No. 20-1800

IN THE
Supreme Court of the United States

HAROLD SHURTLEFF, *et al.*,
Petitioners,

v.

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

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal representation at no charge to individuals whose constitutional rights are threatened or infringed, and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

The Rutherford Institute is interested in the resolution of this case because it concerns whether a state actor may rely on Establishment Clause concerns to exclude religious speech and speakers from otherwise-generally-available public forums. The Rutherford Institute writes in support of petitioners' challenge to such restrictions.

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[1] This amicus brief is filed with the parties' consent. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

INTRODUCTION

Twenty-five years ago in *Capitol Square Review Board* v. *Pinette*, seven Members of this Court concluded that the state does not violate the Establishment Clause when it permits religious expression in a government-sponsored public forum that is open on equal terms to all comers. 515 U.S. 753, 770 (1995) (plurality opinion); *id.*, at 773 (O'Connor, J., concurring).

Notwithstanding *Pinette*, in this case Boston rejected petitioners' flag-display application because the City believed that "the First Amendment's prohibition of government establishment of religion" required it "to refrain respectfully from flying non-secular third-party flags." (Pet. App. 7a-8a.) The First Circuit, although it did not squarely rule on the Establishment Clause issue, likewise believed that "the powerful display of a single religion's flag … could signal the City's embrace of that religion." (Pet. App. 35a.)

These positions are foreclosed by *Pinette*. To be sure, no single opinion in that case commanded a majority of the Court, but both the plurality opinion authored by Justice Scalia and the concurring opinion by Justice O'Connor agreed on the core legal rule that the Establishment Clause is not offended by private religious speech disseminated in a longstanding, government-run public forum. Although the day may come when this Court will choose to revisit the competing rationales offered by the *Pinette* plurality and concurrence, there is no need to do so here. Instead, this case presents an opportunity that is at once more modest and more impactful—a chance

both to clarify that the consensus rule from *Pinette* remains good law and to underscore that that rule will suffice to resolve the Establishment Clause question in the great majority of private-speech cases—including this one.

If the Court agrees that (as petitioners have argued) flying a flag on the City's flagpoles is private (rather than governmental) speech, the *Pinette* consensus rule shows that there is no Establishment Clause objection to petitioners' proposed display. The City therefore cannot use the Establishment Clause to justify its content-based restriction on petitioners' speech. The First Circuit's contrary judgment should be reversed.

SUMMARY OF ARGUMENT

At least since this Court's decision in *Capitol Square Review Board* v. *Pinette*, 515 U.S. 753 (1995), it has been clear beyond peradventure that a state actor may not exclude private religious speech from a public forum based on concerns that permitting the speech to go forward would violate the Establishment Clause. The fractured nature of the Court's decision in that case, however, appears to have allowed some actors (like Boston here) to continue invoking the Establishment Clause as a defense to free speech claims such as this one. As the ensuing sections explain in detail, there is no basis for that position.

To be sure, a series of opinions from Members of this Court has fixed the notion of governmental "endorsement" as an important test for Establishment Clause compliance. *See* Section I.A, *infra*. But, as the analogous facts of *Pinette* make plain, even ad-

herents of the "endorsement" test would not find an Establishment Clause violation where religious speech occurs on government property that historically has hosted a variety of private speech, and that the government continues to hold open on impartial terms—exactly as is the situation here. *See* Section I.C, *infra*.

Likewise, those who favor the bright-line rule adopted by the *Pinette* plurality—no Establishment Clause violation where the speech is private religious speech in a public forum—would find no Establishment Clause violation on these facts, where the speech in question is private speech in a longstanding public forum that has hosted speech on all manner of subjects. *See* Section I.B-C, *infra*.

Consequently, although there may come a day when the Court needs to revisit the two-track reasoning that led to the rule of *Pinette*, there can be no gainsaying the continued vitality of that rule: private religious speech in a public forum does not threaten—much less effect—an Establishment Clause violation. *See* Section II.A, *infra*. It follows that Boston has no justification—much less a compelling one—for its content-based regulation of petitioners' speech, and the First Circuit's judgment should be reversed. *See* Section II.B, *infra*.

ARGUMENT

I. CONCERN ABOUT A POTENTIAL ESTABLISHMENT CLAUSE CHALLENGE CANNOT JUSTIFY EXCLUDING RELIGIOUS SPEECH FROM PUBLIC FORUMS.

As noted above, this case follows squarely in the footsteps of *Pinette*, which sought to resolve tension that had arisen between two threads of this Court's Establishment Clause jurisprudence: the recognition, on one hand, that government endorsement of religion could signal an Establishment Clause violation; and the parallel evolution, on the other, of jurisprudence recognizing that private religious speech in a government-sponsored public forum does not violate the Establishment Clause.

A. The Rise of the Endorsement Test

The notion of endorsement as a proxy for government establishment of religion first arose in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). In that case, the Court upheld (five-to-four) a municipal Christmas display that included everything from Santa Claus and his reindeer to a crèche, holding that any benefit to religion was merely "incidental"—and therefore not objectionable under the Establishment Clause. *Id.*, at 684.

In a concurring opinion, Justice O'Connor proposed modifying the Court's (then-governing) test under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Whereas *Lemon* required a showing, *inter alia*, that the government action had a secular purpose and that its primary effect was neither the advancement

nor the inhibition of religion, *id.*, at 612, Justice O'Connor's proposed endorsement test sought to train courts' attention on whether the state's conduct had either the intent or the effect of endorsing religion. *Lynch*, 465 U.S., at 687–688 (O'Connor, J., concurring). The goal of the new test, she explained, was to prevent the state from communicating "to [religious] nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Ibid.*

Justice O'Connor continued to advocate for adoption of the endorsement test in subsequent cases, frequently concurring in order to refine or further clarify the contours of the test. In *Wallace* v. *Jaffree*, for example, the Court partly adopted the endorsement test, 472 U.S. 38, 56 (1985), but Justice O'Connor concurred to argue for its full adoption, *id.*, at 69 (O'Connor, J., concurring). She also refined her formulation of the test's analytical framework, arguing that government action must be evaluated, for establishment purposes, from the viewpoint of an "objective observer." *Id.*, at 76. Specifically, she proposed asking "whether an objective observer acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of prayer." *Ibid.*

Despite its repeated refinement and frequent invocation by Justice O'Connor and other Members of this Court, the full-fledged version of the endorsement test was never adopted by a majority of the Court. *See, e.g.*, *Cnty. of Allegheny* v. *American Civil*

Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 595 (1989) (opinion of Blackmun, J., joined by Stevens, J.) (applying the endorsement test); *id.*, at 627–632 (opinion of O'Connor, J., joined by Brennan and Stevens, JJ.) (same).

Nevertheless, the fact remains that for many years leading up to this Court's decision in *Pinette*, one of the most frequently asked questions in Establishment Clause cases was whether the government intended to, or its conduct did in effect, endorse religion. *See id.*, at 592 (majority opinion) ("In recent years, we have paid particularly close attention to whether the challenged government practice either has the purpose or effect of 'endorsing' religion.").

B. The Establishment Clause as a Speech-Regulation Defense: *Widmar* and *Lamb's Chapel*

Around the same time that the endorsement test was developing, a separate line of this Court's cases was grappling with the distinct but related question of how (if at all) the Establishment Clause applies to *private* religious speech occurring in a government-provided forum.

One of the earliest of these was *Widmar* v. *Vincent*, which addressed whether the Establishment Clause justified a state university's policy of making its facilities "generally available" to registered student groups, but not "for purposes of religious worship or religious teaching." 454 U.S. 263, 264–265 (1981). Because the school had created a forum generally open for use by student groups, the Court explained, the Free Speech Clause required strict scru-

tiny of discrimination against religious speech. *Id.*, at 270–271.

And the Court emphatically rejected the university's claim that the Establishment Clause prohibits private religious teaching in a public forum. The Court observed that an "equal access" policy that treats all private expression evenhandedly is not "incompatible with this Court's Establishment Clause cases," as it avoids entanglement with religion and does not have the primary effect of advancing religion. *Id.*, at 271–272. "'[I]ncidental' benefits" to religion from "an equal-access policy," the Court explained, do "not violate the prohibition against the 'primary advancement of religion.'" *Id.*, at 273. Although matters might be different if "religious groups [would] dominate [the university's] open forum" if granted equal access, the Court saw no Establishment Clause concern in the absence of "empirical evidence" of such domination. *Id.*, at 275.

Similarly, the Court in *Lamb's Chapel* v. *Center Moriches School District* found that the Establishment Clause did not justify barring a church from showing a Christian-themed film series on school property after-hours. 508 U.S. 384, 386–387 (1993). Echoing *Widmar*, the Court held unanimously that "the government violates the First Amendment when it denies access to a speaker to suppress the point of view he espouses on an otherwise includible subject." *Id.*, at 394.

Lamb's Chapel likewise made quick work of the district's argument that its policy could survive strict scrutiny because it was motivated by a desire to

steer clear of an Establishment Clause violation. Indeed, the Court needed only a single paragraph to conclude "that the posited fears of an Establishment Clause violation are unfounded":

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Id., at 395.

C. The Intersection of Endorsement and the Free-Speech Clause: *Capitol Square Review Board* v. *Pinette*

Although the Court's opinion in *Lamb's Chapel* mentioned endorsement, the public-forum and endorsement threads of First Amendment doctrine fully intersected for the first time in *Pinette*. There, the Court considered the Establishment Clause's application to a Latin cross that the Ku Klux Klan wanted to display on the grounds of the Ohio state capitol. 515 U.S. at 757–58. Although the state's general policy was to allow unattended private displays on the capitol grounds, the relevant state agency refused to

allow the Klan's display on the basis that doing so would violate the Establishment Clause. *Id.* at 761.

Justice Scalia authored an opinion for a four-Justice plurality, declining to apply the endorsement test and concluding that, so long as the government behaves neutrally, a privately sponsored display in a public forum is essentially constitutional *per se*. *See id.*, at 770. In doing so, he explained that this test followed naturally from *Widmar* and *Lamb's Chapel*, as the same factors that were "determinative" in those cases also existed in *Pinette*: "[t]he State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.*, at 763.

The plurality therefore rejected as irrelevant the Board's argument that an observer of a cross display at the state capitol might mistakenly perceive a government endorsement of the religious message. *Id.*, at 763. Although the *Lamb's Chapel* Court had concluded there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," 508 U.S., at 395, the *Pinette* plurality concluded that the no-endorsement determination "was not the result of empirical investigation." *Pinette*, 515 U.S., at 765. Instead, that conclusion "followed directly … from the fact that the forum was open and the religious activity privately sponsored." *Ibid.*

The plurality explained that endorsement "connotes an expression or demonstration of approval or support," and involves "'promotion' or 'favoritism.'" *Id.*, at 763 (citations omitted). Thus, endorsement could arise from "either expression *by the government itself*, … or else government action alleged to *discriminate in favor of* private religious expression or activity," but not from the government simply giving a religious display "the same access to a public forum that all other displays enjoy." *Id.*, at 763–764 (citations omitted).

The *Pinette* plurality specifically found it inappropriate to use an endorsement test to create an exception to the equal-access rule established in *Widmar* and *Lamb's Chapel*, explaining that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with state endorsement." *Id.*, at 768. "[G]iven an open forum and private sponsorship, erroneous conclusions [of endorsement] do not count." *Id.*, at 765. To conclude otherwise would "disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause." *Id.*, at 768.

Applying those principles, the plurality rejected the Board's contention that the Establishment Clause is implicated when private speech is "too close to the symbols of government," such that the "private speech can be mistaken for government speech." *Id.*, at 766. "That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake." *Ibid.* The

plurality concluded that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publically announced and open to all on equal terms." *Id.*, at 770.

A three-Justice concurrence, written by Justice O'Connor, would have applied the endorsement test, and criticized the plurality's "carve out … to the endorsement test for the public forum context." *Id.*, at 773 (O'Connor, J., concurring). "In [her] view, 'the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols,' even where a neutral state policy is at issue." *Ibid.* (quoting *Allegheny*, 492 U.S., at 628 (O'Connor, J., concurring)). Justice O'Connor further posited that private religious displays could be unconstitutional endorsement if they "so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.*, at 777.

Justice O'Connor also took the occasion to elaborate on the characteristics of the endorsement test's "reasonable observer." She "emphasize[d] that … the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Id.*, at 772–773 (quoting *Allegheny*, supra, at 594 (opinion of Blackmun, J.)). This reasonable observer knows not just "the information gleaned simply from viewing the challenged display," but also the "history and context of the community and forum in which the display appears." *Id.* at 780.

Applying these principles, Justice O'Connor concluded that a reasonable observer "would [be] fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Id.*, at 782. As a result, she found "no realistic danger" that the community would think that the government was endorsing "the Klan's cross display." *Id.*, at 773. Justice O'Connor thus concluded that permitting the display survived the endorsement test and would not violate the Establishment Clause.

Justice Souter, authoring a separate concurrence joined by the same three Justices, agreed that the endorsement test should apply. *Id.*, at 784 (Souter, J., concurring). To Justice Souter, "[e]ffects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer." *Id.*, at 787.

Justice Souter explained that he approved the display "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it." *Id.*, at 784. "[A] flat denial of the Klan's application," he explained, "was not the Board's only option to protect against an appearance of endorsement." *Id.*, at 793. A better choice, he observed, would have been a disclaimer: the Board could have (1) granted the Klan's application but required it to include a visible disclaimer that the display was erected by private individuals without government support; or (2) "instituted a policy of restricting all private, unattended displays to one area of the square, with a

permanent sign marking the area as a forum for private speech carrying no endorsement from the State." *Id.*, at 793–794. With such alternatives available, he concluded that the Board's flat denial was neither narrowly tailored nor necessary to satisfy the Establishment Clause. *Ibid.*

Although the reasoning of the various *Pinette* opinions differed, the topline takeaway was that a clear majority of the Court concluded that private religious speech in a known public forum does not violate the Establishment Clause.[2]

What's more, the continued vitality of that central holding is reinforced by this Court's repeated holdings, in the quarter-century since *Pinette*, that a neutral policy treating religious and nonreligious speech similarly does not constitute endorsement. *See Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089–2090 (2019) (32-foot tall Latin cross memorial-

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[2] The Court's post-*Pinette* Establishment Clause jurisprudence is analogous: fractured in the test to be applied, but consistent in treatment of a neutral government's relationship to private speech. *See, e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 678 (2005) (applying an analysis "driven both by the nature of the monument and by our Nation's history"); *McCreary Cnty* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–866 (2005) (applying *Lemon* test); *Zelman* v. *Simmons–Harris*, 536 U.S. 639 (2002) (ignoring *Lemon* and endorsement tests); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

izing area soldiers killed in World War I did not violate the Establishment Clause); *id.*, at 2093 ("[T]he Court has allowed private religious speech in public forums on an equal basis with secular speech.") (Kavanaugh, J., concurring); *Van Orden*, 545 U.S., at 678 (Ten Commandments monument on Texas State Capitol grounds did not violate the Establishment Clause based on historical and local context); *Zelman*, 536 U.S., at 652 ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").

II. THIS CASE PRESENTS NO ESTABLISHMENT CLAUSE CONCERNS.

As the fragmented *Pinette* opinions illustrate, in an appropriate case the Court may wish to reconsider the applicability of the endorsement test, and in particular whether and how it applies to private religious speech on government property. But this case does not require any such inquiry. Instead, it presents the Court an ideal opportunity to expressly reaffirm the holding on which the *Pinette* plurality and concurrence agreed: that private religious speech on government property does not offend the Establishment Clause when it occurs in a long-standing public forum that is held open on content-neutral terms.

Therefore, if, as petitioners convincingly maintain, the speech at issue here is private—rather than government—speech, then the rule of *Pinette* easily

dispenses with Boston's Establishment Clause argument. In that circumstance, the speech in question would be private speech (flying a flag) in a public forum (the City flagpoles) that has long been open on equal terms to all aspirants (not one of whom had previously been turned away).

A. *Pinette* Holds That Private Speech in a Known Public Forum Does Not Violate the Establishment Clause

As described above, the four-Justice *Pinette* plurality concluded that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." 515 U.S., at 770.

The three concurring Justices reached that same result, but by applying the endorsement test, concluding they "would be likely" to find no Establishment Clause violation "where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id.*, at 775 (O'Connor, J., concurring). What's more, the "reasonable observer" from whose perspective these questions are assessed knows not just "the information gleaned simply from viewing the challenged display," but also "the general history of the place in which the cross is displayed," including how and by whom the forum has been used over time. *Id.*, at 780, 781.[3] Most pertinent to this case, the concur-

[3] *See also Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (emphasizing that the "objective observer"

ring Justices also stated that, "[t]o the extent there is a presumption that structures … in front of buildings plainly identified with the State[ ]imply state approval of their message, that presumption can be rebutted *where the property at issue is a forum historically available for private expression*." *Id.*, at 782 (emphasis added).

Thus, although the *Pinette* plurality and concurrence disagreed on a theoretical level, they converged on a simple and practical test that will resolve a large proportion of cases: private speech on government property does not violate the Establishment Clause where (1) the property has historically hosted a variety of private speech and (2) the government continues to hold the space open to private speakers on evenhanded, publicly announced terms. The *Pinette* plurality concluded that if those conditions exist, the endorsement test does not apply; and the *Pinette* concurrence concluded that if those conditions exist, the endorsement test is satisfied. Thus, the outcome is the same under either theory: these two conditions are sufficient to eliminate any Establishment Clause concerns.

This is not to suggest that the disagreement between the *Pinette* plurality and concurrences will never matter. For instance, if the government were to open a new forum for private speech in a geographical area that had not previously been used for

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under the endorsement test "knows all of the pertinent facts and circumstances surrounding the symbol and its placement").

that purpose, the endorsement test might well apply differently than it did in *Pinette*. And endorsement problems might arise if government property that is technically available on a neutral, open basis has in fact historically been used exclusively or predominantly for religious speech. In these relatively rare situations, it would be at least open to question whether the endorsement test's "reasonable observer" would come to the same conclusion as the *Pinette* plurality.[4]

In short, the disagreement between the *Pinette* plurality and concurrences would matter only in relatively unusual cases. In the main, private religious speech on government property will occur in circumstances like those that existed in *Pinette*—and those that exist here: on property that has long been home to private speech, and that the government continues to hold out publicly for that purpose. In those cir-

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[4] In those circumstances, the endorsement test would also require considering the alternative pointed out by Justice Souter's *Pinette* concurrence: posting "a sign" on or near the religious display, "adequately disclaiming any government sponsorship or endorsement of it." *Id.*, at 784. But that is merely an alternative way to satisfy the endorsement test, and not an additional requirement on top of the other *Pinette* factors. When a space has long been used for private speech and the government publicly acknowledges that it is continuing that practice, Justice O'Connor's "reasonable observer" would already know those facts, and so would not need an additional disclaimer.

cumstances, *Pinette* makes clear that the usual rule holds true: "There is no Establishment Clause violation in [government's] honoring its duties under the Free Speech Clause." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995). Following *Pinette*, a number of lower courts have recognized this point.[5] The Court should take the opportunity this case presents to do the same.

B. If the Flags in This Case are Private Speech, Then the Facts Here are Like *Pinette* and Present No Establishment Clause Problem

The record in this case shows that those settled principles apply here and obviate any Establishment Clause problem. As petitioners' brief sets forth, the Boston City Hall flagpoles have hosted private flag-raisings for many years. Brief for Petitioners, 8, 27–29. In the dozen years preceding petitioners' request, private flag-raisings had been held nearly 300 times, and almost weekly (on average) in the imme-

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[5] *E.g., Satawa* v. *Macomb Cty. Rd. Comm'n,* 689 F.3d 506, 524–525 (6th Cir. 2012) (no Establishment Clause violation is likely "where a private individual seeks to express religious views in a public forum"); *Peck* v. *Upshur Cty. Bd. of Educ.,* 155 F.3d 274, 279 (4th Cir. 1998) ("The Supreme Court has … consistently sustained against Establishment Clause challenge neutral government policies that permit private religious speech on and within state … properties on the same terms as private secular speech is permitted.").

diately preceding year. (Pet. App. 136a–140a, 142a–143a, 149a–150a, 173a–180a.)

Those flags symbolized "countries, civic organizations, [and] secular causes" (Pet. App. 6a) as varied as the Chinese Progressive Association, Puerto Rico, Juneteenth, Tibet, various foreign countries such as Albania and Cape Verde, Bunker Hill Day, the Canadian consulate general, the United Nations, commemoration of murder victims, emergency medical services, and Boston Pride. (Pet. App. 6a, 142a–143a, 173a–187a.) On top of that, the City of Boston expressly held out the flagpoles as a "public forum" and had never denied a request for a private flag raising. (Pet. App. 20a, 28a).

This is the kind of situation in which the plurality and concurring approaches in *Pinette* converge. If the flag raisings here were indeed private speech, as petitioners contend, then it plainly occurred in a forum long held open by the government for that purpose, on terms that were publicly announced and even-handed. Although the *Pinette* plurality and concurrences would approach these facts from different points of view—the plurality from the government's, and the concurrences from a hypothetical reasonable observer's—they would both conclude that these facts show that no Establishment Clause violation had occurred.

One final conclusion follows: the City cannot rely on the Establishment Clause to justify its refusal to allow petitioners' flag. On the one hand, if (as the City posits) flag-flying constitutes government speech, then the City's Establishment Clause argument is at best superfluous because the City, as

speaker, can refuse to announce petitioners' proffered message regardless of its content. On the other hand, if (as petitioners persuasively argue, Brief for Petitioners, 44–52), the flagpoles are a public forum and flying a private flag there is private speech, then the City must show that its refusal was narrowly tailored to vindicate a compelling interest. Yet the City cannot make that showing, because the very facts that trigger strict scrutiny—private speech in a public forum—also compel the conclusion, under *both* of the tests discussed above, that there is no Establishment Clause problem in flying petitioners' flag.

* * *

In sum: petitioners' brief ably explains why the flags at issue here were indeed private speech and not government speech. If the Court agrees, then for the reasons explained herein, that settles the Establishment Clause question as well. As both the *Pinette* plurality and concurrence recognized, "there 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." 515 U.S., at 766. At least on facts like these—where the government is simply continuing a history of evenhandedly allowing private speech on government property—that difference is dispositive. Religious speech in such circumstances simply does not give rise to an Establishment Clause violation. The Court should so hold.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted,

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November 22, 2021