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 THE PETITIONERS

Mathew D. Staver
Counsel of Record
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org

Counsel for Petitioners

QUESTIONS PRESENTED

"[T]he [City] seeks to accommodate *all applicants* seeking to take advantage of the City of Boston's *public forums*."[1]

The City of Boston designated its City Hall Flag Poles as one of several "public forums" for "all applicants," and encourages private groups to hold flag raising events at the Flag Poles "to foster diversity and build and strengthen connections among Boston's many communities." Over the course of twelve years prior to the denial of Camp Constitution's application that gave rise to this litigation, the City approved 284 such flag raisings by private organizations, with zero denials, allowing them to temporarily raise their flags on the City Hall Flag Poles for the limited duration of their events. But when Camp Constitution applied to raise a flag during its flag raising event to celebrate the civic contributions of Boston's Christian community, during the week of the national recognition of Constitution Day and Citizenship Day, the City denied the request without viewing the proposed flag solely because it was called "Christian" *on the application*.

The questions presented are:

1. Whether the First Circuit's failure to apply this Court's forum doctrine to the First Amendment challenge of a private religious organization that was denied access to briefly display its flag on a city

---

[1] *See* p. 7, *infra*.

flagpole, pursuant to a city practice and policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, conflicts with this Court's precedents holding that speech restrictions based on religious viewpoint or content violate the First Amendment or are otherwise subject to strict scrutiny and that the Establishment Clause is not a defense to censorship of private speech in a public forum open to all applicants.

2. Whether the First Circuit's classifying as government speech the brief display of a private religious organization's flag on a city flagpole, pursuant to a city practice and policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, unconstitutionally expands the government speech doctrine, in direct conflict with this Court's decisions in *Matal v. Tam*, 137 S. Ct. 1744 (2017), *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

3. Whether the First Circuit's finding that the requirement for perfunctory city approval of a proposed brief display of a private religious organization's flag on a city flagpole, pursuant to a city practice and policy expressly designating the flagpole a public forum open to all applicants with hundreds of approvals and no denials, transforms the religious organization's private speech into government speech, conflicts with this Court's precedent in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and Circuit Court precedents in *New Hope Family*

Servs., Inc. v. Poole, 966 F.3d 145 (2d Cir. 2020), *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018), and *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004).

PARTIES

Petitioners, Harold Shurtleff and Camp Constitution, were the plaintiffs–appellants in the court below. Respondents, the City of Boston and Robert Melvin, in his official capacity as Commissioner of the City of Boston Property Management Department, were the defendants–appellees in the court below.[2]

CORPORATE DISCLOSURE STATEMENT

Petitioner Shurtleff is an individual, and Petitioner Camp Constitution is an unincorporated association and public charitable trust. Neither Petitioner has a parent corporation or publicly held stock owner.

---

[2] Petitioners originally sued Gregory T. Rooney, in his official capacity as Commissioner of Property Management, but Respondent Robert Melvin is Rooney's successor in office and automatically substituted for Rooney herein. *See* S. Ct. R. 35.3.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES iv

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES x

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

A. Camp Constitution's Flag Raising Request. 2

B. The City's Flag Raising Approvals Under Its Policies and Practices Designating the City Hall Flag Poles a Public Forum. 4

C. The City's Denial of Camp Constitution's Application to Use the City Hall Flag Poles Forum. 13

D. The City's Subsequent Written Flag Raising Policy. 18

II. PROCEDURAL HISTORY 20

SUMMARY OF THE ARGUMENT..... 21

ARGUMENT 23

I. THE CITY OF BOSTON, BY WRITTEN POLICY AND LONGSTANDING PRACTICE, INTENTIONALLY CREATED A DESIGNATED PUBLIC FORUM FOR PRIVATE SPEECH ON ONE OF ITS CITY HALL FLAG POLES OPEN TO ALL COMERS TO TEMPORARILY RAISE THEIR FLAGS. 23

A. Camp Constitution's Challenge of the City's Policy Excluding Camp Constitution's Flag Requires the Court to Determine Whether the City Intended to Designate the City Hall Flag Poles a Public Forum. 24

B. By Written Policies and Longstanding Practices Over Twelve Years, Boston Intentionally Designated One of Its City Hall Flag Poles a Public Forum for Private Individuals and Groups to Temporarily Raise Their Own Flags for Their Own Events and Allowed 284 Private Flag Raisings With No Denials. 27

C. Boston's Most Recent 2018 Flag Raising Policy Upholds Its Prior Policies and Practices Intentionally

Designating the City Hall Flag Poles One of "the City of Boston's public forums" Open to "all applicants" for Private Flag Raisings. 29

II. THE CITY'S CENSORSHIP OF CAMP CONSTITUTION'S PRIVATE RELIGIOUS SPEECH IN THE CITY'S DESIGNATED PUBLIC FORUM VIOLATES THE FIRST AMENDMENT. 31

A. The City Unconstitutionally Discriminated Against Camp Constitution's Christian Viewpoint Because of the Word "Christian" in the Application. 33

B. The City's Content-Based Restriction on Camp Constitution's Private Speech Is Subject To, and Fails, Strict Scrutiny. 35

1. The City bears the burden of satisfying strict scrutiny. 35

2. The City's Establishment Clause justification is not a compelling interest in a public forum open to all applicants. 36

3. The City's censorship of Camp Constitution's religious speech is not the least restrictive means of serving any legitimate government interest. 38

C. Even if the City Hall Flag Poles Are a Limited Public Forum, the City's Exclusion of Camp Constitution Was Unconstitutional Because neither Viewpoint Neutral nor Reasonable. 39

D. The City's Flag Raising Policy Vesting the Commissioner with Unbridled Discretion to Approve or Deny Private Flag Raisings Is an Unconstitutional Prior Restraint. 40

III. THE CITY'S ESTABLISHMENT CLAUSE AND GOVERNMENT SPEECH DEFENSES ARE NOT SUPPORTED BY THIS COURT'S PRECEDENTS. 42

A. The Establishment Clause Cannot Justify Boston's Censorship of Private Religious Speech in a Public Forum..... 42

B. Acceptance of Boston's Contrived Government Speech Defense Would Unconstitutionally Expand the Government Speech Doctrine. 44

1. The written policies and unbroken, twelve-year history prior to Camp Constitution's application in 2017, and continuing policy and practice after 2017, evidence conclusively that the private flags were private speech, and readily distinguishable from the

government speech found in *Summum* and *Walker*. 44

2. The foreign government flags raised by private groups cannot be government speech because it is a criminal offense for a local government to raise a foreign nation's flag. 53

C. The First Circuit Did Considerable Damage to the Forum Doctrine and Wiped Away Protections for Private Speech by Inventing a Test That Distorts the Government Speech Doctrine in Violation of This Court's Precedents. 54

CONCLUSION 62

TABLE OF AUTHORITIES

Cases

Archdiocese of Washington v. Washington Metro. Area Transit Auth., 140 S. Ct. 1198 (2020).....33,34

Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)..... 28

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)..... 40

Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987)..... 38

Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).....37,43

Burson v. Freeman, 504 U.S. 191 (1992)..... 35

City of Boerne v. Flores, 521 US. 507 (1997)..... 35

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988)..... 40

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) 24,25,26,28,30

Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9, 880 F.3d 1097 (9th Cir. 2018)..... iii

Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992)..... 41

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001).....36,39

Good News/Good Sports Club v. Sch. Dist. City of Ladue, 28 F.3d 1501 (8th Cir. 1994) 33

Griffin v. Sec'y of Veterans Affairs,
288 F.3d 1309 (Fed. Cir. 2002)..... 56

Hill v. Colorado, 530 U.S. 703 (2000)..... 35

Int'l Soc. for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992)..... 28

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).....33,39

Leake v. Drinkard, 14 F.4th 1242
(11th Cir. 2021).....58,59,60

Matal v. Tam,
137 S. Ct. 1744 (2017)..... ii,50,55

McCullen v. Coakley, 573 U.S. 464 (2014) 36

Minn. Voters All. v. Mansky, 138 S. Ct. 1876
(2018).....24,25,26,33,34,39

NAACP v. Button, 371 U.S. 415 (1963)..... 38

New Hope Family Servs., Inc. v. Poole,
966 F.3d 145 (2d Cir. 2020).....ii,iii

Niemotko v. Maryland, 340 U.S. 268 (1951)..... 41

Pleasant Grove City v. Summum,
555 U.S. 460 (2009).....*passim*

Reed v. Town of Gilbert, 576 U.S. 155 (2015) ...25,36

Ridley v. Massachusetts Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004) 50,51

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004) iii

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 33,36,37

Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)..... 38

United Veterans Memorial & Partiotic Ass'n of the City of New Rochelle v. City of New Rochelle, 72 F. Supp. 3d 468 (S.D.N.Y. 2014) 47,51,52

United Veterans Memorial & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle, 615 F. App'x 693 (2d Cir. 2015)..... 47

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) .....*passim*

Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018) iii,50,52

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 23

Constitutional Provisions

U.S. Const. amend. I .....*passim*

U.S. Const. amend. XIV 1,2,20

Statutes

28 U.S.C. § 1254 1

Mass. Gen. Laws ch. 2, § 6..... 53

Mass. Gen. Laws ch. 264, § 8..... 53

Other Authorities

S. Ct. R. 35.3..... iii

OPINIONS AND ORDERS BELOW

The First Circuit's opinion is reported at 986 F.3d 78 and reprinted in the Appendix to the Petition for Writ of Certiorari ("Petition Appendix") at 1a–40a. The district court's order has not yet been published in the Federal Supplement, but is reported at 2020 WL 555248 and reprinted at Pet. App. 41a–59a. The First Circuit's prior opinion is reported at 928 F.3d 166 and reprinted at Pet. App. 60a–82a. Prior orders of the district court are reported at 385 F. Supp. 3d 109 and 337 F. Supp. 3d 66, and reprinted at Pet. App. 83a–102a and Pet. App. 103a–127a.

JURISDICTION

The First Circuit entered its opinion and judgment on January 22, 2021. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Camp Constitution's Flag Raising Request.

Petitioner Camp Constitution is an all-volunteer association formed in 2009, offering classes and workshops on subjects such as U.S. History, the U.S. Constitution, and current events. (Pet. App. 129a.) Petitioner Harold Shurtleff is the founder and Director of Camp Constitution. (*Id.*) Camp Constitution's mission is to enhance understanding of the country's Judeo-Christian heritage, the American heritage of courage and ingenuity, the genius of the United States Constitution, and free enterprise. (*Id.*)

In connection with the September 17, 2017 observance of Constitution Day and Citizenship Day, Camp Constitution[3] desired to commemorate the historical civic and social contributions of the Christian community to the City of Boston, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution, by hosting an event at Boston's City Hall Plaza to feature "short speeches by some local

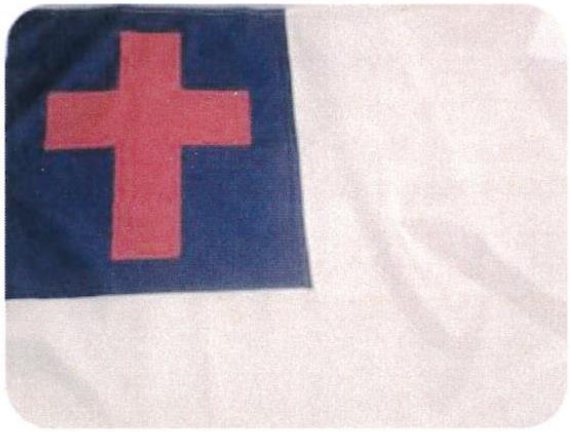
---

[3] Unless otherwise indicated, Petitioners are referred to collectively herein as "Camp Constitution," and Respondents as the "City" or "Boston."

clergy focusing on Boston's history" and "to raise the Christian Flag" on one of Boston's City Hall Flag Poles. (Pet. App. 130a–132a.) On July 28, 2017, Shurtleff telephoned and e-mailed Lisa Menino,[4] the City's senior special events official, seeking approval for the flag raising event. (Pet. App. 131a–132a.)

Shurtleff's e-mail included a picture of the proposed flag:

This is the flag:



Hal Shurtleff
Director, Camp Constitution

(*Id.*) Menino requested approval from Gregory T. Rooney, Commissioner of the City of Boston

---

[4] Lisa Lamberti's name was legally changed to Menino prior to July 2017. (Pet. App. 131a n.2.)

Property Management Department,[5] which she expected to receive. (Pet. App. 132a, 151a.)

B. The City's Flag Raising Approvals Under Its Policies and Practices Designating the City Hall Flag Poles a Public Forum.

The City has designated some its properties to be available to private persons and groups for events, including Faneuil Hall, Samuel Adams Park, City Hall Plaza, City Hall Lobby, City Hall Flag Poles, and North Stage. (Pet. App. 132a–133a.) The City Hall Flag Poles comprise three flag poles on City Hall Plaza, near the entrance to City Hall, as shown here:

(Pet. App. 141a, 161a.) The City generally raises the American Flag and the POW/MIA flag on one pole,

---

[5] Although succeeded in office by Respondent Melvin (*see* note 2, *supra*), Rooney was Commissioner of Property Management at all material times. (Pet. App. 130a.)

the Commonwealth of Massachusetts flag on the second pole, and the City of Boston flag on the third. (Pet. App. 141a–142a.) But the City regularly allows private groups to raise their own flags on the third flagpole in connection with their flag raising events. (Pet. App. 142a–143a.) The City of Boston website states the City's goals for flag raising 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**, and is treated with respect. We also want to raise awareness in Greater Boston and beyond about the many countries and cultures around the world. Our goal is to **foster diversity and build and strengthen connections among Boston's many communities**.

(Pet. App. 143a (bold emphasis added).)

The City posts on its website written policies and an application process for use of its public fora. (Pet. App. 133a–135a.) The online policies provide, in part: "You need our permission if you want to hold a public event at certain properties near City Hall. These locations include . . . the City Hall Flag Poles . . . ." (*Id.*) The policies also provide content-neutral reasons for denying an application, including incompleteness, capacity to contract, unpaid debt to the City, illegality, danger to health or safety, and misrepresentations or prior malfeasance. (*Id.*)

The website allows completion of an application online, or by fax or mail using a printable application form titled, "Property and Construction Management Department City Hall and Faneuil Hall Event Application." (Pet. App. 135a–136a.) The printable application identifies the City Hall Flag Poles as one of several public forum options:

Property and Construction Management Department
City Hall and Faneuil Hall Event Application
Boston City Hall, Rm. 811
Boston MA, 02201
Phone: 617-635-4100 Fax: 617-635 -3250

Name of Contact Person:_____

Billing Address: _____

Telephone Number: (_____)-_____

E-Mail Address: _____

Name of Event:_____

Event Date (s):_____

Event Start Time:_____ **a.m./ p.m. Event End Time:**_____ **a.m./ p.m.**

Set-up Date(s): _____

Set-up Start Time:_____ **a.m./ p.m. Break-down Time:**_____ **a.m./ p.m.**

Location:

Faneuil Hall ☐	**Samuel Adams Park ☐**	**City Hall Plaza ☐**
City Hall Lobby ☐	**City Hall Flag Poles ☐**	**North Stage☐**

(*Id.*)

The application also incorporates "Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles," stating that the "application applies to any public event proposed to take place at [*inter* alia] the City Hall Flag Poles." (Pet. App. 136a (emphasis added).) The guidelines further provide, in part:

> Where possible, the Office of Property and Construction Management seeks to accommodate **all applicants** seeking to take advantage of the City of Boston's **public forums**. To maximize efficient use of these **forums** and ensure the safety and convenience of the applicants and the general public, access to these **forums** must be regulated.

(Pet. App. 136a–140a (emphasis added).) The form promises a response within ten days and provides eleven possible reasons for denial of a request (similar to the online policies), such as schedule conflict, illegality, danger to health or safety, misrepresentations or prior malfeasance, and various procedural defects. (*Id.*; *see* Pet. App. 133a–135a.) Prior to October 2018, the City had no other written policies for use of the City's public forums. (Pet. App. 140a.)

The City's Property Management Department receives and processes all applications for public events on City properties, including flag raising events at the City Hall Flag Poles, through the same system. (Pet. App. 140a.) The Commissioner has

final say over approvals for all events. (Pet. App. 141a.)

For the twelve years preceding Camp Constitution's request, from June 2005 through June 2017, the City approved **284 flag raising events, with no record of a denial.** (Pet. App. 142a–143a, 149a–150a, 173a–190a.) During the one-year period immediately preceding Camp Constitution's request the City approved **39 private flag raisings—averaging more than three per month**. (Pet. App. 142a–143a.)

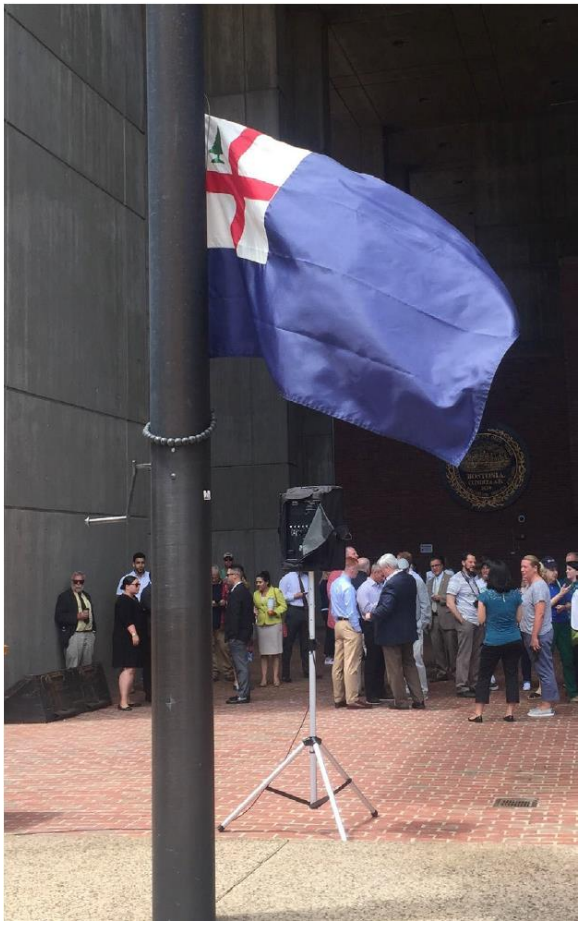
Approved flag raisings have included ethnic and other cultural celebrations, the arrival of foreign dignitaries, the commemoration of independence or other historic events in other countries, and the celebration of certain causes such as "gay pride." (Pet. App. 142a–143a, 173a–187a.) And, while it would be illegal for the City itself to "display[] the flag or emblem of a foreign country upon the outside of a . . . city . . . building ," Mass. Gen. Laws ch. 264, § 8, the City has approved private flag raisings for celebrations of the countries of Albania, Brazil, Ethiopia, Italy, Panama, Peru, Portugal, Puerto Rico, Mexico, as well as China, Cuba, and Turkey, and for the flags of the private Chinese Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, and Boston Pride. (*Id.*)

The City has allowed flags on the City Hall Flag Poles that contain religious language and symbols. (Pet. App. 143a–146a.) For example, the City of Boston flag, which is usually raised on one of the

Flag Poles, depicts the City Seal, containing the inscription "SICUT PATRIBUS, SIT DEUS NOBIS" which means "God be with us as he was with our fathers":

(Pet. App. 143a–144a.) The Turkish flag, which the City has approved at least thirteen times, in 2005, 2006, and 2009–2019, depicts the star and crescent of the Islamic Ottoman Empire:

(Pet. App. 144a–145a.) And for at least three years (2016–2018) the City allowed the Bunker Hill Association to raise the Bunker Hill Flag to commemorate the Revolutionary War Battle of Bunker Hill and Bunker Hill Day. (Pet. App. 145a–146a.) The Bunker Hill Flag, which is virtually identical to the "Christian flag" except for the reverse color scheme and the pine tree, contains a red cross against a white field on a blue flag, as shown here:

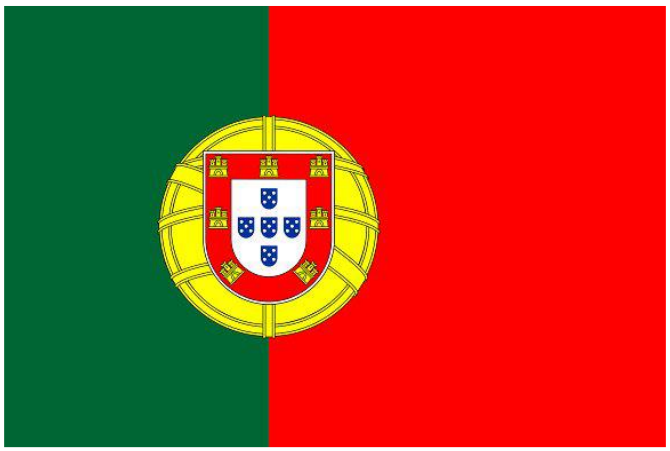


(*Id.*)

The City partnered with a promoter to schedule events on City Hall Plaza, including events approved through the Department of Property Management application process. (Pet. App. 146a–147a.) The schedules for flag raisings and other events were featured on the partner website. (*Id.*) For example, Commissioner Rooney approved a June 2017 Portuguese Flag Raising Ceremony, involving the raising of the Portuguese flag on the City Hall Flag Poles. (Pet. App. 147a–149a.) The partner website posted the organizer's descriptions of the flag's distinctively religious imagery and the ceremony:

> The dots inside the blue shields represent the five wounds of Christ when crucified. Counting the dots and doubling those five in the center, there are thirty dots that represents the coins Judas received for having betrayed Christ. . . .
>
> . . . .
>
> Come and join us in honoring the flag of Portugal in what represents the official recognition of the Portuguese community's presence and importance in the State of Massachusetts. Your presence is of key importance to pay this solemn homage to Portugal and the Portuguese emigrant community with grandeur.

(*Id.*) As described above, the Portuguese flag appears as follows:



(*Id.*)

At the time of Camp Constitution's request in July 2017, the City had no specific written policies for handling flag raising applications, and Rooney had never denied a flag raising application. (Pet. App. 149a–150a.) The Department "never really had a lot of discussion prior to [Camp Constitution's] request related to flag raisings in any way." (*Id.*) According to Rooney, "[f]or the most part, [the City] will allow any event" to take place on City Hall Plaza. (Pet. App. 149a.)

It was Rooney's usual practice not to see a proposed flag before approving a flag raising event, and Rooney never requested to review or change a flag in connection with approval. (Pet. App. 150a.) The City does not require any applicant to give possession or ownership of its flag to the City as a condition for approval. (*Id.*) Rooney has no

knowledge of any person believing Boston has endorsed any organization or subject matter as a result of approving a flag raising event. (*Id.*)

C. The City's Denial of Camp Constitution's Application to Use the City Hall Flag Poles Forum.

Rooney was "concerned about" Camp Constitution's request because he considered it "related to a religious flag." (Pet. App. 150a–151a.) Rooney "didn't know whether or not it was appropriate to put a religious flag on a public building, so [he] wanted to inquire a little bit more." (*Id.*) After "a couple of weeks" he consulted with the City's law department for guidance "[d]ue to the fact that the flag in question *was described as* a religious flag." (Pet. App. 151a (emphasis added).)

In the meantime, Menino updated Shurtleff, "I am just waiting for the approval from my bosses I just sent them another e-mail." (*Id.*) Three weeks after Camp Constitution's request, Shurtleff sent another e-mail inquiry, prompting Menino to e-mail Rooney, "has there been any decision made on Christian flag raising[?]" (*Id.*) Rooney replied, "The Law Department is reviewing our flag raising protocols. Do we have a complete list of organizations that have held flag raisings on the Plaza in recent years?" (*Id.*)

Rooney ultimately decided to deny Camp Constitution's request because "we didn't have a past practice of allowing religious flags, and we weren't going to allow this flag raising." (Pet. App.

152a.) On August 25, 2017, Rooney e-mailed Menino, "Please let them know that the request has been denied. Thanks." (*Id.*) Rooney had no intention of providing an explanation for the denial to Menino or Camp Constitution. (*Id.*) Rooney did not create any record memorializing his reasons for denial. (*Id.*)

On September 5, 2017—more than five weeks after Camp Constitution's request—Menino e-mailed Shurtleff that the request was denied. (*Id.*) Shurtleff requested a reason, prompting Rooney to advise the Boston Mayor's press office and other officials that he would prefer the Law Department, not Menino, to draft a response to Camp Constitution's request for a reason. (Pet. App. 152a–153a.)

On September 8, 2017, Rooney e-mailed Shurtleff an explanation for the denial:

> I am writing to you in response to your inquiry as to the reason for denying your request to raise the "Christian Flag". The City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles. This policy and practice is consistent with well-established First Amendment jurisprudence prohibiting a local government from "respecting an establishment of religion." This policy and practice is also consistent with City's legal authority to choose how a limited

> government resource, like the City Hall flagpoles, is used.
>
> According to the above policy and practice, the City of Boston has respectfully denied the request of Camp Constitution to fly on a City Hall flagpole the "Christian" flag, as it is identified in the request, which displays a red Latin cross against a blue square bordered on three sides by a white field.
>
> The City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one.

(Pet. App. 153–154a.)

Where Rooney referred to Boston's "policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles," he "was referring to past practice" because "up to this point, there had not been any formal written policy regarding flying non-secular flags on the flagpoles." (Pet. App. 154a–155a.) By "non-secular" Rooney meant "a religious flag that was promoting a specific religion." (*Id.*) Rooney did not mean he "had determined that the city had declined to fly non-secular or religious flags in the past," but meant that he "had no record of ever having one had been approved." (*Id.*) Rooney did not work from any formal definition of "non-secular" or "religious" when he denied Camp Constitution's request. (Pet. App. 155a.)

Rooney admitted that excluding "religious" flags serves no goal or purpose of the City in allowing flag raising events on the City Hall Flag Poles, except "concern for the so-called separation of church and state or the constitution's establishment clause." (Pet. App. 157a.) Rooney was concerned Camp Constitution's flag "was a flag that was promoting a specific religion" and "didn't think that it was in the city's best interest to necessarily have that flag flying above City Hall." His concern was not with the flag *itself*, but that on the application it was *called* a "Christian flag." Rooney would not have been concerned if the same flag was called "the Camp Constitution flag" because then "it would have been the flag of the organization and not a religious symbol." (Pet. App. 155a.)

Rooney's concern with allowing the Christian flag was not based on the visual appearance of the flag ("a red cross on a blue field on a white flag"). If Camp Constitution had not called it the "Christian" flag on the application, Rooney would have treated it no differently from the Bunker Hill flag ("a red cross on a white field on a blue flag") which he had approved. (Pet. App. 156a.) Rooney did not consider the Bunker Hill flag a "religious" flag, despite its depiction of a red cross, because "it's to commemorate the Battle of Bunker Hill." (*Id.*) If the Bunker Hill flag had been presented to Rooney as "the Christian flag or a Christian flag, then [Rooney] would . . . have had the same concerns that [he] had about Camp Constitution's flag." (*Id.*)

Rooney would not have been concerned about approving the Portuguese flag raising, had he

known about the religious content of its flag, because Portugal is a "sovereign nation." (Pet. App. 156a.) Rooney, however, would weigh and think differently of a request to raise the Vatican flag "because of the fact that although it's a sovereign nation, it's also the Catholic church . . . ."[6] (Pet. App. 156a–157a.) Rooney does not know whether the text of the Boston City Seal on the City's flag, translated, "God be with us as he was with our fathers," is a religious statement. (Pet. App. 160a.)

On September 13, 2017, Shurtleff submitted to the City a new, written City Hall and Faneuil Hall Event Application, requesting use of City Hall Plaza and the City Hall Flag Poles for the event "Camp Constitution Christian Flag Raising," and proposing dates of October 19, 2017 or October 26, 2017. (Pet. App. 157a–158a.) Shurtleff described the event as follows:

> Celebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth. The Christian flag is an important symbol of our country's Judeo-Christian heritage. During the flag raising at the City Hall Plaza, Boston recognizes our Nation's

---

[6] The City previously had allowed the Vatican flag to be raised over Boston Common, alongside the United States and Massachusetts flags, in connection with the 1979 visit to Boston of Pope John Paul II, four years prior to diplomatic recognition of the Vatican by the United States. (Pet. App. 156a–157a.)

> heritage and the civic accomplishments and social contributions of the Christian community to the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution, which together gave our Nation an unprecedented history of growth and prosperity. The event program includes a speech by Rev. Steve Craft . . . on the need for racial reconciliation, a speech by Pastor William Levi, formerly of the Sudan, on the blessings of religious freedom in the U.S. and an historical overview of Boston by Hal Shurtleff . . . .

(*Id.*)

On September 14, Camp Constitution's counsel sent a letter to the Boston Mayor, with copies to Rooney and others, enclosing the new Application and requesting approval on or before September 27, 2017. (Pet. App. 158a.) The City did not respond to either the new application or counsel's letter. (*Id.*) Only Rooney could have reconsidered Camp Constitution's new request, but Rooney did not respond because the first request "was asked and answered." (*Id.*)

D. The City's Subsequent Written Flag Raising Policy.

In October 2018, after litigation commenced in July, the City committed its past policy and practice to a written Flag Raising Policy. (Pet. App. 159a.) The new Policy does not require the City to handle

requests differently from how they were handled when Camp Constitution submitted its request in July of 2017. (*Id.*) Under the new policy, as in July 2017, the Commissioner of Property Management has final approval authority for all flag raising requests, "such decision to be made in the City's sole and complete discretion." (*Id.*)

The written Policy incorporates seven Flag Raising Rules. (*Id.*) If an application for a flag raising event satisfies all seven of the Flag Raising Rules, the Flag Raising Policy still reserves to the Commissioner "sole and complete discretion" to deny the application for a reason not reflected in the Flag Raising Rules. (*Id.*) The Flag Raising Policy also reserves to the Commissioner the discretion to approve a flag application even if it does not meet one or more of the Flag Raising Rules. (*Id.*)

The first Rule provides, "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.) Whether a flag is deemed "inappropriate or offensive in nature," supporting "discrimination" or "prejudice," or supporting "religious movements" is a determination to be made at the Commissioner's discretion, and there are no separate guidelines or criteria for the Commissioner to use to make any such determination. (*Id.*)

II. PROCEDURAL HISTORY

Camp Constitution commenced this action on July 6, 2018, suing the City for preliminary and permanent injunctive relief, declaratory relief, and damages, on the grounds that the City's denial of Camp Constitution's flag raising request violated Camp Constitution's right to free speech under the First Amendment, as well as the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[7] (Pet. App. 46a–48a.) Camp Constitution also moved for a preliminary injunction, which the district court denied. (Pet. App. 103a.) The First Circuit affirmed the denial. (Pet. App. 60a.)

After discovery the parties filed cross motions for summary judgment. (Pet. App. 47a.) Following a hearing the district court denied summary judgment for Camp Constitution and granted summary judgment for the City. (Pet. App. 41a–59a.)

The First Circuit affirmed, holding that notwithstanding the City's express policy designating the City Hall Flag Poles a public forum for the private speech of all comers, and its practice of never denying any private request to raise a flag during the twelve years prior to the instant denial, the City was justified in denying Camp Constitution's flag under this Court's government speech cases in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Div., Sons*

---

[7] Camp Constitution also pleaded the City's violations of the cognate provisions of the Massachusetts Constitution.

of Confederate Veterans, Inc., 576 U.S. 200 (2015). (Pet. App. 1a.) The First Circuit ignored the express public forum policy and the unbroken history of approvals, and instead created a new "three-part *Summum/Walker* test." (Pet. App. 16a.)

SUMMARY OF THE ARGUMENT

1. The City of Boston violated the First Amendment by excluding Camp Constitution's speech from the City's designated public forum solely because of the religious viewpoint and content of the speech.

The City intentionally designated one of its City Hall Flag Poles a public forum for flag raising events by private actors, as evidenced by the City's express written policies designating the Flag Poles among its "public forums" for "all applicants," and by its unbroken practice of approving 284 flag raisings over twelve years with no denials. But when Camp Constitution applied to raise a flag in connection with its own one-hour flag raising event, the City denied the application because the flag was called "Christian" on the application, citing the Establishment Clause as a justification after the fact.

Under this Court's forum doctrine, in a designated public forum, speech restrictions based on viewpoint are unconstitutional, and restrictions based on content are unconstitutional unless they satisfy strict scrutiny. The City's exclusion of Camp Constitution's flag from the City Hall Flag Poles forum solely because the flag was called "Christian"

is unconstitutional viewpoint discrimination, and is also an unconstitutional content-based speech restriction because it cannot satisfy strict scrutiny. The Establishment Clause provides no compelling interest or other grounds to justify Boston's censorship of Camp Constitution's private religious speech in the City's designated public forum.

2. The private flag raisings on the City Hall Flag Poles pursuant to Boston's "public forums" for "all applicants" policy and practice are private speech, protected by the First Amendment, and not Boston's government speech.

The First Circuit below distorted this Court's holdings in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), to create a rigid, "three-part *Summum/Walker* test," under which the court concluded the private flag raisings on the City Hall Flag Poles are Boston's government speech, freeing Boston to censor flags based on religious viewpoint and content. The First Circuit's test, however, overly focused on the traditional uses of other government flag poles and disregarded Boston's express policies and longstanding practices evidencing the City's intent to designate its Flag Poles a public forum for private flag raisings. The First Circuit test is incompatible with, and does considerable damage to, this Court's forum doctrine—particularly the designated and nonpublic forum categories—by creating an almost irrebuttable presumption that government property traditionally used for government speech can only be used for government speech, and that even a

neutral, minimal application requirement to access government property transforms private speech into government speech, no matter how clearly a government's actual policy and practice evidence its intent to designate the property a public forum for private speech.

ARGUMENT

I. THE CITY OF BOSTON, BY WRITTEN POLICY AND LONGSTANDING PRACTICE, INTENTIONALLY CREATED A DESIGNATED PUBLIC FORUM FOR PRIVATE SPEECH ON ONE OF ITS CITY HALL FLAG POLES OPEN TO ALL COMERS TO TEMPORARILY RAISE THEIR FLAGS.

This Court recognized decades ago that flags are expressive for governments and private actors alike: "The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Thus, as a private actor, Camp Constitution engages in speech protected by the First Amendment when it flies its flag. Camp Constitution sought the City's approval to fly its flag on one of the City Hall Flag Poles, for Camp Constitution's own flag raising event, pursuant to the City's "public forums" for "all applicants" policy. Under this Court's forum doctrine, determining the constitutionality of the

City's exclusion of Camp Constitution's flag from the Flag Poles forum requires proper characterization of the forum based on the access sought by Camp Constitution. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). As used for displaying the private flags of all comers during their flag raising events, the City Hall Flag Poles are a *designated* public forum.

A. Camp Constitution's Challenge of the City's Policy Excluding Camp Constitution's Flag Requires the Court to Determine Whether the City Intended to Designate the City Hall Flag Poles a Public Forum.

When the government excludes from its own property private speech protected by the First Amendment, this Court's precedents require a forum analysis for assessing the constitutionality of the speech restriction. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). "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." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009). The Court uses the forum analysis "as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800.

Under the forum doctrine, a court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius*, 473 U.S. at 797. Then the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

The forum doctrine generally recognizes traditional public forums, designated public forums, and nonpublic forums, each with its own "requisite standard" for regulating access:

> In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. *The same standards apply in designated public forums*—spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose. In a nonpublic forum, on the other hand—a space that is not by tradition or designation a forum for public communication—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is

> reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Minn. Voters All., 138 S. Ct. at 1885 (cleaned up) (emphasis added).

A *designated* public forum exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Summum*, 555 U.S. at 469 (cleaned up). Thus, "[a] public forum may be created by government designation of a place or channel of communication for use by the public at large for speech or assembly, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. Courts look to the "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." *Id.* Under these well-settled principles, the City's express, written policies and documented practices demonstrate that the City intentionally opened a public forum for private flag raisings on one of the City Hall Flag Poles.

B. By Written Policies and Longstanding Practices Over Twelve Years, Boston Intentionally Designated One of Its City Hall Flag Poles a Public Forum for Private Individuals and Groups to Temporarily Raise Their Own Flags for Their Own Events and Allowed 284 Private Flag Raisings With No Denials.

The City's official written policies demonstrate it has intentionally designated several City-owned venues to be public forums for expressive activities and events, including the City Hall Flag Poles. (App. 132a–133a.) The City's printable application guidelines for using the venues—*i.e.,* "the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the **City Hall Flag Poles**"—document that the City "seeks to accommodate *all applicants* seeking to take advantage of the City of Boston's *public forums*." (App. 136a–140a (emphasis added).) Both the City's online and printable applications expressly identify the City Hall Flag Poles as a separate and distinct public forum for events (App. 135a–136a), and the City's website for scheduling flag raising events documents the City's intentionally open policy "to create an environment in the City where everyone feels included" and "to foster diversity and build and strengthen connections among Boston's many communities." (App. 143a.) This explicit identification of the City Hall Flag Poles as one of Boston's "public forums" for "all applicants" demonstrates the City has intentionally opened the Flag Poles for protected private expression through

flag raising events. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("To create a forum of this type, the government must intend to make the property generally available to a class of speakers." (cleaned up)); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("property that the State has opened for expressive activity by part or all of the public"). Thus, by both name and range of expression permitted, the City has intentionally designated the City Hall Flag Poles a public forum.

In addition to its written policy designating the Flag Poles among its "public forums" for "all applicants," the documented practices of the City pursuant to that policy confirm the City's intent. *See Cornelius*, 473 U.S. at 802. The undisputed factual record shows the City's acceptance of all flag raising applications, consistent with its stated "all applicants" intention: During the twelve years preceding its denial of Camp Constitution's flag raising request, the City *approved 284 flag raising events at the Flag Poles with no record of a denial*. (App. 136a–140a, 142a–143a, 149a–150a, 173a–187a.) And in the year immediately preceding Camp Constitution's denial, *the City approved 39 flag raising events—averaging more than three per month*. (*Id.*) This history and frequency of flag raising events with no denials (prior to Camp Constitution's request) also demonstrate that the Flag Poles are compatible with expressive activity, *see Cornelius*, 473 U.S. at 802, and are "capable of accommodating a large number of public speakers without defeating the essential function of the [Flag Poles]." *Summum*, 555 U.S. at 478. Thus, the City's

express policies and documented practices establish that the City intended to open a designated public forum for flag raisings on the City Hall Flag Poles.

C. Boston's Most Recent 2018 Flag Raising Policy Upholds Its Prior Policies and Practices Intentionally Designating the City Hall Flag Poles One of "the City of Boston's public forums" Open to "all applicants" for Private Flag Raisings.

At the time of Camp Constitution's application in 2017, Boston's written policies applicable to flag raisings comprised the City's printable application form and guidelines for "all applicants" using the City's "public forums" (expressly including the Flag Poles), the City's online application and guidelines for all events on the City's properties (also expressly including the Flag Poles), and the City's flag raising purpose statement: "We commemorate flags from many countries and communities at Boston City Hall Plaza during the year. . . . Our goal is to foster diversity and build and strengthen connections among Boston's many communities." (Pet. App. 132–140, 143.) The City's October 2018 Flag Raising Policy was the first written policy directed specifically to flag raisings, but it merely documented policies already in effect, though "'updated to address other concerns.'" (Pet. App. 159a.) Specifically, after the City adopted the 2018 Flag Raising Policy, the City still followed the policies reflected in its printable application form and guidelines identifying the Flag Poles as one of "the City of Boston's public forums" for "all

applicants." (R. 58-2 at 4.[8]) Thus, the 2018 Flag Raising Policy upheld the "public forums" for "all applicants" policy covering flag raisings on the City Hall Flag Poles, as historically applied to the 284 flag raising approvals with no denials during the twelve years preceding Camp Constitution's application.

* * *

Under the Court's forum doctrine, Camp Constitution's flag is speech protected by the First Amendment, and the constitutionality of Boston's exclusion of the flag from the City's Flag Poles forum depends on "the nature of the forum" and whether the City's "justifications for exclusion satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The Flag Poles—as regularly and frequently used by private actors to raise their own flags for their own events—are a designated public forum, and the City's exclusion of Camp Constitution's flag is unconstitutional under the requisite standard.[9]

---

[8] In interrogatory answers, the City testified, through Rooney: "[T]he City states that it follows the policies stated on its website . . . as well as those stated on its written Event Application (Doc 1-8)." (R. 58-2 at 4.) The Event Application states the "public forums" for "all applicants" policy. (Pet. App. 135a–136a.)

[9] Discussion of the First Circuit's disregard of the forum doctrine, and improper invocation and expansion of the government speech doctrine, follows in Part III, *infra*.

II. THE CITY'S CENSORSHIP OF CAMP CONSTITUTION'S PRIVATE RELIGIOUS SPEECH IN THE CITY'S DESIGNATED PUBLIC FORUM VIOLATES THE FIRST AMENDMENT.

The City's intentional designation of its Flag Poles as a public forum for private flag raisings is clearly evidenced by its written policies and longstanding practices. The written policies describe "Boston's public forums" open to "all applicants" to include the City Hall Flag Poles. (Pet. App. 135a–136a.) Access only required applicants to meet neutral administrative criteria (date availability, health and safety, etc.). (Pet. App. 133a–135a.)

On the purposes of the flag raising forum, the policies state:

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

(Pet. App. 143a.)

Camp Constitution's proposed event and flag raising in observance of Constitution Day and Citizenship Day satisfied the administrative criteria and comfortably fit within the otherwise permitted

subject matters of the purpose statement. Camp Constitution desired to commemorate the historical civic and social contributions of the Christian community to the City of Boston and the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution, by hosting an event at City Hall Plaza to feature "short speeches by some local clergy focusing on Boston's history" and "to raise the Christian Flag" on one of the Flag Poles. (Pet. App. 130a–132a.) The event and the flag raising aimed to recognize the Judeo-Christian heritage and community of Boston and the Commonwealth. (*Id.*)

The City has never contested that Camp Constitution's application satisfied all requirements and fit the permitted subject matters of the forum. Rather, it is indisputable that the City denied the private flag raising solely because the application used the word "Christian" before the word "Flag," resulting in the first censorship of a private flag raising application after twelve years with no denials. This admitted reason for censoring the flag is unconstitutional because it is not viewpoint neutral, and also because it was a content-based restriction unsupported by a compelling interest or narrow tailoring. Furthermore, the unbridled discretion vested in the Commissioner is an unconstitutional prior restraint.

A. The City Unconstitutionally Discriminated Against Camp Constitution's Christian Viewpoint Because of the Word "Christian" in the Application.

Because the City's explicit policies designate the City Hall Flag Poles a "public forum" for private expression (Pts. I.B, C, *supra*), the City's restrictions on speech in that forum are subject to the same level of First Amendment scrutiny applicable to traditional public forums. *See Summum*, 555 U.S. at 479. In a designated public forum, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All.*, 138 S. Ct. at 1885.

Religion is a viewpoint on multiple subjects, and exclusion of all religious speech on otherwise permissible subjects is unconstitutional viewpoint discrimination. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112, n.4 (2001) ("Religion is the viewpoint from which ideas are conveyed. . . . [W]e see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys."); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) ("[V]iewpoint discrimination is the proper way to interpret the University's objections to [religion as a subject matter]."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (holding exclusion of religious speech from forum is viewpoint discrimination); *cf. Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 140 S. Ct.

1198, 1199 (2020) (statement of Gorsuch, J.) ("[O]nce the government allows a subject to be discussed, it cannot silence religious views on that topic.").

The City's reason for denying Camp Constitution's flag raising event was precisely and only because the City deemed the flag objectionable, because it was *called* a "Christian Flag" on the application (Pet. App. 150a–151a, 153a–156a), even though Camp Constitution's purpose—to commemorate the contributions of one of Boston's diverse communities to the City and the Commonwealth—otherwise fit perfectly with the City's permitted subject matters according to the City's purposes for allowing flag raisings. (App. 130a–131a, 143a.) The flag's *appearance* was not objectionable to Rooney, but the flag's *description* as "Christian" *on the application* triggered the denial. (App. 155a–156a.) If the flag had not been described as "Christian," Rooney would have approved it. (*Id.*) Because viewpoint discrimination is prohibited in a designated public forum, *Minn. Voters All.*, 138 S. Ct. at 1885, the City's exclusion of Camp Constitution's flag for its Christian viewpoint was unconstitutional.

B. The City's Content-Based Restriction on Camp Constitution's Private Speech Is Subject To, and Fails, Strict Scrutiny.

1. The City bears the burden of satisfying strict scrutiny.

Even if the City's exclusion of Camp Constitution's flag from the designated Flag Poles forum was not viewpoint discriminatory, the City's restriction of Camp Constitution's religious speech was content based. "Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which government restrictions rarely survive. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

The City's sole reason for denying Camp Constitution's flag raising was because the City deemed the message communicated by Camp Constitution's flag to be religious. (App. 150a–151a, 153a–156a.) "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulations, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 721 (2000). Even if Camp Constitution's request was not denied based on the Christian viewpoint of its flag raising event (which it was; *see* Part II.A,

supra), it undoubtedly was denied based on the religious "subject matter" of its flag, which is a content-based restriction on speech that is presumptively unconstitutional and subject to strict scrutiny. *See Reed*, 576 U.S. at 163.

It is the City's burden to prove narrow tailoring under strict scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014). However, the City has never argued its censorship of Camp Constitution's flag was narrowly tailored. Instead, City relied solely on the Establishment Clause to justify its decision. As the case progressed, the City added the government speech defense, which fares no better. The City's policies and actions are not narrowly tailored.

2. The City's Establishment Clause justification is not a compelling interest in a public forum open to all applicants.

The City's ostensible interest in avoiding an Establishment Clause violation provides no compelling interest justifying its censoring private religious speech in a public forum otherwise open to all comers. As this Court wrote, "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities . . . ." *Rosenberger*, 515 U.S. at 842; *see also Good News Club*, 533 U.S. at 114–15. The same is true of Boston's designated Flag Poles forum that has been made generally available to a wide spectrum of private organizations expressing

private messages associated with their private events. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

Moreover, "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion." *Rosenberger*, 515 U.S. at 839 (emphasis added). Such a "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.*

The Establishment Clause provides no justification for suppressing the religious content of Camp Constitution's speech in a forum that is available to similarly situated private speakers expressing content from non-religious perspectives. *See id.* (noting this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching governmental programs neutral in design"). The City Hall Flag Poles are available to a broad range of speakers on a variety of topics, as at least 284 applications were approved without any denial before Camp Constitution's application. (Pet. App. 142a–143a, 149a.) Thus, the City's pretextual interest in avoiding an Establishment Clause

violation by granting equal access to Camp Constitution on a neutral basis is not compelling, or even legitimate.

3. The City's censorship of Camp Constitution's religious speech is not the least restrictive means of serving any legitimate government interest.

Even if the City could articulate a compelling interest for excluding religious speech, the City's forum policy and actions still fail strict scrutiny because they are not narrowly tailored. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *See Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

A narrowly tailored regulation of speech is one that achieves the government's interest "without unnecessarily interfering with First Amendment freedoms." *Sable Commc'ns*, 492 U.S. at 126. By prohibiting all "non-secular" speech (Pet. App. 153a–156a), the City's policies and practices completely prohibit and unnecessarily interfere with the speech of religious organizations. Such policies are not

narrowly tailored and therefore cannot pass strict scrutiny.

C. Even if the City Hall Flag Poles Are a Limited Public Forum, the City's Exclusion of Camp Constitution Was Unconstitutional Because neither Viewpoint Neutral nor Reasonable.

Even if the alternative nonpublic forum analysis applied, under which "the government has much more flexibility to craft rules limiting speech," *Minn. Voters All.*, 138 S. Ct. at 1885, the First Amendment still demands that restrictions on speech be reasonable in light of the forum's purposes, and viewpoint neutral. *See Lamb's Chapel*, 508 U.S. at 392. The City's exclusion of Camp Constitution from the Flag Poles forum was neither, and is therefore unconstitutional.

Indeed, the City's discrimination against Camp Constitution's Christian viewpoint (*see* Pt. II.A, *supra*) ends the inquiry. *See Good News Club*, 533 U.S. at 107 ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum."); *Lamb's Chapel*, 508 U.S. at 393 n.6 (same).

Nor was the exclusion reasonable in light of the flag raising forum's express purposes: to "*commemorate flags from many . . . communities*," "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."

(Pet. App. 143a.) The City did not act reasonably in excluding Camp Constitution's commemoration of the contributions of Boston's Christian community, based solely on its flag being called "Christian."

D. The City's Flag Raising Policy Vesting the Commissioner with Unbridled Discretion to Approve or Deny Private Flag Raisings Is an Unconstitutional Prior Restraint.

The City's standard-less policies and practices amount to an unconstitutional prior restraint that vests unbridled discretion in a City official to determine whether speech can be excluded as "non-secular" despite meeting all criteria for use of the City's designated public forums.[10] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing cases).

"[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). And "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the

---

[10] Camp Constitution raised this prior restraint argument in both appeals below, but the City never responded to it, and therefore conceded it. (*See* 18-1898 C.A. Reply Br. 23–24; 20-1158 C.A. Reply Br. 26–27.)

licensing authority." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (cleaned up).

Prior to October 2018, the City had no written policies specifically applicable to flag raising events at the Flag Poles public forum. (Pet. App. 140a, 154a–155a, 159a.) From 2005 to 2017, the City's written policies governed all its designated public forums collectively, which included the Flag Poles. (Pet. App. 133a–140a.) Then, after the litigation began, in 2018 the City memorialized in a written policy what it had always practiced, which is to grant unbridled discretion to the Commissioner to approve or deny flag raising requests regardless of compliance with stated criteria. (Pet. App. 159a–160a.)

As unwritten, the anti-religion policy and practice the Commissioner ostensibly used to deny Camp Constitution's application (Pet. App. 154a–155a) never could have provided the requisite standards to appropriately cabin the discretion of Boston officials. *See Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). The purported anti-religion policy was not listed in the written guidelines provided to all applicants seeking to use the City's public forums (Pet. App. 133a–140a), nor was the anti-religion rationale for denial documented in any record prior to Camp Constitution's demanding a reason for the denial (Pet. App. 152a–153a). And the October 2018 written memorialization of the City's flag raising policies and practices did not cure its unconstitutionality, for the written policy codified the very unbridled discretion rendering the flag

raising regulation unconstitutional. (Pet. App. 159a–160a.)

III. THE CITY'S ESTABLISHMENT CLAUSE AND GOVERNMENT SPEECH DEFENSES ARE NOT SUPPORTED BY THIS COURT'S PRECEDENTS.

Though accepted by the First Circuit, the City's Establishment Clause and government speech defenses fail under this Court's precedents. The Establishment Clause is not concerned with private flag raisings on the City Hall Flag Poles because those flags are not government speech. The First Circuit ignored the relevant facts that distinguish the privately-owned flags temporarily raised by private actors in Boston's public forum from the permanent monuments owned, maintained, and displayed by the city in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and the license plates designed, printed, issued, owned, and branded by Texas in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Furthermore, the rigid government speech test minted by the First Circuit definitionally hobbles and does significant damage to this Court's public forum doctrine.

A. The Establishment Clause Cannot Justify Boston's Censorship of Private Religious Speech in a Public Forum.

Commissioner Rooney admitted that excluding "religious" flags served no goal or purpose of the City

except "concern for the so-called separation of church and state or the constitution's establishment clause." (Pet. App. 157a.) Despite his ostensible fear of violating the Establishment Clause, however, Rooney did not work from any formal definition of "religious" when he denied Camp Constitution's request; nor did he even look at Camp Constitution's flag. (Pet. App. 153a–156a.) In any event, as shown in Part II.B.2, *supra*, the City cannot invoke the Establishment Clause as a defense to its censorship of private religious speech in a public forum the City created and gave access to based on neutral criteria. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. Because the private flag raisings the City allowed on the Flag Poles forum it created are not government speech (*see infra* Parts III.B, C), the City had no legitimate Establishment Clause concern, let alone justification for excluding Camp Constitution's flag from the Flag Poles forum.

B. Acceptance of Boston's Contrived Government Speech Defense Would Unconstitutionally Expand the Government Speech Doctrine.

1. The written policies and unbroken, twelve-year history prior to Camp Constitution's application in 2017, and continuing policy and practice after 2017, evidence conclusively that the private flags were private speech, and readily distinguishable from the government speech found in *Summum* and *Walker*.

As shown above (Part I.A, *supra*), the forum doctrine governs the analysis of the claims against the City for excluding Camp Constitution's flag from the City Hall Flag Poles. But the First Circuit forsook forum analysis and, relying on this Court's decisions in *Summum* and *Walker*, canonized and applied a rigid, "three-part *Summum*/*Walker* test" (Pet. App. 16a) to hold the 284 private flag raisings approved by the City before denying Camp Constitution's were government speech. The First Circuit's test, however, was not faithful to *Summum* or *Walker*, both of which expressly recognized that forum analysis, rather than government speech analysis, applies to nontraditional forums intentionally designated by the government for private expression. *See Summum*, 555 U.S. at 469–70 ("[A] government entity may create 'a designated public forum' if government property that has not

traditionally been regarded as a public forum is intentionally opened up for that purpose," and "may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects."); *see also Walker*, 576 U.S. at 215–16.

In *Summum*, the question was whether "the First Amendment entitled a private group to insist that a municipality permit it to place a permanent monument in a city park." 555 U.S. at 464. The Court rejected such a First Amendment claim because "the placement of a *permanent monument* in a public park is best viewed as a form of government speech." *Id.* (emphasis added). This was so because "[i]t is certainly not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 471. The permanent nature of the proposed monument was critical to the Court's rejection of the plaintiffs' argument that the City had created a forum for private expression by accepting a limited number of other permanent monuments. *Id.* at 478–79.

The *Summum* Court offered several examples distinguishing government 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. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. A public university's student activity fund can provide money for many campus activities. 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. at 478 (emphasis added) (citations omitted). Thus, the Court reasoned, "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 470.

The undisputed record facts here show where flag raisings on Boston's City Hall Flag Poles fit within *Summum*'s 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. (Pet. App. 132a–142a, 149a–150a.) The 284 approvals with no denials (including 39 approvals— averaging more than three per month—

the year before Camp Constitution was denied) prove 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. The temporary nature of the flag raisings (e.g., Camp Constitution requested an hour (Pet. App. 131a)) ensures the Flag Poles are continually open for the City's own speech (e.g., the City of Boston Flag (Pet. 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." (Pet. App. 141a–143a.) *Summum*'s government speech analysis could only apply to Camp Constitution if it had requested to permanently occupy the third Flag Pole, or permanently place its own flagpole in the ground. *Cf. United Veterans Memorial & Patriotic Ass'n of the City of New 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).

In *Walker*, the Court confirmed the importance of the permanence of the monuments at issue in *Summum*: "we emphasized that monuments were 'permanent,' and we observed that public parks can accommodate only a limited number of permanent monuments." *Walker*, 576 U.S. at 213–14. Indeed, the Court "believed that the speech at issue was

government speech" because it "found it hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group." *Id.*

The issue in *Walker* was whether Texas accommodated private speech or engaged in government speech when it adopted numerous specialty license plate designs for a program offering drivers a choice between standard-issue and specialty Texas license plates. 576 U.S. at 203–04. In holding the specialty plates to be government speech, the *Walker* Court referred to the factors considered in *Summum*, but it emphasized the "exercise" of "direct" and "effective" government control over the specialty plates, indicating that the license plate messages were "conveyed on behalf of the government." *Id.* at 212–14, 216. A specialty plate design could be proposed by either Texas or private actors, through three different processes, *id.* at 205, but Texas exercised all aspects of ownership over the specialty license plates. The state prepared the designs of the specialty plates, owned the designs, and was responsible for making and disseminating the plates. *Id.* at 205, 212–14, 216. In addition, Texas required that all specialty plates be returned to the state at the end of their use. *Id.* at 212. Moreover, Texas law required all drivers to obtain and display a license plate on their vehicle, which the Court noted was "primarily used as a form of government ID," bearing the state's name. *Id.* at 212, 214, 216.

The "exercise" of "direct" and "effective" government control essential to the Court's

government speech finding in *Walker* does not exist in Boston, where 284 flag raisings were approved with no review of the flags whatsoever. Boston does not design, fabricate, take ownership of, or affix its name to any private flag approved for a flag raising—or even look at a proposed flag before approving it (or denying it in Camp Constitution's case). (Pet. App. 150a, 156a.) And Boston's simple, one-step process for proposing a flag raising—submitting a single form with the box checked for the City Hall Flag Poles among the City's other "public forums" (Pet. App. 135a–136a)—is nothing like the three separate processes, with multiple layers of review and approval, before Texas adopts, prints, and issues a specialty license plate with the state's insignia, and then later demands its return.

The relevant government control in *Walker* was the state's "*direct control* over the messages conveyed," where the state "*actively exercised* this authority" and "*rejected* at least *a dozen* proposed 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 application. (App. 132a–143a, 149a–150a.)

The City *says* it must review and approve flag raising requests (Pet. 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). Just as this Court has held that the mere involvement of private parties in selecting a 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."). Access to many public forums requires an application or some form of permission from the government, but an application requirement by itself cannot transform private speech in a public forum into government speech.

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; c*f. Walker*, 576 U.S. at 221 (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that

threatens private speech that government finds displeasing."). Thus, the government cannot, merely by reserving to itself "approval" rights, convert to government speech the private speech it openly solicits and allows in its designated forums. Any claim by the City of direct or effective control over flag raising messages is a litigation contrivance contradicted by the undisputed evidence of the City's actual practice.[11]

And, although the *Walker* Court concluded the permanence factor emphasized in *Summum* was not relevant to the Texas specialty license plates under consideration, *see* 576 U.S. at 213–214, it does not follow that the permanence factor is irrelevant to the nature of the Boston Flag Poles forum as posited by the First Circuit. (Pet. App. 22a.) If *Summum* has any application at all to the instant case, then the lack of permanence of the myriad private flags flown on the City Hall Flag Poles militates against any government speech finding. *Compare New Rochelle*, 72 F. Supp. 3d at 475 ("United Veterans' flags are

---

[11] The record shows one denied flag raising request sometime *after* the denial of Camp Constitution's application, after the commencement of litigation. (Pet. App. 160a.) The only reason given was "the City's sole and complete discretion." (*Id.*) With no other evidence, this lone, *post litigation* 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.

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*." (emphasis added)), *with Wandering Dago, Inc.*, 879 F.3d at 35 ("[D]rawing on the Court's reasoning in *Summum*, which also involved the use of public land—we find it significant that the food vendors participating in the Lunch Program are a merely temporary feature of the landscape, and quite visibly so."). Moreover, though not emphasized like the permanence factor, government control was also important to the *Summum* government speech holding, for Pleasant Grove City "took ownership of the monument," "[a]ll rights previously possessed by the monument's donor [were] relinquished," and the city maintained the permanent monuments placed in the park. 555 U.S. at 473. Thus, neither the permanence nor control important in *Summum* are implicated by the private flag raisings on Boston's Flag Poles.

Finally, Boston's flag raising policies include a critical component missing from *Summum*'s permanent monument policy and *Walker*'s state license plate policy: an express, written "public forums" designation for "all applicants." (Pet. App. 137a.) Boston's express statement of intent combined with an unrebutted record of approving as many flag raisers as apply compel the conclusion that Boston has intentionally designated the Flag Poles a public forum for private expression.

2. The foreign government flags raised by private groups cannot be government speech because it is a criminal offense for a local government to raise a foreign nation's flag.

Massachusetts criminal law also precludes the conclusion that Boston is speaking through the myriad private flags it allows on its Flag Poles, some of which are the flags of foreign nations. It is 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, and the common definition of "upon" includes "in . . . approximate contact with." Dictionary.com, *upon*, https://www.dictionary.com/browse/upon (last visited Nov. 9, 2021). Moreover, Rooney testified that the City raises its flags on the Flag Poles pursuant to another statute providing that "[t]he flag of the United States and the flag of the commonwealth shall be displayed *on* the main or administration *building* of each public institution of the commonwealth." Mass. Gen. Laws ch. 2, § 6 (emphasis added). (R. 58-2 at 4.) If flying the United States and Massachusetts flags on the Flag Poles satisfies the statute requiring those flags to be displayed "on" City Hall, then flying foreign nations' flags on the Flag Poles violates the statute prohibiting the display of those flags "upon the outside of" City Hall. The City, when it speaks, does not enjoy the First Amendment's protection from criminal prosecution for pure speech as private speakers do. No reasonable observer of the regular and frequent occurrence of foreign nations' flags on

the Flag Poles would conclude Boston—the Capital City of the Commonwealth—is violating the Commonwealth's criminal law, as opposed to merely accommodating the private speech of the private flag raisers.

C. The First Circuit Did Considerable Damage to the Forum Doctrine and Wiped Away Protections for Private Speech by Inventing a Test That Distorts the Government Speech Doctrine in Violation of This Court's Precedents.

By subjecting Camp Constitution's requested flag raising to its rigid, "three-part *Summum/Walker* test" for government speech in the first instance, the First Circuit's opinion conflicts not only with this Court's forum doctrine precedents (*see* Pt. I.A, *supra*), but also with *Summum* and *Walker* because they disclaim any such formulaic application of "the recently minted government speech doctrine," *Summum*, 555 U.S. at 481 (Stevens, J., concurring), and affirm that forum doctrine applies to intentional designations of government property for private speech.[12] Though *Walker* emphasized three primary factors from *Summum*, the Court clarified that *Summum* did not

---

[12] The First Circuit ultimately paid lip service to forum analysis, but with circular reasoning, having already committed to its formulaic government speech finding. (Pet. App. 27a ("[A] conclusion that the City has designated the flagpole as a public forum 'is precluded by our government-speech finding.'").)

provide a formulaic test for government speech by highlighting some of the other, nonexclusive considerations deemed relevant to the government speech finding. *See Walker*, 576 U.S. at 210 ("In light of these and a few *other relevant considerations*, the Court concluded that the expression at issue was government speech." (emphasis added)), 213 ("That is *not* to say that *every element* of our discussion in [*Summum*] is relevant here." (emphasis added)); *cf. Matal*, 137 S. Ct. at 1759 ("Holding that the monuments in the park represented government speech, we cited *many factors*." (emphasis added)). The First Circuit's rigid approach expands the government speech doctrine beyond its constitutional bounds. *See Matal*, 137 S. Ct. at 1760 ("*Walker* . . . likely marks the outer bounds of the government speech doctrine.").

The First Circuit's formulaic test comprises (1) history ("the historical use of flags by the government"); (2) attribution ("whether an observer would attribute the message of a third-party flag on the City's third flagpole to the City"); and (3) control ("whether the City maintains control over the messages conveyed by the third-party flags"). (Pet. App. 16a–23a.). By discarding other relevant factors, this test can eviscerate the public forum doctrine.

A recently designated public forum would invariably have a prior history of government speech, allowing courts to ignore the evidence of express policies and actual practices and rely on *ad hoc* government litigation positions used to justify censorship. Or, if a court *a priori* assumes that certain government property is incompatible with a

public forum based on the general history of *other* government properties, then it could refuse to consider the government's intentional designation of the forum by policy and practice, which is what the First Circuit did in this case, citing a case where a government flagpole was never designated or ever used as a public forum.[13] (Pet. App. 17a.) While a flagpole may not be a typical designated public forum (by nature designated public forums are not typical), when the government intentionally designates a flagpole a public forum, as the City did here, it becomes a public forum in the same way as any other government property becomes a designated public forum. Without the First Circuit's categorical, *a priori* assumption, Boston's policy and practice make the designated public forum conclusion easy. Indeed, the history of *Boston's* Flag Poles preclude a government speech finding even under the First Circuit's test.

After stumbling out of the gate with its first prong, the First Circuit crammed its government speech conclusion into the second and third prongs. Under the second "attribution" prong, the First Circuit shunned the perspective of any reasonable *and informed* observer (Pet. App. 17a–21a), allowing the court to disregard the express policy and longstanding practice evidencing the City's intent to accommodate private speech in a designated

---

[13] *See Griffin v. Sec'y 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 . . . ." (emphasis added)).

forum.[14] Despite Commissioner Rooney's admitting there is no evidence that any observer ever concluded the private flags flown on the Flag Poles were endorsed by the City (Pet. App. 150a), the First Circuit supposed its *uninformed* observer would so conclude based on *made-up* facts nowhere in the record. For example, the court imagined that an up-close observer of a flag raising would "see a city employee replace the city flag with a third-party flag." (Pet. App. 18a.) But Commissioner Rooney disclaimed any knowledge of whether a city employee ever raised a private flag. (Pet. App. 191a.) The court also imagined that "[a] faraway observer (one without a view of the Plaza)" would necessarily attribute a temporary private flag to the City because it would be flying next to the U.S. and Massachusetts flags. (Pet. App. 18a–19a.) But City Hall and other buildings surrounding the Plaza are taller than the Flag Poles, so there is no realistic vantage point from which an observer could see the private flag without also seeing an associated flag raising event on the Plaza. (Pet. App. 161a.)

Finally, the control prong of the First Circuit finds government speech where even de minimis government control is exercised over access to the forum. This allowed Boston to use its neutral and minimal application process to turn private speech

---

[14] *See Summum*, 555 U.S. at 487 (Souter, J., concurring) ("To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige . . . .").

into government speech when it served as a convenient excuse to censor religious viewpoints.

The Eleventh Circuit took a better approach in *Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021). The *Leake* court invoked its version of the *Summum*/*Walker* factors and held that a veterans parade funded and organized by the City of Alpharetta, Georgia, was the city's speech. *Id.* at 1253. Thus, "the Sons of Confederate Veterans cannot force the City to include a Confederate battle flag in the veterans parades it funds and organizes." *Id.* (cleaned up).

Unlike the First Circuit, the Eleventh Circuit in *Leake* acknowledged that courts "lack a 'precise test'" for determining "[w]hat makes speech *government* speech," but that "there are three factors we use to distinguish government speech from private speech" which "are neither individually nor jointly necessary for speech to constitute government speech." *Id.* at 1248. The court named the three factors "history, endorsement, and control." *Id.*

In addition to recognizing the "three factors" are nonexclusive and nondispositive, the *Leake* court also applied the factors more intuitively than the First Circuit. The *Leake* court considered "[t]he history of military parades in general, *and this Parade* in particular." *Id.* (emphasis added). The First Circuit, by contrast, considered only the general history of government flag poles, but disregarded the history of the Boston City Hall Flag

Poles and their extensive use by private actors to communicate private messages. (Pet. App. 17a.)

Applying the "endorsement" factor, *Leake* used a reasonable *and informed* observer who would know the parade was organized and funded by the city, even though the public largely viewed the parade as an event put on by the local American Legion post, and knew the city promoted the parade as the Legion's partner, but did not know the city was the chief organizer and financial backer of the event. *Id.* at 1249–1250. The First Circuit, applying its attribution test, rejected an informed observer in favor of an ignorant observer who only knows whatever is in the observer's line of sight (Pet. App. 17a–21a), or the court's imagination (*see* "up-close observer" and "faraway observer," *supra*). Conversely, the Eleventh Circuit's informed observer would have known: (1) that the City's policy and practice "seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums," including the City Hall Flag Poles (Pet. App. 136a–140a); (2) that the City permits private organizations to temporarily raise their flags associated with their private events (Pet. App. 142a); (3) that the City approved at least 284 flag raising events over twelve years with no denials (Pet. App. 142a–143a); (4) that during the year preceding Camp Constitution's application the City approved an average of over three flag raisings per month (Pet. App. 142a–143a); (5) that the City will allow essentially any event to take place on City Hall Plaza (Pet. App. 149a); (6) that the City does not even review the content of the flags it allows private organizations to raise (Pet. App. 150a); and (7) that

the private events using flags of foreign nations cannot be government speech under Massachusetts law (Part III.B.2, *supra*). A half-informed observer even marginally aware of these undisputed facts could not conclude that Boston speaks through the private flags on its Flag Poles.

The *Leake* court also concluded that the "control" factor favored government speech because the city "'effectively controlled the messages conveyed' by requiring applicants to describe the messages they intended to communicate and then by 'exercising final approval authority over their selection' based on those descriptions." 14 F.4th at 1250 (*quoting Walker*, 576 U.S. at 213). The court reasoned, "When the City exercised this control as the Parade's organizer by excluding organizations with whose speech the City disagreed, the City was speaking." *Id.* Thus, like this Court in *Walker*, the *Leake* court viewed exclusions from the parade as evidence of the city's *effective* control over the parade. *See id.*; *Walker*, 576 U.S. at 213 ("[The State] and its predecessor have *actively* exercised this authority. . . . [T]he State has rejected at least a dozen proposed designs." (emphasis added)). But the First Circuit discounted Boston's history of accepting all comers to its Flag Poles prior to denying Camp Constitution. (Pet. App. 24a–25a.)

The *Leake* court's summation of its "control" analysis, however, may promote the same error that the First Circuit adopted. According to *Leake*, "Either exclusion or advance preconditions would be adequate control." 14 F.4th at 1250–51. Most designated or limited public forums are likely to

condition use on an application, neutral criteria, and conformance with the purpose of the forum. Finding government speech based on such de minimis regulation which is inherent to any government property—no matter how clear the evidence of government intent to open a forum—damages the forum doctrine by constructing an almost irrebuttable presumption against a designated or limited forum. Such a presumption conflicts with this Court and several circuits holding that mere government approval or allowance of access to its property does not transform private speech into government speech. (Q.P.3, Part III.B.1, *supra*.)

* * *

Courts should begin with forum analysis to determine whether the government's policy and practice evidence an intent to designate a public forum for private speakers, or open a nonpublic forum for certain speakers or subjects. The First Circuit's *a priori* assumptions about the City Hall Flag Poles ignored the City's policy and practice evidencing its intent to designate the Flag Poles a public forum. The court then distorted *Summum* and *Walker* to support its *a priori* assumptions. If the First Circuit can commit such an obvious error under the facts of this case, there is little protection from other courts' misapplying *Summum* and *Walker* and obliterating the designated and nonpublic forum categories. The shrinking public forum would be a tragic loss of free speech.

CONCLUSION

For all of the foregoing reasons, the Court should reverse and vacate the First Circuit's decision and remand the case for entry of judgment for Camp Constitution on its First Amendment claims.

Dated this November 15, 2021.

Respectfully submitted,

Mathew D. Staver, *Counsel of Record*
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org

Counsel for Petitioners