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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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If allowed to stand, the First Circuit's novel "*Summum / Walker* Test" (Pet. 22–34) would replace the designated public forum category under this Court's forum analysis with a near presumption of government speech, allowing for unchecked viewpoint discrimination. The First Circuit's rigid and formulaic test allowed it to disregard the City's explicit policy and undisputed practice intentionally designating the City Hall Flag Poles a public forum for flag raising events, and to wrongly accept the City's argument that the Establishment Clause justified its censorship. The First Circuit failed to duly consider that (1) the City's application form designates the Flag Poles as one of "Boston's public forums" open to "all applicants" for private speech; (2) the City never censored a flag in the twelve years prior to Camp Constitution's application; (3) the City approved 39 flags (averaging over three per month) in the year prior to Camp Constitution's application; and (4) the approved flags of the foreign countries could not be government speech because under Massachusetts law it is illegal to raise a foreign nation's flag upon City Hall. (Pet. 22–23.)

The City's Brief in Opposition does not reconcile the conflict between the First Circuit's test and the First Amendment precedents of this Court and nearly every other Circuit. Rather, the City tries—and fails—to maintain the First Circuit's diversion from the legal consequence of the City's intentional forum designation.

A. 284 Private Flag Raisings With No Denials Proves They Are Compatible With the City's Use of Its Flag Poles.

1. The temporary flag raisings do not implicate the permanence essential to *Summum*'s government speech finding.

The City's express policies and documented practices establish that it intentionally designated the City Hall Flag Poles as a public forum for flag raising events. (Pet. 26–28.) The City expressly includes the City Hall Flag Poles in its official documents identifying "Boston's public forums" open to "all applicants." (Pet. 4–8; App. 132a–140a.) Nevertheless, despite 284 approvals with no denials (including 39 approvals averaging more than three per month the year before Camp Constitution was denied), the City contends it could not have intended to create a designated public forum for flag raisings on the Flag Poles because such flag raisings (which occurred for twelve years) would be somehow incompatible with the City's own use of the Flag Poles. (Br. Opp'n 21–25.)

The undisputed record facts, however, show that the temporary nature of the flag raisings (e.g., Camp Constitution requested an hour (App. 131a)) ensures the Flag Poles are continually open for the City's own speech (e.g., the usual City of Boston Flag (App. 141A–142a)), as well as the speech of a large number of other private organizations allowed to raise their flags pursuant to the City's "public forums" for "all applicants" policy, serving the City's

express purposes of "foster[ing] diversity and build[ing] and strengthen[ing] connections among Boston's many communities." (App. 141a–143a.)

In *Pleasant Grove City v. Summum*, the Supreme Court distinguished such accommodation of temporary private speech from permanent monuments constituting government speech:

> The 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*. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. . . . A public university's buildings may offer meeting space for hundreds of student groups. A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators.
>
> By contrast, public parks can accommodate only a limited number of *permanent* monuments.

555 U.S. 460, 478 (2009) (emphasis added) (citations omitted).

The undisputed record facts show where flag raisings on Boston's City Hall Flag Poles fit within the above illustrations: the Flag Poles are "capable

of accommodating a large number of public speakers without defeating the essential function of the [Flag Poles]," *id.*, because they have done so frequently and continually, for "all applicants" over twelve years. (App. 132a–142a, 149a–150a.) Thus, the Flag Poles "over the years, can provide a [forum] for a very large number of [flags] . . . for all who want to speak . . . ." 555 U.S. at 479. *Summum*'s government speech analysis could only apply to Camp Constitution if Camp Constitution had requested to permanently occupy the third Flag Pole or place its own flagpole in the ground. *Cf. United Veterans Memorial & Patriotic Ass'n of the City of Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 475 (S.D.N.Y. 2014) ("United Veterans' flags are displayed for long periods of time (until they become tattered) and then promptly replaced [such that] their presence at the Armory is nearly as constant as that of the park monuments in *Summum*."), *aff'd*, 615 F. App'x 693 (2d Cir. 2015).

To save its incompatibility point, the City relies heavily on governments' historical use of flags to communicate their own messages. (Br. Opp'n 9–10.) But this is irrelevant to a determination of whether *Boston* has intentionally opened a designated public forum on its Flag Poles to supplement their traditional use. The proper inquiry is whether the City has a policy and practice designating a forum on *its* Flag Poles, not whether *other governments* have designated flag poles as forums. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–03 (1985). The City's policy and practice show Boston intentionally opened a

designated public forum for flag raisings on the City Hall Flag Poles.

The City also tries to argue its Flag Poles are incompatible with a designated public forum, despite its express policies and 284 flag raising approvals with no denials over twelve years, by positing that the Flag Poles are used for private flag raisings only "15% of the time." (Br. Opp'n 14–15.) But the City's math proves both too little and too much.

The argument proves too little because a designated public forum is measured by intent, not a speech quota. No precedent holds a public forum is less a public forum because it is not being used to capacity. And even if the rate of usage was relevant, the City's 15% estimate is meaningless without meaningful comparators from other public forums. To be sure, Boston's expansive, open-air City Hall Plaza is no less a public forum because it is empty most of the time. (App. 167a ("'During the majority of the days of the year, it's kind of empty . . . or kind of underutilized and formless . . . .'").) By contrast, the City Hall Flag Poles are used for private expression almost weekly. (App. 142a–143a.)

The City's 15% usage argument also proves too much because the City's documented "public forums" for "all applicants" policy, and resulting 100% approval rate for twelve years, proves the Flag Poles can accommodate all the private speech that is requested, with room for more. There is no evidence that maintaining a no-denial designated public forum for flag raisings on its Flag Poles has ever

disrupted Boston's own use of its Flag Poles for its own speech (i.e., actual government speech) at all times in between the approved flag raisings—which according to the City is the vast majority of the time. Thus, the City can fly the City of Boston flag, or the Boston Bruins flag, or any other flag—whenever it wants. This reality further differentiates Boston's Flag Poles from the public park in *Summum* that was space-constrained for purposes of permanent monuments.

2. The City's Record of Approving All Flag Raisings Confirms It Intended to Designate a Public Forum *on* the Flag Poles.

To avoid the legal consequence of having designated its Flag Poles as one of "Boston's public forums" for "all applicants," the City strains to carve out a "selective," "separate and distinct flag-raising program" based on a feigned difference between "the ***location at the*** City Hall Flag Poles," and the Flag Poles ***as flag poles.*** (Br. Opp'n 15, 19–20.) This contrived distinction, however, is invalid as a matter of undisputed fact and untenable as a matter of law.

The undisputed record shows the distinction between "the location at" the City Hall Flag Poles and the Flag Poles themselves, *qua* flag poles, is invalid as a matter of fact. The Flag Poles are located at City Hall Plaza, and the City's written policies and application forms designate City Hall Plaza and the City Hall Flag Poles as two distinct "public forums." (App. 132a–137a, 141a.) It would have been superfluous to name the Flag Poles as one of

"Boston's public forums" if the intent was merely to identify some patch of the Plaza grounds *at* the Flag Poles, because those grounds were already covered by the designation of City Hall Plaza.

Furthermore, the 284 flag raisings approved before Camp Constitution's request (App. 142a–143a)—*on and at* the City Hall Flag Poles—were initiated by applications received and processed by the City according to the same procedures as all other events at "Boston's public forums," and pursuant to the same open invitation to "all applicants." (App. 140a ("The City processes all applications for public events on City properties, including flag raisings, in the same way.").) Thus, the City's argument that it operates a "separate and distinct flag-raising program," which is not subject to the City's invitation to its "public forums" for "all applicants," is directly contradicted by the City's policies, procedures, and record.

The City's position that the Flag Poles are a public forum for a private organization's flag raising event (*at* the Flag Poles), but not for the private organization's flag itself (*on* the Flag Poles)—even though the private organization owns the flag, provides the flag, flies the flag only during its event, and retains ownership of the flag after the event—is

legally untenable.[1] It cannot be true that the private organization's flag is government speech while every other aspect of the flag raising event under the flag is private speech. The Court should reject the City's false, litigation-born distinction. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 871–72 (2005).

B. The City's Minimal Application to Access the Flag Poles Forum Does Not Turn the Private Speech Into Government Speech.

The City claims its control and final approval authority over private flag raisings transforms the private organizations' flags into government speech. (Br. Opp'n 12–15.) But the "exercise" of "direct" and "effective" government control essential to the Supreme Court's government speech finding in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), does not exist in Boston where 284 flag raisings were approved with no review of the flags whatsoever.

In *Walker*, the relevant government control over the disputed specialty license plate messages was the state's "*direct control* over the messages conveyed," where the state "*actively exercised* this authority" and "*rejected* at least *a dozen* proposed

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[1] The City deems significant the fact that groups raising flags must obtain a hand crank from the City (Br. Opp'n 21), but providing the hand crank is no different, constitutionally, from providing a City building key to a private group for a meeting—neither act communicates endorsement of the private group's message.

designs." 576 U.S. at 213 (emphasis added). Thus, the Court concluded, "Texas has *effectively controlled* the messages conveyed by *exercising* final approval authority over their selection." *Id.* (emphasis added) (cleaned up). In this case, however, Boston does not actively exercise its authority to reject or even look at proposed flags, and there is no record of any denial prior to Camp Constitution's. (App. 132a–143a, 149a–150a.) To be sure, the City *says* it must review and approve flag raising requests (App. 149a), but the City's bare "statement of intent [is] contradicted by consistent actual policy and practice" of never so much as looking at a flag before approving it. *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004). Thus, the City's claim of "control" over flag raising messages is another litigation contrivance (*see supra* Part A.2), contradicted in full by the undisputed evidence of the City's actual practice.[2]

Just as this Court has held that the mere involvement of private parties in selecting a

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[2] The City has denied one flag raising request since denying Camp Constitution's. (App. 160a.) The only reason given was "the City's sole and complete discretion." (*Id.*) With no other evidence, this lone, *post hoc* denial does not alter the decisiveness of the City's uninterrupted streak of 284 approvals with no denials in the designated public forum analysis. Just as "[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum," *Ridley*, 390 F.3d at 78, a lone, aberrational departure from the City's otherwise perfect record of approving every request does not defeat the City's intent to create a public forum.

government message does not, in and of itself, make the message private expression, *see Walker*, 576 U.S. at 210, 217, the mere involvement of the government in providing a forum likewise does not constitute sufficient control to make the message government speech. *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34–35 (2d Cir. 2018) ("[S]peech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some ways allows or facilitates it."). Accepting the City's rationale would vastly expand and sanction dangerous aspects of the government-speech doctrine: "[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. *If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints*." *Matal*, 137 S. Ct. at 1758 (emphasis added).[3] Thus, the government cannot, merely by reserving to itself "approval" rights, convert to government speech the private speech it openly solicits and automatically allows in its designated forums.

Finally, the City proves by its arguments that the flags of foreign countries repeatedly raised on the Flag Poles by civic affinity groups cannot

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[3] The City protests that *Matal* is trademark case. (Br. Opp'n 16–17.) But the quoted admonition from the Supreme Court's opinion *precedes* and transcends the Court's application of the doctrine to trademarks. *See Matal*, 137 S. Ct. at 1758.

reasonably be viewed as government speech. The City argues flags have a "traditional use . . . as a means for government to . . . identify *itself* to the public." (Br. Opp'n 9 (emphasis added).) But Boston does not identify *itself* when it allows civic affinity groups to raise their foreign nations' flags—the groups are identifying *the groups*, not Boston. No observer would conclude Boston is identifying itself as Turkey for the hour of the Turkish flag raising event.

Moreover, it would be a crime for any Boston official to "display[] the flag . . . of a foreign country upon the outside of a . . . city . . . building," Mass. Gen. Laws ch. 264, § 8. The City claims this law cannot cover flags flown on the City Hall Flag Poles because they are "separate and apart from the City Hall building." (Br. Opp'n 15–16.) But the law prohibits other nations' flags "upon the outside" of a city building, and the common definition of "upon" includes "in . . . approximate contact with." Dictionary.com, *upon*, https://www.dictionary.com/browse/upon (last visited Sept. 16, 2021). So by the City's own description of the Flag Poles elsewhere in its brief—"prominently located in front of the entrance to City Hall, which is the seat of the city government" (Br. Opp'n 1)—flags on the Flag Poles are "upon the outside" of City Hall. Thus, the Flag Poles are either so closely associated with City Hall that flying foreign nations' flags on them violates the statute, in which case it is unreasonable to conclude the flags are Boston's government speech, or the Flag Poles are sufficiently "separate and apart from the City Hall building" that the other nations' flags do not compel the conclusion that Boston is speaking

through them. Boston's government speech argument fails either way.

C. Even if the Flag Poles Are a Nonpublic or Limited Public Forum, the City Unconstitutionally Discriminated Against the Religious Viewpoint of Private Speech.

Even in a nonpublic or limited public forum, regulations of speech must still be viewpoint neutral and reasonable given the forum's purposes. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993). The City's exclusion of Camp Constitution's speech is neither.

First, the City skipped over the content of Camp Constitution's flag and rejected it based on its Christian viewpoint (i.e., it was called "Christian"). (Pet. 34–36; App. 155a–156a.) This ends the inquiry. *See Lamb's Chapel*, 508 U.S. at 393 n.6; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.").

Second, even if it was somehow not viewpoint discriminatory to reject a civic organization's flag for being "Christian," the exclusion was unreasonable given the express purposes of the flag raising forum: to "*commemorate* ***flags from many*** *countries* ***and communities*** *at Boston City Hall Plaza during the year*," to create an environment in the City where **everyone feels included, and is treated with**

respect," and "to **foster diversity** and build and strengthen connections among Boston's **many communities**." (App. 143a (bold emphasis added).) Given these express purposes, the City did not act reasonably in excluding Camp Constitution's flag raising to commemorate the civic contributions of Boston's Christian community. (App. 130a–131a, 156a.) Indeed, Rooney admitted the exclusion did not serve any of these purposes, but was solely to avoid perceived Establishment Clause liability for granting a religious flag equal access. (App. 157a.) Thus, the City's exclusion of Camp Constitution's honoring of Boston's Christian community cannot survive the neutrality and reasonableness inquiries.

CONCLUSION

For the foregoing reasons, and those in Camp Constitution's Petition, the Petition should be granted.

Dated this September 17, 2021.

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