No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, ET AL., PETITIONERS

v.

CITY OF BOSTON, MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the denial of petitioners' application to hold an event raising a religious flag on a flagpole outside Boston City Hall violated the Free Speech Clause of the First Amendment.

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INTEREST OF THE UNITED STATES

This case arises from the denial of petitioners' application to hold a flag-raising event using a flagpole outside Boston City Hall. The constitutionality of that denial depends in part on whether the flags raised in the City's flag-raising program are government speech or instead private speech in a government-created forum. The United States has an interest in that question because federal governmental entities manage a variety of programs in which private speakers participate. For example, the National Park Service manages hundreds of park units in which demonstrations, special events, and government-sponsored events may occur. And the United States Postal Service manages a program in which members of the public may design custom postmarks. The extent to which those and other programs constitute government speech has important conse-

quences for the management and regulation of those programs. The United States thus has a substantial interest in the proper interpretation and application of the relevant First Amendment principles.

STATEMENT

1. Respondent City of Boston allows private groups to apply to hold flag-raising events using one of the three flagpoles on the plaza in front of Boston City Hall. That flagpole ordinarily flies the City's flag; the other poles fly the United States flag (along with the POW/MIA flag) and the Massachusetts flag. Pet. App. 141a-142a. When the City approves a private group's application to hold a flag-raising event, the group's chosen flag temporarily replaces the City's flag. *Ibid.* Such flag raisings typically occur in conjunction with events held on the plaza below. *Id.* at 4a, 141a-142a.

The City considers the plaza, including the area immediately below the flagpoles, to be a public forum. Pet. App. 132a-133a, 137a. The City requires groups seeking to hold events on the plaza to submit a written application and to satisfy various requirements related to scheduling, safety, and other administrative matters. *Id.* at 133a-140a. But the City does not consider the content or viewpoint of the proposed events in deciding whether to approve them, and the City has approved many events held by religious groups. *Id.* at 136a-137a, 141a.

A group seeking to raise a flag in connection with its event must fill out the same application form, but the City's review of the flag-raising portion of the request is different. Pet. App. 140a-141a. Before 2018, the City had no written policy governing review of flag-raising applications. *Id.* at 149a. Approval decisions were made by a city commissioner, respondent Gregory Rooney. *Ibid.* Rooney testified that he would consider whether

the flag was "consistent with the City's message, policies, and practices." *Id.* at 149a (citation omitted). But Rooney typically did not "see a proposed flag before approving a flag-raising event," and he "never requested to review a flag or requested changes to a flag." *Id.* at 149a-150a.

Between June 2005 and July 2017, the City received 284 applications to hold flag-raising events and approved all of them. Pet. App. 24a, 142a. Most of the resulting events raised the flags of foreign countries. *Id.* at 142a. Others raised the flags of community and civic organizations like the National Juneteenth Observance Foundation, the Bunker Hill Association, and Boston Pride. *Ibid.*; see *id.* at 173a-187a (listing events). The City's website stated that the City's flag-raising program "commemorate[s] flags from many countries and communities" and that its goal is to "foster diversity and build and strengthen connections among Boston's many communities." *Id.* at 143a.

2. Petitioner Camp Constitution is a volunteer association that seeks "to enhance understanding of the country's Judeo-Christian moral heritage." Pet. App. 6a. In July 2017, Camp Constitution requested approval to "raise the Christian flag" during an hour-long event on City Hall Plaza commemorating the "civic and social contributions of the Christian community" to Boston. *Id.* at 130a-131a. The proposed event would have consisted of speeches by local clergy focusing on Boston's history. *Id.* at 131a. Camp Constitution's director, petitioner Harold Shurtleff, submitted his request by email and included an image of the flag, which is a red cross against a blue background in the upper left corner of an otherwise plain white flag. *Id.* at 131a-132a.

When Rooney received petitioners' request, he reviewed past flag raisings and determined that the City had no record of having approved a request to raise a religious flag. Pet. App. 151a-152a. Based on that review, Rooney denied petitioners' application. *Id.* at 152a. When Shurtleff asked for an explanation, Rooney consulted the City's law department and responded:

> 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.

Id. at 153a-154a (citation omitted).

Rooney later testified that he had approved flags with religious symbolism in the past, but only because they had been presented as representations of secular occasions or entities. Pet. App. 156a. The City stipulated that, had petitioners not described their flag as a "Christian Flag," 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." *Ibid.* (citation omitted).

In his email to Shurtleff explaining the denial, Rooney said that the City would "consider a request to fly a non-religious flag" for petitioners' event. Pet. App. 154a. Petitioners then submitted an application for an event titled "Camp Constitution Christian Flag Raising," *id.* at 157a, but the City did not respond, considering the request duplicative of the earlier application it had already denied, *id.* at 159a.

In 2018, the City "committed its past policy and practice" for flag-raising events to writing. Pet. App. 159a. The City's written Flag Raising Policy has seven rules, *ibid.*, the first of which 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," *id.* at 160a (citation omitted). According to the policy, Rooney has discretion to deny a flag-raising application even if it satisfies all seven rules—and, conversely, discretion to approve one that fails to satisfy the rules. *Id.* at 159a. Since the adoption of the written policy, Rooney has denied one flag-raising application: a request to raise a "Straight Pride" flag. *Id.* at 160a. Rooney did not explain the denial beyond a statement that "[d]ecisions on the raising of flags on the City Hall Flag Poles are at the City's sole and complete discretion." *Ibid.*

3. Shurtleff and Camp Constitution sued the City and Rooney, alleging as relevant here that the denial of their application violated the First Amendment's Free Speech Clause. The district court denied petitioners' motion for a preliminary injunction, Pet. App. 103a-127a, and the court of appeals affirmed, *id.* at 60a-82a.

The parties then filed cross-motions for summary judgment based on a joint statement of undisputed facts. Pet. App. 42a-43a; see *id.* at 128a-160a. The district court granted respondents' motion and denied petitioners' motion. *Id.* at 41a-59a. As relevant here, the court held that the City's flag-raising program is government speech and thus not subject to scrutiny under the Free Speech Clause. *Id.* at 48a-54a. The court stated that this Court's decisions in *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009), and *Walker* v. *Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015),

set forth "three primary factors" to consider in identifying government speech: "1) the history of the speech at issue; 2) a reasonable observer's perception of the speaker and 3) the state's control over the speech." Pet. App. 50a. The court determined that all three factors indicated that the flags were government speech. *Id.* at 51a-54a.

4. The court of appeals affirmed. Pet. App. 1a-40a. As relevant here, the court agreed that the flags displayed in the City's flag-raising program are government speech. *Id.* at 13a-31a. Like the district court, the court of appeals held that "[t]he three-part *Summum/Walker* test is controlling here." *Id.* at 16a. And like the district court, it concluded that all three factors favored respondents.

The court of appeals framed the first factor as "the historical use of flags by the government." Pet. App. 17a. And the court emphasized that "governments have used flags throughout history to communicate messages and ideas." *Ibid.*

As to the second factor, the court of appeals stated that "an observer would attribute the message of a third-party flag on the City's third flagpole to the City" because "an observer would arrive in front of City Hall, 'the entrance to Boston's seat of government,'" and would see the third-party flag replace the City's own flag and fly alongside "the United States flag and the Massachusetts flag, both 'powerful governmental symbols.'" Pet. App. 17a-18a (citations omitted). The court emphasized that "the three flags are meant to be—and in fact are—viewed together," and that "a display of three flags flying in close proximity communicates the symbolic unity of the three flags." *Id.* at 18a.

As to the third factor, the court of appeals found that "the City maintains control over the messages conveyed by the third-party flags" because it "has instituted procedures to ensure both that it is aware of all flags flown and that such flags display approvable messages." Pet. App. 22a. The court observed that "Rooney must review [each] request to determine whether the proposed flag-raising is consistent with the City's message, policies, and practices," *ibid.*, and that "the City limits physical access to the flagpole" to parties whose requests are approved, *id.* at 23a. "All in all," the court concluded, "the decision to fly a flag falls squarely on the City," and "in reserving this final approval authority, the City 'has "effectively controlled" the messages conveyed' in the flag display." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

Under this Court's precedents and based on the record in this case, the City's flag-raising program is not government speech, but instead a forum for private speech. The Court should therefore reverse the decision below. In so doing, however, the Court should reaffirm that the First Amendment affords the City and other governments ample latitude to craft expressive programs—including programs involving contributions from private parties—without relinquishing their right to control the message or exclude other private speakers.

A. The government-speech doctrine recognizes that although the Free Speech Clause restricts the government's ability to regulate private speech, it does not restrict the government's own speech. This Court has long recognized that the government could not operate unless it had the freedom to speak for itself. The Court has also made clear that the government may rely on

private parties in developing and disseminating its messages or in creating its expressive presentations. At the same time, the Court has emphasized that the government cannot transform private speech into government speech merely by approving private messages expressed in a forum for private speakers.

This Court's recent decisions have identified several factors that are relevant in distinguishing government speech from a government-created forum for private speech. Those factors include whether the mode of expression historically has been used to communicate government speech, whether the public would reasonably associate the speech with the government, and whether the government has exercised sufficient control over the speech. The Court has also considered other factors, including whether the government owns the physical media conveying the speech and whether that media is displayed permanently.

As applied to the record before this Court, those factors establish that the City's flag-raising program is not government speech. Most important, the City typically exercises no input into or control over the choice of flags or the content of the events at which they are raised. Instead, the City has made its flagpole generally available to a variety of private groups, approving all 284 applications it received in the twelve years before this case arose—usually without even reviewing the flags. This Court's decisions make clear that a government creates a forum for private speech where, as here, it seeks to foster a diversity of views from private speakers. And the Court has also held that the resulting speech remains private even if the government seeks to exclude religious speakers or other specific viewpoints.

The other relevant factors reinforce the conclusion that the program at issue here is not government speech. Although historically flags have often been used to convey government messages, the specific history of the City's flag-raising program is quite different because the City has opened its flagpole to a wide variety of private groups. And for the same reason, the public would not reasonably attribute the flags flown during frequent private flag-raising events to the City—just as they would not reasonably attribute to the City the messages conveyed by the associated events on the plaza below. Finally, the flags are flown only temporarily and remain the property of the private parties.

B. Because the flag-raising program is a forum for private speech, the City's denial of petitioners' application violated the First Amendment. A private speaker's right to access a government-created forum generally depends on the nature of the forum. This Court has recognized and articulated rules governing traditional public forums, designated public forums, and nonpublic forums. The First Amendment permits reasonable content- and speaker-based restrictions in some of those forums, but it prohibits viewpoint discrimination in all of them.

Here, it is unnecessary to determine what type of forum the City has created because the denial of petitioners' application was based on viewpoint. The City denied the application only because petitioners' flag was described as religious. This Court has long held that denying access to an otherwise-available forum simply because of the religious nature of the speech is viewpoint discrimination. The City cannot generally open its flagpole to flags from private civic and social groups

while excluding otherwise-similar groups with religious views.

C. Although the design of the City's existing flag-raising program precludes it from drawing viewpoint-based distinctions, the First Amendment leaves the City and other governments broad latitude to incorporate contributions from private groups without destroying the governmental character of the speech. When, for example, the National Park Service allows private participation in expressive events held in areas that are not traditionally open as forums for private speech, the Service sponsors and controls the events. The City could do the same with its flag raisings. Alternatively, the City could preserve much of the character of its current program without drawing viewpoint-based distinctions. It could, for example, establish the program as a nonpublic forum limited to the flags of sovereign nations, which have made up the vast majority of the flags raised in the current program.

ARGUMENT

A. The Flags Displayed Under The City's Flag-Raising Program Are Not Government Speech

This Court's precedents have consistently emphasized that the Free Speech Clause does not prevent the government from expressing its own views. The Court has likewise recognized that the government may rely on contributions from private parties without transforming government speech into private speech. But the Court has also made clear that the government does not engage in government speech when it simply provides a forum for private speakers to express a diversity of private views. Because that is what the City has done here, its flag-raising program is not government speech.

1. The government-speech doctrine allows the government to rely on contributions from private actors, but does not apply when the government creates a forum for a diversity of private views

a. "The Free Speech Clause restricts government regulation of private speech; it does not restrict government speech." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). The government is thus "entitled to promote a program, to espouse a policy, or to take a position," even though it thereby endorses some viewpoints and rejects others. *Walker* v. *Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). Indeed, "it is not easy to imagine how government could function if it lacked this freedom." *Summum*, 555 U.S. at 468. "[S]ome government programs involve, or entirely consist of, advocating a position." *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550, 559 (2005). And in many contexts "it is the very business of government to favor and disfavor points of view." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment).

Accordingly, a "government entity has the right to 'speak for itself,'" "'to say what it wishes,'" and "to select the views that it wants to express" without implicating the Free Speech Clause. *Summum*, 555 U.S. at 467-468 (citations omitted). In so doing, the government "represents its citizens and carries out its duties on their behalf." *Walker*, 576 U.S. at 208. And "when the government speaks," it is "accountable to the electorate and the political process for its advocacy." *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (citation omitted). The principal check on government speech is thus the electoral process, not the Free Speech Clause. *Walker*, 576 U.S. at 207.

Examples of government speech "exempt from First Amendment scrutiny" under the Free Speech Clause, *Summum*, 555 U.S. at 467 (citation omitted), have included "[p]ermanent monuments displayed on public property," *id.* at 470; specialty automobile license plates, *Walker*, 576 U.S. at 208; "the selection and presentation of [a public broadcaster's] programming," *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666, 674 (1998); and an advertising campaign controlled by the government, *Livestock Marketing Association*, 544 U.S. at 560.

As those examples illustrate, the government "is not precluded from relying on the government-speech doctrine" merely because the program at issue relies on "assistance from nongovernmental sources." *Livestock Marketing Association*, 544 U.S. at 562. The government may, for example, rely on private groups for help in "developing specific messages" in an advertising campaign. *Ibid.* It may accept license-plate designs or monuments from private parties. *Walker*, 576 U.S. at 208; *Summum*, 555 U.S. at 470. And it may "disburse[] public funds to private entities to convey a governmental message." *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995) (citing *Rust* v. *Sullivan*, 500 U.S. 173, 196-200 (1991)).

In a variety of contexts, moreover, the principles reflected in the government-speech doctrine allow a government to invite some private speakers, but not others, to participate in a government-sponsored presentation. A state university hosting a lecture series may invite speakers to offer a diversity of opinions on a topic without thereby bestowing on other individuals with additional opinions a constitutional right of access to the podium. See *Widmar* v. *Vincent*, 454 U.S. 263, 276-277

(1981). In structuring a ceremony to commemorate a historical event, the federal government may select private speakers to give a range of viewpoints without thereby incurring an obligation to ensure that other viewpoints are represented. And "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of programming, it engages in speech activity" and thus may make content- and viewpoint-based editorial judgments. *Forbes*, 523 U.S. at 674. "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints rather than others." *Ibid.*

At the same time, there is an important distinction between the government's own speech—including government speech involving private actors—and private speech that the government has merely chosen to approve or otherwise favor. See *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017). The Court has long held, for example, that the government-speech doctrine is inapplicable (and viewpoint-based distinctions are not allowed) when the government "does not itself speak or subsidize transmittal of a message it favors" but instead seeks "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; see, *e.g.*, *Velazquez*, 531 U.S. at 542.

b. The Court's recent decisions in *Summum*, *Walker*, and *Tam* illustrate the line between government speech and government-assisted private speech.

In *Summum*, this Court found that the permanent monuments in a city park were government speech even though some of them had been donated by private

groups. 555 U.S. at 470. The Court explained that "[g]overnments have long used monuments to speak to the public." *Ibid.* The Court added that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Id.* at 471. And the Court emphasized that the city had "exercised selectivity," *ibid.*, and had "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection," *id.* at 473 (citation omitted).

In addition to those three factors, the Court in *Summum* relied on the fact that the city had "taken ownership of most of the monuments." 555 U.S. at 473. And the Court emphasized that the monuments were to be displayed permanently, not temporarily, explaining that although a "public park, over the years, can provide a soapbox * * * for all who want to speak," "it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." *Id.* at 479. Those circumstances confirmed that the monuments in the park were the city's speech, not the respective donors' speech.

Similarly, the Court in *Walker* found that Texas's specialty license-plate program was government speech after examining all relevant factors, including the three main factors set forth in *Summum*. First, "the history of license plates shows that * * * they long have communicated messages from the States," and Texas's plates in particular had done so since at least 1919. 576 U.S. at 210-211. Second, "Texas license plate designs 'are often closely identified in the public mind with the State,'" including because the "governmental na-

ture of the plates is clear from their faces," and because Texas "owns the designs" on the plates and "dictates the manner in which drivers may dispose of unused plates." *Id.* at 212 (brackets and citation omitted). Third, "Texas maintains direct control over the messages conveyed on its specialty plates," as evidenced by the fact that a state "Board must approve every specialty plate design proposal" and the Board had "actively exercised this authority" in the past. *Id.* at 213.

In contrast, the Court in *Tam* concluded that trademarks registered by the U.S. Patent and Trademark Office (PTO) are private speech, not government speech. 137 S. Ct. at 1757-1760. The Court explained that the PTO "does not dream up these marks" and "does not edit marks submitted for registration." *Id.* at 1758. The Court also emphasized that trademarks lack the main features on which it had relied in *Summum* and *Walker*: "Trademarks have not traditionally been used to convey a government message," "there is no evidence that the public associates the contents of trademarks with the Federal Government," and the PTO generally does not consider "the viewpoint expressed by a mark" in deciding to register it, *id.* at 1760—that is to say, it is generally *not* selective.

2. The City's flag-raising program is a forum for private speech, not government speech

Based on the record developed below, the City's current flag-raising program is not government speech. Instead, it is a forum for private speech.

a. Most important, the City generally has not exercised any meaningful control over, or selectively chosen among, the flags flown during flag-raising events. Although the City must formally approve any request to fly a flag, it does not "dream up" the flags or "edit

[flags] submitted" for approval. *Tam*, 137 S. Ct. at 1758. Indeed, before this case arose, there was no record of the City's having had any input into the design or choice of flags. To the contrary, Rooney's "invariable practice" was to approve applications "without seeing the actual flag." Pet. App. 5a. Rooney had "never requested to review a flag or requested changes to a flag in connection with approval." *Id.* at 150a. There is likewise no indication that the City had any role in shaping or approving the other communicative aspects of the flag-raising events, such as the choice of speakers or the messages to be conveyed. And in the twelve-year period before the rejection of petitioners' application in 2017, the City approved every flag-raising application it received—a total of 284. *Id.* at 6a.

The court of appeals dismissed that unbroken record of approvals, stating that it simply shows that "potential applicants have self-selected and offered a narrow set of acceptable secular designs," which the court characterized as flags representing "a country, civic organization, or secular cause." Pet. App. 25a-26a. But that category of flags is not "narrow"; it includes virtually any flag other than a religious one.

The City's own description of the flag-raising program further confirms that its purpose is to provide a forum for a diversity of speech by private groups. The City's website stated that the program's goal is to "build and strengthen connections among Boston's many communities." Pet. App. 143a. And the City accomplishes that goal not by selecting for itself which communities to recognize and celebrate, but instead by making its flagpole generally available to private groups.

To be sure, the City has adopted a policy stating that it will not approve flags "deemed to be inappropriate or

offensive in nature or those supporting discrimination, prejudice, or religious movements." Pet. App. 160a. But that sort of narrow exclusion from an otherwise broadly available government venue or program does not transform private speech into government speech. In *Tam*, for example, this Court focused on the PTO's general lack of control over the viewpoints expressed in trademarks, not on the narrow exclusion of disparaging trademarks that was challenged in that case. 137 S. Ct. at 1758, 1760. And this Court has repeatedly held that a government creates a forum for private speech when it opens a program or venue to a wide range of private speakers but attempts to exclude religious speech. See *Rosenberger*, 515 U.S. at 830-834 (student activity fund); see also *Good News Club* v. *Milford Central School*, 533 U.S. 98, 106-112 (2001) (school facilities outside of school hours); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 393-394 (1993) (same). So too here.

b. The court of appeals also erred in its application of the other main factors considered in *Summum* and *Walker*—the history of the relevant form of speech and whether a reasonable observer would attribute the speech to the government. As to each factor, the court failed to take account of the particular features of the City's flag-raising program.

First, the court of appeals was quite correct to observe that governments have traditionally used flags to communicate government messages, including "a government's identity, values, or military strength." Pet. App. 17a. But the form of speech at issue here is not a government's flying its own flag; instead, the City's flag-raising program was specifically designed to allow private groups to raise their chosen flags in connection

with privately sponsored events on the plaza below. The relevant history, therefore, must consider not just flags and government-owned flagpoles in general, but also a flagpole deliberately made available for public use under circumstances like those present here.

In *Forbes*, for example, this Court explained that although a public broadcaster's choice of programming *in general* is government speech, a candidate debate *in particular* "is different from other programming" in part because it is "by design a forum for political speech by the candidates," rather than expression of the broadcaster's views or editorial judgment. 523 U.S. at 675. The same logic applies here, where the City's flag-raising program is—by design—far less selective than typical government practices involving the choice and display of flags. Cf. Pet. App. 141a-142a.

Second, the court of appeals' account of how a reasonable observer would perceive a flag-raising event similarly overlooked relevant features of the City's current program. The court assumed that a reasonable observer would simply see a third-party flag flying in front of City Hall alongside the flags of the United States and Massachusetts, without additional context or explanation. Pet. App. 18a; cf. *Summum*, 555 U.S. at 477. In reality, however, flag raisings are generally conducted in conjunction with events on the plaza below. Pet. App. 4a, 141a-142a. Because the plaza is a public forum, a reasonable observer would not attribute the messages conveyed by or at the events held there to the City—even though the events are held in front of City Hall. And for similar reasons, there is no reason to assume that a reasonable observer would attribute to the City a flag raised during such a private event.

In considering whether a reasonable observer would attribute speech to the government, moreover, this Court has considered not just a display's immediate appearance, but also its broader context. In *Walker*, for example, the Court considered not just the face of a license plate, but also that "every Texas license plate is issued by the State," that the State "owns the designs on its license plates," and that "Texas dictates the manner in which drivers may dispose of unused plates." 576 U.S. at 212; see *Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment) (considering "a reasonable and fully informed observer"). A similar approach applies in the context of determining whether government speech endorses religion in violation of the Establishment Clause. There, too, a "reasonable observer * * * must be deemed aware of the history and context of the community and forum in which the [relevant] display appears." *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and in the judgment); cf. *American Legion* v. *American Humanist Association*, 139 S. Ct. 2067, 2089 (2019) (emphasizing "the events surrounding the erection of the Cross" when "viewed in historical context"). Here, a reasonable observer would not attribute to the City a flag raised as part of a flag-raising program that is generally open to a wide range of private groups and over which the City exercises little meaningful control.

c. Finally, the other relevant considerations from *Summum* likewise point away from a finding of government speech here. Unlike the monuments in *Summum* and the license plates in *Walker*, the City does not own the flags displayed under the flag-raising program; they remain the property of the private parties holding the

events. Pet. App. 150a. Although the City may have had greater involvement in some flag-raising events, its only necessary role appears to be providing the applicant the hand crank required to hoist the flag. *Id.* at 143a. Nor are the flags permanently displayed. Instead, they are raised for only a short time—generally for the duration of the associated event—and are then replaced by the City of Boston flag that ordinarily flies on the flagpole. See *id.* at 141a-142a. Here, for example, petitioners sought to raise their flag only during an hour-long event. *Id.* at 131a.

B. Because The City's Flag-Raising Program Is A Forum For Private Speech, The Denial Of Petitioners' Application Was Impermissible Viewpoint Discrimination

When, as here, government property is open to speech that is not the government's speech, the property generally is said to be a "forum" for private speech. See *Summum*, 555 U.S. at 478; *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). A private speaker's right to access that property generally depends on the type of forum at issue. But the Court need not decide how to classify the City's flag-raising program because the denial of petitioners' application was based on viewpoint and thus impermissible in any type of forum.

1. "Generally speaking," this Court has recognized "three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1885 (2018). Traditional public forums include "parks, streets, sidewalks, and the like," *id.* at 1885, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts

between citizens, and discussing public questions," *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) (citation omitted). In a traditional public forum, "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." *Minnesota Voters Alliance*, 138 S. Ct. at 1885.

A designated public forum "consists of public property which the [government] has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. The government can designate a public forum "only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). The government also "must intend to make the property 'generally available' to a class of speakers." *Forbes*, 523 U.S. at 678. Examples include "university meeting facilities" and a "municipal theater" that have been generally opened to the public. *Perry*, 460 U.S. at 45-46. The "same standards" that apply to traditional public forums "apply to designated public forums." *Minnesota Voters Alliance*, 138 S. Ct. at 1885.

A nonpublic forum, by contrast, is "a space that 'is not by tradition or designation a forum for public communication,'" but that has been opened to some expressive activity by private speakers. *Minnesota Voters Alliance*, 138 S. Ct. at 1885 (citation omitted). Examples include jails, advertisements on public transit, military bases, postal letterboxes, a school's internal mail system, a charity drive for federal employees, airport terminals, televised candidate debates, and polling places. See, respectively, *Adderley* v. *Florida*, 385 U.S. 39, 47-

48 (1966); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974); *Greer* v. *Spock*, 424 U.S. 828, 838 (1976); *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 130-131 (1981); *Perry*, 460 U.S. at 46-47; *Cornelius*, 473 U.S. at 804-806; *Krishna Consciousness*, 505 U.S. at 682-683; *Forbes*, 523 U.S. at 680; and *Minnesota Voters Alliance*, 138 S. Ct. at 1886.

In nonpublic forums, the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly*, 385 U.S. at 47. Accordingly, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; see *Minnesota Voters Alliance*, 138 S. Ct. at 1885-1886 (explaining that "the government may impose some content-based restrictions on speech in nonpublic forums," as long as those restrictions are "'not an effort to suppress expression merely because public officials oppose the speaker's view'") (citation omitted).*

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* This Court has recognized that forums may "be created for a limited purpose such as use by certain groups or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7 (citations omitted). The Court has sometimes described such a limited forum as a species of designated public forum. See *Krishna Consciousness*, 505 U.S. at 678 (distinguishing between a nonpublic forum and a "designated public forum, whether of a limited or unlimited character"); see also, *e.g.*, *Cornelius*, 473 U.S. at 811; *Perry*, 460 U.S. at 47. More recently, however, the Court has analogized limited forums to nonpublic forums where reasonable content- and speaker-based restrictions are permissible. See, *e.g.*, *Tam*, 137 S. Ct. at 1763 (stating that when the "government creates a limited public forum for pri-

2. The court of appeals concluded that the City did not create a forum of any kind because it has not opened its flagpole to all comers and instead "controls which third-party flags are flown." Pet. App. 29a. Relying on *Perry*, *Cornelius*, and *Forbes*, the court stated that such "selective access" is inconsistent with the creation of a "public forum." *Ibid.* But as those decisions illustrate, selective access is a frequent feature of nonpublic forums. The school mail system in *Perry*, the charity drive in *Cornelius*, and the candidate debate in *Forbes* were all subject to selective-access requirements, but the Court treated them as "nonpublic forum[s]" subject to the requirement that access restrictions be "viewpoint neutral" and "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806; see *Forbes*, 523 U.S. at 676; *Perry*, 460 U.S. at 49. The City's retention of control over access to the flagpole thus provides no basis to conclude that the flag-raising program is not a forum for private speech at all.

3. Petitioners contend that the City's flagpole is a designated public forum in part because the City's "written policies" have characterized it that way. Pet. Br. 27; see *id.* at i, 7. The City disputes that interpretation of its policies. Br. in Opp. 18-20. This Court need not resolve that factual dispute or decide whether the City's current flag-raising program is a designated public forum or a nonpublic forum. In either type of forum, the City cannot exclude speakers based on their

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vate speech," "some content- and speaker-based restrictions may be allowed"); *Rosenberger*, 515 U.S. at 829-830 (explaining that "[o]nce [the government] has opened a limited forum, * * * content discrimination * * * may be permissible if it preserves the purposes of that limited forum"). This case presents no occasion to address the proper classification and treatment of limited forums.

viewpoint. But that is what the City did when it denied petitioners' application because their flag "was promoting a specific religion." Pet. App. 155a.

This Court has long held that restricting a speaker's access to a forum based solely on the religious nature of the speech constitutes viewpoint, not merely content-based, discrimination. In *Lamb's Chapel*, for example, the Court considered a program that generally allowed school facilities to be used for "social, civic, and recreational purposes," but excluded any use for "religious purposes." 508 U.S. at 387, 391. The Court assumed that the program created only a nonpublic forum. *Id.* at 392-393 (citations omitted). But the Court held that a school could not apply the rule against religious uses to deny a church's request to use school premises to show films expressing religious views on family issues. *Id.* at 388. The Court rejected the argument that the rule "was viewpoint neutral," emphasizing that it would have permitted "school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Ibid.*

Similarly, in *Rosenberger*, this Court held that a rule prohibiting a university's student activities fund from reimbursing "religious activities" was not viewpoint neutral. 515 U.S. at 825. The Court explained that religion provides "a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. The Court thus reiterated its holding in *Lamb's Chapel* that "discriminating against religious speech was discriminating on the basis of viewpoint." *Id.* at 832. And a few years later, the Court "reaffirm[ed]" its "holdings in *Lamb's Chapel* and *Rosenberger* that [excluding] speech discussing otherwise

permissible subjects * * * from a religious viewpoint * * * constitutes impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 111-112.

Under those precedents, the rejection of petitioners' flag-raising application was based on viewpoint and thus impermissible. The parties agreed in the district court that Rooney rejected the application solely because "the flag [petitioners] intend[ed] to raise 'was a flag that was promoting a specific religion.'" Pet. App. 155a (citation omitted). And respondents have not attempted to argue that their denial was viewpoint neutral, instead maintaining only that "viewpoint neutrality * * * is incompatible with the intended use of the property" here. Br. in Opp. 23.

But even when the government wishes to reserve a certain forum "for certain groups or for the discussion of certain topics," it cannot discriminate based on viewpoint and "must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. Here, the City has generally opened its flagpole for flag-raising events held by groups representing "Boston's many communities." Pet. App. 143a (citation omitted). Respondents have not identified any aspect of petitioners' request that would be outside of those self-identified boundaries *except* for the religious viewpoint conveyed by the flag. Cf. *id.* at 160a (written policy categorically prohibiting the raising of "flags * * * supporting * * * religious movements") (citation omitted).

In denying petitioners' application, the City cited Establishment Clause concerns. Pet. App. 154a, 157a. But those concerns appeared to be rooted in the City's mistaken belief that the flags flown in its flag-raising program are government speech. The City has not argued that if the program instead created a forum for

private speech, it would violate the Establishment Clause to allow religious speech on the same terms as secular speech. And in other cases involving public forums, this Court has rejected the argument that the Establishment Clause justifies the exclusion of religious speakers from "broad-reaching government programs neutral in design," *Rosenberger*, 515 U.S. at 838-839; see, *e.g.*, *Good News Club*, 533 U.S. at 112-119; *Pinette*, 515 U.S. at 762-763; *Lamb's Chapel*, 508 U.S. at 394-395—at least where, as here, a reasonable observer would understand that the speech is private rather than governmental, see *Pinette*, 515 U.S. at 779-782 (O'Connor, J., concurring in judgment).

Because the City's denial of petitioners' application was based on viewpoint, it violated the First Amendment even under the forgiving standards applicable to a nonpublic forum. See *Minnesota Voters Alliance*, 138 S. Ct. at 1885. There is thus no need for the Court to engage in a detailed forum analysis, cf. Pet. Br. 23-32, 35-39; to consider whether the City's rules are reasonable in light of the forum's purposes, cf. *id.* at 39-40; or to address petitioners' challenge to the City's discretion to approve or reject flag-raising applications, cf. *id.* at 40-42. A holding that the flag-raising program is not government speech and that the City's denial of petitioners' application was based on viewpoint fully resolves this case.

C. The First Amendment Gives Governments Ample Latitude To Develop Programs Involving Private Speakers

Based on the record in this case, the City has structured its current flag-raising program in a manner that precludes it from excluding flags based on their viewpoint. The City suggests that it may be unwilling to continue the program unless it can exclude flags that it

finds offensive or derogatory. Br. in Opp. 25. But this Court's decisions make clear that the Free Speech Clause leaves ample room for the government to develop programs that incorporate speech from private actors without relinquishing the ability to exclude other speech. A variety of federal programs illustrate some permissible approaches. Similar alternatives are available to the City. Cf. *Perry*, 460 U.S. at 50 n.9 (explaining that the school could, if it wished, adopt more or less restrictive rules for a nonpublic forum or close it to private speech altogether).

1. The federal government has many programs that, while allowing some participation by and input from private actors, are designed to ensure that the program remains government speech. Examples include certain events sponsored by the National Park Service and the United States Postal Service's pictorial-postmark program.

The National Park Service has taken care to ensure that certain programs in park areas qualify as government speech, even as those areas at other times host public events. For example, although private persons can obtain permits to hold "demonstrations" or "special events" in park areas within the national capital region, see 36 C.F.R. 7.96(g)(1)(i) and (ii), the Park Service has defined a separate category of "national celebration events"—such as presidential inauguration ceremonies and the lighting of the National Christmas Tree—that are controlled by the government and "have priority use of particular park areas." 36 C.F.R. 7.96(g)(4)(ii).

Courts have recognized that the Park Service may plan and hold such events without being compelled to grant access to other speakers, in part because those events are government speech. See, *e.g.*, *A.N.S.W.E.R.*

Coalition v. *Jewell*, 153 F. Supp. 3d 395, 410-413 (D.D.C. 2016) (concluding that the speech of the Presidential Inaugural Committee, a nongovernmental entity, qualifies as government speech under *Walker* and *Summum*), affirmed on other grounds, 845 F.3d 1199 (D.C. Cir. 2017); see also, *e.g.*, *Community for Creative Non-Violence* v. *Lujan*, 908 F.2d 992, 995-996 (D.C. Cir. 1990) (affirming the Park Service's rejection of a monument proposed to be displayed alongside the National Christmas Tree as part of the Christmas Pageant of Peace).

In addition to national celebration events, the Park Service sponsors one-time events in park areas that may involve the active participation of private entities. For example, in July 2019, "a once-in-a-lifetime celebration of the 50th anniversary of Apollo 11" featured images and a movie about the moon landing "projected on the east face of the Washington Monument." Smithsonian National Air and Space Museum, *Apollo 50: Go for the Moon*, airandspace.si.edu/go-for-the-moon. That celebration was the result of a partnership between the Park Service and the Smithsonian Institution, which in turn partnered with 59 Productions, a private studio and production company. *Ibid.*; see 59 Productions, *Apollo 50: Go for the Moon*, 59productions.co.uk/project/apollo-50.

Congress specifically authorized the projection of images onto the face of the Washington Monument for that event only, and the Park Service implemented that authorization in a temporary regulation. See Joint Resolution of July 5, 2019, Pub. L. No. 116-28, 133 Stat. 1029; 84 Fed. Reg. 32,622, 32,624 (July 9, 2019). In part by undertaking those formal steps to make clear the government's sponsorship of the event and ultimate control over the message conveyed, the government ensured that the program retained its character as gov-

ernment speech—and was not merely the government's "affixing [its] seal of approval" on the speech of the private entity that created the images and movie. *Tam*, 137 S. Ct. at 1758.

The United States Postal Service has taken similar care to preserve the governmental character of its pictorial-postmark program, which allows people to request customized postmarks for community events. See United States Postal Service, Pub. 186, *Celebrating with Pictorial Postmarks* (2007), about.usps.com/publications/pub186.pdf (USPS Pub. 186); United States Postal Service, Handbook PO-230, *Pictorial Postmarks* (2011), about.usps.com/handbooks/po230.pdf (USPS Handbook PO-230). As the Postal Service has explained, "[f]rom the earliest days, years before official postage stamps were introduced in 1847, handwritten and stamped townmarks or postmarks were used to indicate the place and date of mailing." USPS Pub. 186, at 10. And "[o]nce postage stamps were introduced," local postmasters created "a rich variety of locally produced pictorial markings" to cancel stamps, "limited only by their imagination and carving skills." *Ibid.*

Under the pictorial-postmark program, the Postal Service invites the public (rather than just postmasters) to submit postmark designs, but it strictly regulates the contents and imposes detailed requirements for what must be included in a design. See USPS Pub. 186, at 3-6; USPS Handbook PO-230, at 3-14. If the design is approved, the Postal Service creates the hand-canceling device and sets up a temporary retail station at the event, all at the government's expense. USPS Pub. 186, at 7. The Postal Service also announces pictorial postmarks in its biweekly *Postal Bulletin* so that others around the world can request that the design be stamped

onto their letters. USPS Pub. 186, at 2, 15; USPS Handbook PO-230, at 3, 15. The Postal Service retains ownership and possession of the hand-canceling device, which it destroys once a certain amount of time has passed after the event. USPS Handbook PO-230, at 19, 22. The Postal Service's extensive involvement in and control over the ultimate postmark design, as well as its ownership of the hand-canceling device, make clear that the postmarks retain their character as government speech, even though they are designed by private parties.

2. As those examples suggest, the City could modify its current flag-raising program to ensure that future flag raisings are the City's own speech. For example, the City could cosponsor flag raisings (either as standalone events or in conjunction with associated events in the plaza below), as the National Park Service has done with certain events using its facilities. Although *Summum* stated that a formal resolution "publicly embracing 'the message'" is not *necessary* for a finding of government speech, 555 U.S. at 473, it can help to make clear that the government is speaking rather than providing a forum for private speakers. The City could also adopt policies more clearly defining the message or messages it seeks to convey with flag-raising events—for example, celebrating or commemorating holidays or other occasions that the City has officially recognized through other means, such as proclamations or resolutions. And the City could play a meaningful role in selecting, reviewing, and shaping flag-raising events. Particularly in combination, those steps would likely bring a flag-raising program within the bounds of government speech set forth in *Summum* and *Walker*.

Alternatively, or in addition, the City could define the content and purpose of the flag-raising program in a reasonable and viewpoint-neutral manner that still preserves the City's asserted interests. So long as a government observes those limitations, it is free to control access to a nonpublic forum "based on subject matter and speaker identity." *Cornelius*, 473 U.S. at 806. For example, the City could adopt a policy limiting the program to flags of other sovereign nations, on the ground that a government flagpole generally should be reserved for government flags. That would allow Boston to retain the program largely in its current form, given that the overwhelming majority of flag raisings have involved the flags of foreign countries. See Pet. App. 173a-187a (listing the flag raisings from 2005 to 2017). Or the City might consider limiting the class of speakers eligible to raise a flag—for example, to nonprofit groups. Cf. *Cornelius*, 473 U.S. at 806. But the First Amendment prohibits the City from continuing to generally open its flagpole to use by a broad range of private groups while denying access to a small minority of groups based on the messages their flags convey.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2021