No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, *et al.*,

Petitioners,

v.

CITY OF BOSTON, *et al.*,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION, THE NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

in Support of Petitioner

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INTERESTS OF *AMICI CURIAE*[1]

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Massachusetts, seek to ensure that the free exercise of religion and the autonomy of religious organizations is protected.

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[1] The parties were given timely notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. PJI often represents religious organizations whose members wish to speak and congregate publicly without unconstitutional, discriminatory restrictions.

SUMMARY OF ARGUMENT

Providing groups the opportunity to communicate on government property does not give the government the right to discriminate based on the content of their speech. Nor does a permitting process convert private speech into government speech. That conclusion follows from both this Court's forum analysis under its Free Speech Clause jurisprudence and its Free Exercise Clause precedents requiring religious organizations to be treated in a non-discriminatory basis when government benefits are dispensed or restrictions imposed. Both lines of authority condemn Boston's actions here. Even if Boston had set up a limited, rather than a designated, forum, the First Circuit was manifestly wrong in holding that Petitioners and the Christian flag they sought to exhibit did not qualify for participation in it.

The First Circuit also misused the

Establishment Clause to justify Boston's viewpoint discrimination against religious speech. In doing so, it relied on its own decision in *Carson v. Makin*, which this Court will hear argued this coming term. The Court should promptly grant the petition, but, at a minimum, it should hold this petition in abeyance pending its decision in *Carson*.

ARGUMENT

Your *Amici* concur with Petitioners that (a) Boston established, by policy and practice, a designated public forum from which they were wrongfully excluded; and (b) the First Circuit wrongly identified Petitioners' speech as government speech. Without repeating the petition's arguments, your *Amici* wish to raise briefly the following supplementary points.

I. Even If the Forum Were a Limited One, Boston Improperly Denied Petitioners' Request

As if it were the beginning and end of the issue, the First Circuit repeatedly states that Boston had restricted use of the flagpole to "flags of countries, civic organizations, or secular causes." *See, e.g.*, *Shurtleff v. Boston*, 986 F.3d 78, 84, 91, 92, 93 (1st Cir. 2021). Without analysis, it excludes from this grouping Petitioners and their desire to exhibit the Christian flag as their symbol. Two points deserve mention.

First, even in limited public forums on government property that require advance permission for their use, discrimination against

religious viewpoints violates the Free Speech Clause. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Second, it is befuddling that the First Circuit apparently does not regard churches and other religious organizations that may exhibit the Christian flag as "civic organizations." We deem it unnecessary to launch into an excursus of de Toqueville and a multitude of others who would beg to differ. It is unnecessary, in part, because the Supreme Court in *Lamb's Chapel* affirmed that religious organizations are "civic" bodies and that prohibiting a religious expression on a topic otherwise allowed in the limited public forum is unconstitutional viewpoint discrimination. 508 U.S. at 391-94.

II. The First Circuit's Decision Is Inconsistent with This Court's Recent Precedent Prohibiting Discrimination Against Religious Groups in the Granting of Government Benefits

In a recent series of decisions beginning with *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), and continuing with *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), this Court has made it pellucid that a government offends the Free Exercise Clause when it withholds a government benefit from, or imposes greater restrictions on, religious organizations because of their religious status. That

is exactly what Boston has done here, and explicitly so. Incredibly, the First Circuit sees as an excuse that no other flag flown had been described in religious language. 986 F.3d at 96. That only defines the problem. Governments may not deny or restrict benefits to civic organizations because of their religious status.

III. The Establishment Clause Does Not Justify Boston's Discrimination Against the Christian Flag, and, at a Minimum, This Case Should Be Held Until *Carson v. Makin* Is Decided

The First Circuit also gives credence to Boston's claim that, by discriminating against Petitioners' religious speech, it was honoring the Establishment Clause. The petition well discusses how this part of the court's ruling contradicts the precedent of this Court and that of other circuits. Two additional comments are in order.

First, it is facially incredible to suggest that display of the Christian flag on Boston's third flagpole would be considered by a reasonable observer to be government speech. Any such reasonable observer would know that this flagpole has been used hundreds of times over a few years by private organizations on a temporary basis and that the city does not agree with everything espoused by each of those organizations or with everything those flags represent. A reasonable observer would understand any flag's exhibition for what it is stated to be: a benefit granted by the city to allow a private organization to fly its selected emblem for a short time—in other words, an exercise in private, not

government, speech. *See Lamb's Chapel*, 508 U.S. at 394-96 (rejecting argument similar to Boston's in part because the limited forum was used by many different civic organizations).

Second, the First Circuit when discussing Establishment Clause issues relied in large part on its own recent decision in *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020). *See* 986 F.3d at 95. This Court has recently granted the petition to review *Carson* (No. 20-1088, July 2, 2021), and the First Circuit's decision appears manifestly contradictory to this Court's recent ruling in *Espinoza*. While the questions presented by this case that do not overlap those of *Carson* deserve independent consideration by this Court, such that the Court should grant this petition at its earliest convenience, at the very least the Court should reserve consideration of this petition until after its decision in *Carson*.

CONCLUSION

The petition should be granted for the reasons stated in it and for the additional reasons stated above. The First Circuit's decision is manifestly contrary to this Court's precedent and shows a hostility toward, rather than a protection of, our religious freedoms.

Respectfully submitted
this 26th day of July, 2021,

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