see also* Pet. App. at 142a (such requests are “[o]ften” made “in connection with a proposed event”).

Boston’s published event guidelines require applicants to obtain permission to hold events at City properties and direct applicants to an event application form. 986 F.3d at 83. The online application form does not reference flag-raising events. *Id.*

Boston also provides a written event application form, which states that it “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.” Pet. App. 132a. Similar to the online application, it makes no reference to a flag-raising event. 986 F.3d at 83.

From June 2005 through June 2017, Boston raised a substitute flag on its third flagpole 284 times. *Id.* These 284 approvals involved many repeat flags; in fact, Boston raised roughly 50 different flags over a 13-year period. *See* Pet. App. 173a-187a. The City frequently raised flags of other countries or territories in place of the Boston City flag, usually in connection with cultural celebrations, to mark the arrival of dignitaries, or in commemoration of historic events. 986 F.3d at 83. The City also raised flags of significance to other communities, including the

Juneteenth flag representing the end of slavery, the LGBTQ+ pride flag, and the Bunker Hill Association flag. *Id.* at 83–84. While some of the approved flags (particularly those of other nations) contain religious imagery, none were proposed to be raised for a specifically religious purpose. *See id.* at 84.

In July 2017, Petitioners requested to “raise the Christian Flag” on the City’s flagpole and to host an attendant event with local clergy speaking about “Boston’s history.” *Id.* At the time of Petitioners’ application, Boston had not reduced to writing its policy concerning flag-raising requests. *Id.* Boston believed Petitioners’ request to be the first it had received to raise a religious flag. *Id.* On the basis that it did not have a past practice of flying a religious flag, the City denied Petitioners’ flag-raising request. *Id.* Boston did not deny Petitioners’ request to hold a speaking event, but denied their request to raise “the Christian Flag” and suggested as an alternative that a non-religious flag could be raised in connection with the event. *Id.* To the best of the lone witness’s knowledge, Boston had never denied a flag-raising request prior to Petitioners’ request. *Id.*; *cf.* Brief for Respondents (“Resp’ts’ Br.”) at 11 (discussing limited testimony).

In October 2018, Boston issued a written Flag Raising Policy codifying its past policy and practice. 986 F.3d at 84; *see also* Pet. App. 159a. It includes seven “Flag Raising Rules,” the first of which is: “At 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. 160a. Boston’s webpage

concerning flag-raising events also states the goals for the events:

[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 ... 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.

986 F.3d at 83.

Since denying Petitioners' request, Boston has denied Super Happy Fun America's request that Boston raise a "Straight Pride" flag on a City Hall flagpole. Pet. App. 160a.

Boston recently suspended its flag-raising program "in light of the U.S. Supreme Court's recent decision to consider whether the program as currently operated complies with Constitutional requirements." City of Boston, *How to Hold an Event Near City Hall*, <https://www.boston.gov/departments/property-management/how-hold-event-near-city-hall> (last visited Dec. 21, 2021).

B. The Government Speech Doctrine.

For government to be effective, it must be able to choose what to say—and what not to say. As this Court has observed, "it is not easy to imagine how government could function if it lacked [the] freedom"

to express a point of view. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) (Alito, J., writing for a unanimous Court). Indeed, “[i]t is the very business of government to favor and disfavor points of view.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment).

Under the government speech doctrine, the First Amendment’s Free Speech Clause “does not regulate government speech.” When a government entity such as the City of Boston speaks, it may “select the views that it wants to express.” *Summum*, 555 U.S. at 468.

As this Court has repeatedly recognized, government speech may incorporate the speech of a private person or entity without becoming private speech. “A government entity may exercise [the] freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.” *Id.*; see also *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 217 (2015) (“The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum provider.”). Whether a government speaks through a privately donated monument, *Summum*, 555 U.S. at 468, a privately-designed specialty license plate, *Walker*, 576 U.S. at 217, or an ad campaign funded by a targeted assessment, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005), the government is free to express its chosen message.

Although government speech is not restrained by the Free Speech Clause, it may be limited by other

constitutional provisions such as the Establishment Clause. *Summum*, 555 U.S. at 468. And the government speech doctrine is buttressed by the ballot box because officials are ultimately accountable to the people for the viewpoints expressed. *Johanns*, 544 U.S. at 563.

This Court has considered several non-exclusive factors when distinguishing between government speech and private speech. In *Summum*, the Court found that erecting a privately donated monument in a government-owned park was government speech. 555 U.S. at 472. It was important to the Court’s analysis that governments have used monuments to communicate “since ancient times.” *Id.* at 470. In addition, the Court noted that governments have traditionally “exercised selectivity” in accepting and displaying donated monuments in public parks, and the city had done so in that case. *Id.* at 471–73. The Court also emphasized that “persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.” *Id.* at 471–72 (“Public parks are often closely identified in the public mind with the government unit that owns the land.”). The Court also considered the city’s decision to take ownership of “most” donated monuments, the permanence of the donated monument, and the risk that public “parks would be overrun if [governments] were obligated to accept all monuments offered by private groups.” *Matal v. Tam*, 137 S. Ct. 1744, 1759–60 (2017) (discussing and quoting *Summum*, 555 U.S. at 472).

In *Walker*, the Court found that messages on Texas’s specialty vehicle license plates also were government speech. 576 U.S. at 213. The Court

emphasized that license plates traditionally have been used to convey state messages; that license plates are “closely identified in the public mind” with the government; and that Texas maintained control over the messages conveyed on the license plates. *Id.* at 210–14.²

Most recently, in *Matal*, the Court held that a federally registered private trademark was not government speech. *Matal*, 137 S. Ct. at 1760. The Court explained that trademarks did not satisfy any of the key factors discussed in *Summum* or *Walker*, noting that “[t]rademarks have not traditionally been used to convey a Government message,” that “there is no evidence that the public associates the contents of trademarks with the Federal Government,” and that a trademark’s content did not play a role in the government’s decision whether to register the mark. *Id.*

² Although the *Walker* dissent disagreed with the majority’s conclusions, it identified several of the same or similar factors as relevant. It emphasized (1) governments’ historical means of conveying government speech, 576 U.S. at 227–28 (Alito, J., dissenting); (2) whether the public likely would associate the speech with the government, *id.* at 221–22 (rhetorically asking whether an observer would “really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars”); (3) the government’s control over the message, *id.* at 231 (discussing the government’s “selective receptivity” to any proposed message) & 228 (“[T]here is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey.”); and (4) “spatial limitations” on the number of monuments that could be displayed, *id.* at 228, 232–33. All of these factors support the conclusion that the flags Boston flies on flagpoles located directly in front of City Hall constitute government speech.

C. Flying a Flag on Boston’s City Hall Flagpoles Is Quintessential Government Speech.

Applying the several factors the Court discussed in *Summum*, *Walker*, and *Matal* to the facts of this case, the flags the City of Boston chooses to fly on its seven-story City Hall flagpole are government speech, not subject to First Amendment scrutiny.

1. Flags Are a Traditional and Powerful Way to Convey Government Messages.

There is no question that governments have long used flags and banners to communicate to the public. Just as they have erected monuments, governments have hoisted flags “[s]ince ancient times” in order “to speak to the public.” *Summum*, 555 U.S. at 470. Just as a “monument, by definition,” is “designed as a means of expression,” *id.*, so too is a flag. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (“The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”); *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (“We have no doubt that the government engages in speech when it flies its own flags over a national cemetery.”). And, like monuments, governments have always used flags “to express a government message, and members of the public understand this.” *Walker*, 576 U.S. at 229 (Alito, J., dissenting).

Governments regularly declare that their flags embody the principles that they seek to espouse, or even the state itself. In the United States, for example, we recite a pledge of alliance “to the flag” *and also* “to the republic for which it stands.” 4 U.S.C. § 4. The Executive branch has declared that “[t]he flag of the United States of America is universally representative of the principles of justice, liberty, and democracy enjoyed by the people of the United States.” Proclamation No. 2605, 9 Fed. Reg. 1957 (Feb. 18, 1944). And Congress has stated that the American “flag represents a living country and is itself considered a living thing.” 4 U.S.C. § 8(j).

A flag flown at a seat of government is quintessential government speech. *See, e.g., Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 696 (6th Cir. 2013) (holding that displays on “the most governmental of government properties: City Hall” were government speech). Both the historical use of flags and Boston’s own practice strongly weigh in favor of finding that the City speaks when it temporarily flies a substitute flag alongside the flags of the United States and Massachusetts, directly in front of the Boston City Hall.

2. The Public Understands That a Flag Flying on a Government-Owned Flagpole at the Seat of Government Sends a Government Message.

Flags are ubiquitous on and around government buildings, and the public well understands that a flag at the seat of government represents a government message.

In *Summum*, the Court found that the public would reasonably attribute the message conveyed by a monument in a public park to the government “because property owners typically do not permit the construction of such monuments on their land.” *Summum*, 555 U.S. at 471; *accord Walker*, 576 U.S. at 228 (Alito, J. dissenting) (“Here in the United States, important public monuments like the Statue of Liberty, the Washington Monument, and the Lincoln Memorial, express principles that inspire and bind the Nation together. Thus, long experience has led the public to associate public monuments with government speech.”).

The same is true of a flag flying atop a seven-story flagpole at the entrance to City Hall. Governments—like other property owners—typically do not install prodigious flagpoles to fly flags of others’ choosing. The reasonable observer attributes messages displayed on Boston’s 83-foot flagpole—which is unmistakably City property—to the City of Boston.

Moreover, to fly a flag requested by a private party, the City of Boston must lower its *own* flag. When the City uses its resources to fly a different flag in the space the City flag normally occupies, the reasonable observer understands that the City is endorsing the substitute flag’s message. As with the monuments in *Summum*, “there is little chance that observers will fail to appreciate the identity of the speaker” as the City of Boston. 555 U.S. at 471.

Petitioners and several supporting amici rely on purported facts that are not, in fact, supported by the record. Amicus the United States, for example, asserts that “flag raisings are generally conducted in conjunction with events on the plaza below” and

“there is no reason to assume that a reasonable observer would attribute to the City a flag raised during such a private event.” Brief for the United States at 18. This is mistaken on several levels.

First, nothing in Boston’s policies or practices requires that a substitute flag be associated with a private event on the Plaza.³ Indeed, the record makes clear that some number of substitute flags are *not* requested by a party holding an event on the Plaza. *See* Pet. App. at 4a (stating that third-party requests to raise a substitute flag are “typically” made “in connection with an event taking place within the immediate area of the flagpoles”) & 142a (noting that such requests are “[o]ften ... made in connection with a proposed event”). And even when a substitute flag is raised on the day of a private event, nothing in the record suggests that Boston flies the substitute flag only for the duration of such an event. In fact, a simple Internet image search reveals numerous photographs of City Hall with a substitute flag displayed over the Plaza and no associated event. A single stock image service offers no fewer than four such images, including this one showing the display of Tibetan flag:

³ It is undisputed that City Hall Plaza itself—in contrast to the City-owned flagpoles—is a public forum open to public events. *See* Resp’ts’ Br. at 6, 20.



Boston City Hall (March 2020)

See also Appendix.

Second, at 8.8 acres,⁴ City Hall Plaza is bigger than six football fields combined. To the west, the Plaza is bounded by Cambridge Street (four lanes) and faces the atrium leading to the Suffolk County Superior Court and the John Adams Courthouse, which houses the Massachusetts Appeals Court and Supreme Judicial Court. Congress Street (six lanes) and the shopping and tourist hub at Faneuil Hall and Quincy Market compose the eastern border. The John F. Kennedy Federal Building runs along the Plaza's north side, while its irregular southern side is bounded by shops, office buildings, and City Hall itself.

⁴ Casey Ross, *Boston's City Hall Plaza – past and future*, BOSTON GLOBE, <http://archive.boston.com/business/gallery/cityhallrenderings?pg=2>.

The three 83-foot-tall flagpoles are clearly visible from most of the Plaza, Cambridge Street, a portion of Congress Street and Quincy Market, and the surrounding buildings. It is an open, heavily trafficked pedestrian area, and the flagpoles themselves are roughly 100 feet from the Government Center MBTA subway station.⁵ On a typical weekday, thousands of commuters stream across City Hall Plaza traveling to and from work in Boston's economic and administrative center. The City has estimated that daily foot traffic on the Plaza is 20,000 to 30,000 people.⁶

There is *every* reason to believe that a reasonable observer—whether a visitor to City Hall, the nearby courts, government buildings, or marketplaces; a subway commuter; a passing driver; or an onlooker from a nearby building—would associate flags flown from Boston's City Hall flagpoles with the City rather than with private parties who may or may not be present on the Plaza.

Even a reasonable observer who happened to see a substitute flag while a private event was taking place on the Plaza may or may not be aware of that event, much less be close enough to hear a private speaker's message. For the reasons discussed above, even those observers within earshot of the hypothetical private event would almost certainly associate *any* flag flying

⁵ Mass. Bay Transp. Auth., *Government Center*, <https://www.mbta.com/stops/place-gover> (last visited Dec. 21, 2021).

⁶ City of Boston, *City Hall Plaza* (2015), <https://www.cityofboston.gov/mayor/cityhallplaza.asp> (last visited Dec. 21, 2021).

from a flagpole in front of City Hall with the City and not a private party. And the many observers out of earshot would only see a substitute flag flying high above City Hall next to the U.S. and Massachusetts flags. It is unrealistic to suggest that the public would associate a flag flown on Boston's City Hall flagpoles with any speaker other than Boston itself.

3. Consistent with the Traditional Practice of Governments, Boston Has Been Selective in Choosing What Flags to Fly at the Seat of Government.

Also like the monuments in *Summum*, governments have traditionally flown flags that “portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture,” *Summum*, 555 U.S. at 472, and “there is no history of governments giving equal space to those wishing to express dissenting views.” *Walker*, 576 U.S. at 229 (Alito, J., dissenting).

Just as the National Park Service would not likely erect monuments to “Jefferson Davis, Orval Faubus, or the North Vietnamese Army” because they would be repugnant to the U.S. government's views on slavery, white nationalism, and communism, *id.*, the City of Boston would have rejected a request that it fly the Nazi flag (alongside the flag of the United States no less) because doing so would violate the City's policies and contradict its goal of promoting inclusion. Pet. App. 160a (“At no time will the City of Boston display flags ... supporting discrimination [or] prejudice[.]”).

Although the particular message of the flag Petitioners sought to have flown is in no way comparable to flags that violate Boston's flag-raising policy because they convey hate speech, it is also Boston's reasonable practice and policy to avoid non-secular flags of all types. *Id.* (Boston policy not to display flags "supporting ... religious movements"). Boston did not fail to exercise selectivity; it simply had never before been presented with an application to raise a flag that violated City policy.

Petitioners and several amici argue that because the City of Boston approved 284 applications to raise a substitute flag, it failed to exercise selectivity in the messages conveyed from its flagpole and therefore created a public forum. As the City has explained, Petitioners drastically misread the record. In fact, only approximately 50 different substitute flags were approved, and of those roughly 90% were national flags raised in ethnic or cultural celebration. Resp'ts' Br. at 8. The rest were associated with either a particular holiday or a recognized day of observance. *Id.* at 8–10. Notably, Petitioners have not contended that any of these flags were contrary to Boston's flag-raising policy.

Petitioners essentially argue that, because their application was the first one the record shows was denied, this proves that Boston did not exert control over which flags to fly on its flagpole. In fact, it demonstrates the *opposite*—that Boston *does* control the messages expressed from its flagpole.

If a group had asked the City to raise the Confederate battle flag before Petitioners submitted their application, Boston clearly would have denied the request as contrary to its flag-raising policy. Pet.

App. 160a.⁷ The government speech analysis should not turn on whether Boston regularly received requests for flag raisings that were inconsistent with its flag-raising policy. It is enough that the City had a policy and followed it, including in the first time it received an application for a flag that was not consistent with its policy.

4. Limited Duration Government Speech Is Still Government Speech.

The flags Boston flies on its flagpoles are no less expressive, and no less government speech, because they are flown for a limited time. Although the Court discussed the “permanence” of the monuments in *Summum*, *Walker* recognized that “permanence” is not relevant in every case that draws the line between government speech and private speech. *Walker*, 576 U.S. at 213–14. In fact, the vast majority of speech that is indisputably government speech is of limited duration. *See, e.g., Leake v. Drinkard*, 14 F.4th 1242, 1252 (11th Cir. 2021) (city-organized and sponsored parade is government speech); *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 254 (D.D.C. 2017) (Congressional Art Competition and display of winning art is government speech); *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806

⁷ *See also* Anti-Defamation League, *Hate on Display™ Hate Symbols Database* (“The Confederate flag is one of the more common white supremacist symbols. Although still used by non-extremists, especially in the South, as a symbol of Southern heritage or history, a growing number of people recognize it as a hate symbol.”), <https://www.adl.org/hate-symbols> (last visited Dec. 21, 2021).

F.3d 1070, 1079 (11th Cir. 2015) (banners temporarily hung on school fence are government speech).

The limited time during which Boston flies a substitute flag in front of City Hall does not cut either for or against a finding that doing so is government speech. “Permanence” is simply not relevant here. The discussion of “permanence” in *Summum* dovetailed with the important practical consideration that a public park can hold only so many permanent monuments. 555 U.S. at 479. Here, Boston’s decision to fly a substitute flag for a day does not affect its ability to fly a different flag—whether its own City flag or another substitute flag—on a different day. But that in no way undermines the fact that it is *Boston* speaking when it flies a flag for any period of time on the flagpoles standing directly in front of its City Hall.

5. Boston Owns its Flagpoles, and Ownership of the Substitute Flag Does Not Alter the Analysis.

Boston owns the City Hall flagpoles, but does not limit its practice of raising substitute flags to only those flags it owns. Pet. App. 150a. This Court has considered ownership of the expressive media as a relevant, but not determinative, factor. In *Summum*, the Court noted that the city had taken ownership of “most” of the privately funded monuments installed in its public park, 555 U.S. at 473, but it regarded *all* of the monuments—even those the city apparently did not own—to be government speech. *Id.* at 472. The *Walker* Court viewed Texas’s ownership of each specialty plate design as relevant, 576 U.S. at 216, but did not suggest that ownership was a critical factor,

and *Sumnum* shows that it is not. Boston's willingness to fly a borrowed flag does not convert the City's expressive act of raising a flag on its own flagpole into private speech. See *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (government entity's editorial discretion in selecting between privately owned public art exhibits was government speech).

II. THE REPERCUSSIONS OF A RULING THAT BOSTON'S CITY HALL FLAGPOLE IS A PUBLIC FORUM.

A ruling by the Court that Boston inadvertently converted one of its City Hall flagpoles into a public forum in which it cannot constitutionally favor one viewpoint over another would have real-world negative consequences. In that event, Boston's flagpole likely would be co-opted by private speakers who would wish to imply that the government endorses their message or even by opportunists intent on using the City Hall flagpoles as a propaganda and recruiting tool. The latter is an especially serious concern in light of the rising tide of white supremacy and antisemitism, and the sophisticated recruitment and radicalization tools used by hate groups. Boston's only means to avoid public confusion or becoming the tool of speakers who espouse views antithetical to the City's own would be to refuse all private flags, stifling Boston's voice and resulting in less speech.

A. Private Speakers Would Be Drawn to the City Hall Flagpoles Because of the Likelihood that Their Message Would Be Mistaken for a Government-Endorsed Message.

The undisputed purpose of Boston’s flag-raising program is to promote diversity and strengthen community ties within Boston. *Shurtleff*, 986 F.3d at 83. Raising a meaningful flag at City Hall is a powerful way for Boston to honor a particular community. A flag flying several stories in the air next to the U.S. and Massachusetts banners and in front of the seat of government resonates with all the authority of that government and elevates the community so honored by conveying “official” recognition and support. It broadly communicates Boston’s message to the thousands who may personally view the third-party flag, and to the many more who may view an everlasting image of the flag flying in front of City Hall.

The public observes government flags in light of the truism that governments fly flags to assert their own authority and messages; they do not fly the flags of those with whom they disagree. *Cf. Walker*, 576 U.S. at 229 (Alito, J., dissenting). Here, as explained above, an observer reasonably would believe that a flag flying next to the U.S. and Massachusetts flags on a City flagpole in front of City Hall is Boston’s own speech. Groups and individuals with views that Boston may not share—or even those whose views may be anathema to Boston—would recognize the expressive power of raising a flag at City Hall. Speakers would be drawn to fly their preferred banner on the City Hall flagpoles precisely because observers

would likely to believe—mistakenly in this hypothetical—that a flag flying in front of City Hall represents the government’s views. *See, e.g., Walker*, 576 U.S. at 212-13 (“[A] person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message.”)⁸; *Mech*, 806 F.3d at 1076 (the “positive association” of one’s speech with the government’s imprimatur is “likely why” certain private speakers prefer school-approved banner program to “purely ‘private media’”). A holding that the Boston City Hall flagpoles are a public forum would allow any speaker to fly a flag expressing any viewpoint, no matter how abhorrent to the City. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (in public forum, government may not discriminate between viewpoints). It will also give that speaker a right to aggrandize that message by visually associating it with (and cloaking it in the apparent approval of) the Boston city government, not to mention the United States and Massachusetts, whose flags would fly alongside the private speaker’s.

⁸ Although the *Walker* dissent argued that this did not itself support a finding that Texas’s specialty license plates were government speech, it agreed that many private speakers “would welcome a sign of government approval” or endorsement. 576 U.S. at 232 (Alito, J., dissenting). The *Walker* dissent disagreed with the majority’s view that a driver’s chosen vanity license plate on his or her own car is, or would likely be construed as, government speech. By contrast, a flag flying on a City-owned flagpole standing directly in front of City Hall and adjacent to the flags of the United States and Massachusetts is, and would likely be construed as, government speech carrying government endorsement. *See supra* § I.C.

B. Some Private Speakers Would Be Drawn to the Powerful Propaganda Value of Expressing a Provocative Message from the City Hall Flagpoles.

Other groups and individuals may well wish to convey a message from the City's flagpoles that most viewers would understand to be antithetical to Boston's policies, goals, and values in order to generate controversy and raise the profile of the message and the messenger. Whereas Boston seeks to promote diversity and honor numerous communities through its flag program, Pet. App. 143a, a group could, for example, fly the Nazi or Confederate flag in front of City Hall as a direct challenge to those values—and to show that Boston cannot stop them from doing so.

The prominent display of white supremacist or other extremist banners would be an enormous coup for such groups. Among other things, it would suggest a level of power, or even triumph, that such groups crave.

Victors raise their flags in triumph. *Cf.* Resp'ts' Br. at 24. This well-understood act resonates deeply, and it may invoke feelings of American pride and patriotism, as in the iconic photograph of six Marines raising the U.S. flag over Iwo Jima in 1945, or joy at seeing the Soviet flag waved over the Reichstag to signal victory in the Battle of Berlin.



Raising the Flag on Iwo Jima (Feb. 23, 1945).



Red Army Soldiers Raising the Soviet Flag Over the Reichstag (April 30, 1945)

However, a perceived victory over American ideals can, and recently has been, celebrated in much the same way. In late July 2021, as the Taliban began to take control of large areas of Afghanistan, it released an image of four soldiers raising the Taliban flag in a

mocking echo of the Iwo Jima image.⁹ The point, of course, was not to claim a particular hill or to communicate anything to those present. *The photo itself was the point.* Even if a banner does not wave for long, in a media-saturated, intensely connected world, the “photo op” is a powerful propaganda tool.



Afghanistan (July 2021)

Requiring Boston to fly any flag on its City Hall flagpoles regardless of viewpoint would invite extremists and others whose flags would violate Boston’s flag-raising policy to create similar faux-triumphal propaganda images.

The events of the 2017 “Unite the Right” rally in Charlottesville, Virginia are instructive. The Charlottesville gathering was heavily promoted by several white supremacist groups in a successful effort to create a show of force and, critically, to use

⁹ J.D. Simkins, *Taliban photo appears to mock Iwo Jima flag raising in latest propaganda push*, MARINE CORPS TIMES (Aug. 21, 2021), <https://www.marinecorpstimes.com/off-duty/military-culture/2021/08/21/taliban-photo-appears-to-mock-iwo-jima-flag-raising-in-latest-propaganda-push/>.

mainstream media coverage as a recruitment tool. The rally was the largest gathering of white supremacists in more than a decade,¹⁰ and included members of the National Socialist Movement (many carrying the Nazi flag), the Traditionalist Workers Party (another neo-Nazi group), the League of the South, and Vanguard America (whose adherents included James Fields, who was convicted of murder after crashing his car into a crowd of counter-protesters, killing one and injuring nineteen).¹¹



Charlottesville, VA (Aug. 11, 2017)

On the evening of August 11, a group of white supremacists carrying torches marched across the University of Virginia campus to the Rotunda, where they surrounded a statue of the University's founder, President Thomas Jefferson.

¹⁰ Anti-Defamation League, *Racists Converge on Charlottesville: 2017 Impact Report*, <https://www.adl.org/2017-impact-report/racists-converge-on-charlottesville>.

¹¹ Anti-Defamation League, *Anti-Semitism on Full Display in Charlottesville* (Aug. 15, 2017), <https://www.adl.org/blog/anti-semitism-on-full-display-in-charlottesville>.

Marchers threw Nazi salutes as they waved swastika flags, proudly wore swastika pins and shirts, and shouted “sieg heil!”.... “Blood and soil,” which the white supremacists chanted several times, is the translation of the Nazi slogan, “Blut und Boden.” And at least once, white supremacists changed their refrain, “You will not replace us” to “Jews will not replace us.”

Id.

The marchers were at the Rotunda for a mere nine minutes.¹² The images, however, live on as a permanent testament to the protesters’ message of hate—exactly as intended. The chief instigator of the Unite the Right rally tipped off the press about the group’s “take over” of the Rotunda.¹³ Photos and videos of the rally appeared almost immediately in media outlets and social media around the world. As one observer noted: “The whole thing has been orchestrated around trying to get media attention.... They used the controversy around the [Robert E.] Lee statue as a peg but what you really have is all these little hate groups competing in the same space trying to make a name for themselves. They’ll use media

¹² University Police Department, *August 11 Timeline, U. VA. August 11 And 12, 2017: Recovery and Response Documents* (Sept. 11, 2017), <https://response.virginia.edu/system/files/public/upd-timeline.pdf>.

¹³ Joe Heim, *Recounting a Day of Rage, Hate, Violence, and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottes-ville-timeline/>.

coverage and strategically controlled images [from the gathering] to bring in new members.”¹⁴



Charlottesville, VA (Aug. 12, 2017)

That media strategy paid off. As ADL has observed, “[t]he violence on the streets of Charlottesville has kindled two major tracks of white

¹⁴ Cynthia Littleton, *Analysis: Hate Groups Bank on Charlottesville Media Coverage as Recruitment Tool*, VARIETY (Aug. 12, 2017) (second alteration in original), <https://variety.com/2017/tv/news/charlottesville-rally-unite-the-right-media-coverage-1202525825/>; see also Bert Johnson, *California White Supremacist Says Charlottesville May Boost Recruitment*, KQED (Aug. 14, 2017) (quoting the leader of a white supremacist organization: “I think there will be some people that, as a result of [the Charlottesville events and fallout], will come over to us.”), <https://www.kqed.org/news/11611957/california-white-supremacist-says-charlottesville-may-boost-recruitment>.

supremacist activity.”¹⁵ This includes “the rampant dissemination of propaganda designed to promote their views and attract attention.” *Id.* During the 2018–2019 school year, for example, ADL documented 313 cases of white supremacist propaganda on U.S. college campuses—a 7% increase from the prior academic year.¹⁶

ADL has also tracked a broader series of violent attacks in the two years since the Charlottesville rally.¹⁷ These “include the deadly white supremacist shooting rampages in Parkland, Pittsburgh, Poway and El Paso. ... In each of these cities, white supremacist murderers acted on the threat embodied in the chant made famous in Charlottesville: “Jews will not replace us! You will not replace us!”¹⁸

¹⁵ Anti-Defamation League, *Two Years Ago, They Marched in Charlottesville. Where Are They Now?* (Aug. 8, 2019), <https://www.adl.org/blog/two-years-ago-they-marched-in-charlottesville-where-are-they-now>.

¹⁶ Anti-Defamation League, *White Supremacists Continue to Spread Hate on American Campuses* (June 27, 2019), <https://www.adl.org/blog/white-supremacists-continue-to-spread-hate-on-american-campuses>.

¹⁷ Anti-Defamation League, *supra* note 15.

¹⁸ *Id.*; see also Anti-Defamation League, *The Decade’s Top 10 Incidents of Hate*, <https://www.adl.org/resources/reports/the-decades-top-10-incidents-of-hate>; Anti-Defamation League, *Deadly Shooting at California Chabad Highlights Threat to Jewish Houses of Worship* (Apr. 27, 2019), <https://www.adl.org/blog/deadly-shooting-at-california-chabad-highlights-threat-to-jewish-houses-of-worship>; Andy Campbell, *Hate Has Flourished in 2 Years Since ‘Unite the Right’ Rally in Charlottesville*, HUFFPOST (Aug. 12, 2019) (“White supremacists have carried out numerous attacks across the globe since that
(footnote continued on next page)

U.S. incidents of hate, extremism, and antisemitism have spiked in recent years. According to the most recent FBI Hate Crime Statistics, there were 8,263 reported hate crime incidents in 2020.¹⁹ This represents a 13% increase in incidents over the prior year, and more hate crimes were reported last year than any year in more than a decade.²⁰ In 2020, ADL

deadly weekend in Charlottesville, often with support or endorsement from their peers online. The killing of a gay Jewish college student in January 2018 was cheered on by a violent neo-Nazi group called Atomwaffen Division, to which the alleged killer subscribed. And after a white supremacist shot and killed 17 people at a high school in Parkland, Florida, people on the message board 4chan celebrated by crafting conspiracy theories and hoaxes to further victimize the students.”), https://www.huffpost.com/entry/charlottesville-anniversary-hate-flourishes-unite-the-right_n_5d506f6be4b0fd2733f1f3d4.

¹⁹ U.S. Dept. of Justice, *FBI Releases 2020 Hate Crime Statistics*, <https://www.justice.gov/hatecrimes/hate-crime-statistics>; see also Anti-Defamation League, *ADL Deeply Alarmed by 2020 FBI Hate Crimes Data; Reiterates Calls for Increased Reporting* (Aug. 30, 2021), <https://www.adl.org/news/press-releases/adl-deeply-alarmed-by-2020-fbi-hate-crimes-data-reiterates-calls-for-increased>; Anti-Defamation League, *ADL: White Supremacist Propaganda Hits All-Time High in 2020* (Mar. 17, 2021), <https://www.adl.org/news/press-releases/adl-white-supremacist-propaganda-hits-all-time-high-in-2020>; Anti-Defamation League, *Hate Crimes Rise to Highest Level in 12 Years; White Supremacist Praise of the Taliban Takeover Concerns US Officials* (Sept. 2, 2021), <https://www.adl.org/blog/hate-crimes-rise-to-highest-level-in-12-years-white-supremacist-praise-of-the-taliban-takeover>.

²⁰ U.S. Dept. of Justice, *supra* note 19; see also Joe Hernandez, *Hate Crimes Reach the Highest Level in More than a Decade*, NPR (Sept. 1, 2021) (also noting that the data is underreported because numerous local jurisdictions declined to provide hate
(footnote continued on next page)

tracked 6,972 extremist and antisemitic incidents.²¹ In 2020–21, ADL tracked no fewer than 430 extremist and antisemitic incidents in Massachusetts, including one racially motivated murder, two terrorist plots/attacks, 15 white supremacist rallies and events, and 90 antisemitic incidents of vandalism or harassment.²²

In light of this disturbing rise in hate and extremism, the Court’s decision in this case is all the more consequential. A ruling that members of the public have a First Amendment right to fly their preferred flag from the City Hall flagpoles would allow anyone to fly any flag, even if Boston (or any government with a similar program) finds the promoted message to be repugnant. White supremacists and other extremists would recognize the ability to fly their flags over Boston as a valuable propaganda opportunity, which they would surely seize.

In contrast, a ruling that Boston may select the messages that appear on its City Hall flagpoles would not prohibit or limit any private party’s speech. Indeed, although Boston certainly would refuse to fly a Nazi flag, such groups are unquestionably permitted

crime data), <https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade>.

²¹ Anti-Defamation League, *ADL H.E.A.T. Map: Hate, Extremism, Antisemitism, Terrorism*, <https://www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-maps>; see also Stop APPI Hate, *National Report (Through September 2021)* (10,370 hate incidents against Asian American and Pacific Islander persons reported to Stop APPI Hate from March 19, 2020 to September 30, 2021), <https://stopaapihate.org/national-report-through-september-2021/>.

²² Anti-Defamation League, *supra* note 21.

to—and do—hold rallies in public forums throughout the City, which are subject only to reasonable time, place, and manner limitations. *See Summum*, 555 U.S. at 469. For example, in June 2020, “a fairly devout group of neo-Nazis” based in Massachusetts displayed the Nazi sonnenrad banner at a rally in front of the Massachusetts State House, which is located a short walk from City Hall Plaza.²³ A spokesperson for the Nationalist Social Club proclaimed, “We’re asserting ourselves publicly.”²⁴ The First Amendment protects their right to do so. But the First Amendment does not grant such a group the right to *require* the City of Boston to fly a Nazi flag over City Hall Plaza, or to create the false impression that the City endorses their hate-based ideology.

* * *

This case is not about the value of religious speech versus secular speech. Nor is the Court asked to referee any debate between those who espouse hate and those who promote an inclusive society. Private speakers are free to espouse views on those or any

²³ Danny McDonald, ‘A fairly devout group of Neo-Nazis.’ *Local white supremacist group has been active in recent weeks*, BOSTON GLOBE (July 14, 2020) (discussing activities of neo-Nazi group including displaying Nazi “sonnenrad” flag at a rally in front of the Massachusetts State House and hanging a banner from a Boston overpass reading “New England is ours”), <https://www.bostonglobe.com/2020/07/14/metro/fairly-devout-group-neo-nazis-local-white-supremacist-group-has-been-active-recent-weeks/>; see also Anti-Defamation League, *Hate on Display™ Hate Symbols Database: Sonnenrand*, <https://www.adl.org/education/references/hate-symbols/sonnenrad> (last visited Dec. 21, 2021).

²⁴ McDonald, *supra* note 23.

other subject, and they may do so regardless of whether their views are welcomed or loathed by the government or their fellow citizens. This case is about whether a private speaker can force the City of Boston to communicate that private message from its own towering flagpoles in front of City Hall, and thereby lend government imprimatur to a private speaker's message.

A finding that Boston, much to its own surprise and contrary to its intent, has created a public forum on its own flagpole would result either in groups usurping the City's flagpole as a propaganda tool or, more likely, in less speech. Boston has already suspended its flag-raising program pending this Court's review, *see supra* at 7, and it would almost certainly feel compelled to terminate the program if the Court rules against it. Other government entities similarly would be put in the position of having to refuse most or even all privately donated expression, even temporary expression, lest those governments be found to have relinquished control over their message. In such event, those who oppose the values Boston's democratically elected government seeks to promote through the flag-raising program—inclusion, diversity, and understanding across different communities—will have gained a “heckler's veto.” *Summum*, 555 U.S. at 468 (citation omitted).

Although the expressive medium in this case is different from the monuments in *Summum*, the practical considerations are no less real.

If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either “brace themselves for an influx

of clutter” or face the pressure to remove longstanding and cherished monuments.... The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Id. at 479–80. The same is true here.

CONCLUSION

ADL respectfully urges the Court to affirm the First Circuit’s decision.

December 22, 2021 Respectfully submitted,

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APPENDIX

1a

Appendix



Boston City Hall (Sept. 2019)
(showing display of Puerto Rican flag)



Boston City Hall (Mar. 2020)
(showing display of Tibetan flag)

2a



Boston City Hall (Nov. 2019)
(showing display of Lithuanian flag)



Boston City Hall (Apr. 2017)
(showing display of transgender pride flag)