No. 20-1800

In The Supreme Court of the United States

HAROLD SHURTLEFF AND CAMP CONSTITUTION,
Petitioners,

V.

CITY OF BOSTON, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS SUBMITTED ON BEHALF OF THOMAS MORE SOCIETY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

Amicus Thomas More Society is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated for the protection of First Amendment rights and worked to eliminate discrimination against persons of faith.

SUMMARY OF ARGUMENT

In this case, the City of Boston regularly flew flags temporarily from a specific flagpole at the request of private organizations—until it received a request to fly a Christian flag. Because this flag was religious, the City rejected it.

The First Circuit upheld the City's rejection on the basis of the government speech doctrine, which puts the government's own speech beyond the reach of the Free Speech Clause of the First Amendment. Acceptance of the government speech doctrine to validate the City's actions, however, is inconsistent with the instances in which this Court has previously applied it. Instead of adhering to

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

precedent, the First Circuit created its own "*Summum/Walker* test" that risks the doctrine's invocation being used as a pretext for invidious discrimination where traditional forum analysis would otherwise permit access. In light of societal changes, the need to protect religious speech from the sweep of incorrect applications of the government speech doctrine is all the greater.

Therefore, the decision of the First Circuit should be reversed.

ARGUMENT

This case arises from the City of Boston's refusal to fly a Christian flag on one of its flagpoles at the request of Camp Constitution, a volunteer association that engages in civic education. (Pet. App. 129a-132a.) The flagpole in question was no ordinary pole. Over the twelve years preceding Camp Constitution's application, the City had raised 284 private flags from the pole upon receiving completed applications from various private organizations. (Pet. App. 142a-143a, 149a-150a, 173a-190a.)

The point of the City's flying private flags was to "commemorate flags from many countries and communities at Boston City Hall Plaza during the year . . . [and] create an environment in the City where everyone feels included." (Pet. App. 143a.) The point of Camp Constitution in seeking to fly its Christian flag was commemoration of the civic contributions made by Christians to local and national history. (Pet. App. 130a–132a.) Upon seeing that the flag to be flown was religious, the City decided that "everyone" did not really mean

"everyone." After some back and forth among City officials as to how to respond, the flag was finally rejected on the official grounds that it was religious. (Pet. App. 151a., 153a-154a.)

Despite the absence of any prior policies restricting religious flags from being flown and despite a history of apparently never before rejecting any other flag from a private origination, the First Circuit held that the City's actions escaped First Amendment scrutiny because they were protected by the government speech doctrine. *Shurtleff v. City of Boston*, 986 F.3d 78, 87-88 (1st Cir. 2021). To reach this result, however, the First Circuit had to craft a rigid test that is inconsistent with the approach taken by this Court in its decisions. This test likewise fails to account for the role that anti-religious bias can play in denying speakers access to forums on equal terms. The need for judicial protection against state use of the government speech doctrine to suppress religion is greater now than ever, but the First Circuit's opinion admits of no such protections. Because of these problems with the First Circuit's approach, its decision upholding the actions taken by the City should be reversed.

I. THE FIRST CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S GOVERNMENT SPEECH DOCTRINE IN A MANNER THAT ENDANGERS TRADITIONAL FORUM ANALYSIS.

A. Protection of Free Speech Requires Limiting the Scope of the Government Speech Doctrine.

The First Amendment seeks to preserve "the opportunity for free political discussion to the end

that government may be responsive to the will of the people." *Stromberg v. California*, 283 U.S. 359, 369 (1931). "Free speech . . . is essential to our democratic form of government . . . [and] furthers the search for truth." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). Whenever the government controls speech, however, there is a danger of censorship and thought control. *See Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) ("Innocent motives do not eliminate the danger of censorship[.]"); *cf. R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.") (citations omitted). As stated in *Reed v. Town of Gilbert*, "'[t]he vice of content-based [regulation] . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" 576 U.S. at 167 (quoting *Hill v. Colo.,* 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)).

While the government speech doctrine holds that "government speech is not restricted by the Free Speech Clause," *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), it nonetheless requires a similarly clear-eyed recognition by the judiciary of the dangers it presents. Otherwise, there exists a risk that desultory acceptance of the government speech doctrine will result in denial of access to forums by speakers whose ideas are disfavored by those in power. *See generally Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (summarizing forum doctrine).

Forum analysis, which turns on consideration of whether the government space is a traditional public forum, designated public forum, or nonpublic forum,

is well established in this Court's precedent:

> 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.

Mansky, 138 S. Ct. at 1885 (internal quotation marks and citations omitted). The First Circuit's approach to the government speech doctrine threatens to undermine this analytical structure.

In its prior decisions, this Court has restricted application of the government speech doctrine based on the particular facts before it. In *Pleasant Grove City v. Summum*, this Court rejected a First Amendment challenge to a municipality's refusal to display a *permanent* monument in a public park at which were displayed other privately donated monuments. 555 U.S. at 472-73, 481 (2009). The

Court's decision rested on the fact that "public parks can accommodate only a limited number of permanent monuments." *Id.* at 478. This made acceptance and display of a monument radically different from "the delivery of speeches and the holding of marches and demonstrations" in a park. *Id.* at 477. "A public park . . . can provide a soapbox for a very large number of orators—often, for all who want to speak—but 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.

Several years after *Summum*, by a 5 to 4 decision, this Court relied on the government speech doctrine to uphold the refusal of the State of Texas to issue specialty license plates honoring the Sons of Confederate Veterans in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* 576 U.S. 200, 219-20 (2015). As in *Summum*, this Court took a close look at the particulars of the medium at issue (the Texas specialty license plate program). Weighing in favor of finding government speech were such factors as the history of printing state-sponsored messages on license plates, the likelihood that both an observer *and the vehicle owner* would interpret the license plate as state speech (otherwise "the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate"), the extensive control exercised by the State over the design and approval of specialty plates, and the fact that license plates "are, essentially, government IDs." *Id.* at 210-13.

In a subsequent opinion, this Court stated that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Finding that a trademark was profoundly different from the Texas specialty license plate program, the Court in that case rejected the argument that "registration of a trademark converts the mark into government speech." *Id.*

B. The First Circuit's "*Summum/Walker* Test" Distorts this Court's Precedent.

In contrast to this Court's more careful approaches in its cases, the First Circuit here extended the government speech doctrine to new bounds, illustrating how, if left unmoored to its origins, the doctrine threatens to eviscerate much of traditional forum analysis. To uphold the City's exclusion of Camp Constitution's flag, the Court of Appeals fashioned its own "*Summum/Walker* test," consisting of three factors: (1) historical practice regarding the type of medium (here, flagpoles generally); (2) potential attribution of the speech to the government by a reasonable observer; and (3) control by the government. *Shurtleff*, 986 F.3d at 87-88.

As argued by Petitioners in their brief, when characterized at such a high level of generality, this Court's precedent could be twisted to recast any number of forums as instruments of government speech. (Pet. Br. 44-52.) Thus, as Petitioners explain, the First Circuit's historical analysis ignores the practices by the City regarding this particular flag pole, which had previously hosted almost three hundred different private flags; and, it further obscures the fact that Camp Constitution's flag was (just like all other private flags flown) to be

temporary, not permanent, making it far more akin to an orator in a park than a stone monument. (Pet. Br. 45-46, 55-56.) The First Circuit's opinion further assumes an uninformed observer rather than a reasonable person with knowledge of the City's practices. (Pet. Br. 56-57.) Moreover, the First Circuit accepted the *de minimis* amount of involvement by the City with the flag approval process to be "control" sufficient to trigger the government speech doctrine, in spite of this Court's rejection in *Matal* of the doctrine for the much more elaborate procedures for trademark registration, *see generally* 15 U.S.C. §§ 1051-1072. (Pet. Br. 58-59, 61.)

As a result, the First Circuit's test permits a governmental entity to exclude a certain class of speakers from a forum, under the pretext of the government speech doctrine. This is not a far-fetched hypothetical. Instead, it is precisely what occurred here—Camp Constitution's flag was rejected by the City *because it was religious*.

To prevent the government speech doctrine from consuming forum analysis, this Court should cabin the doctrine's reach by reversing the decision of the First Circuit.

II. COURTS SHOULD ENSURE THAT THE GOVERNMENT SPEECH DOCTRINE IS NOT USED AS A PRETEXT FOR INVIDIOUS DISCRIMINATION.

The problem with the First Circuit's decision is not merely in its application of the three factors it identified as the "*Summum/Walker* test," but also in the very limiting of its analysis to these criteria. This Court has never held that the government

speech doctrine turns on application of a limited set of factors nor has it specifically articulated any test. *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 [in *Summum*] was government speech.") (emphasis added); *id.* at 213 ("That is not to say that every element of our discussion in *Summum* is relevant here."); *see Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise.").

Moreover, this Court has said "that the government speech doctrine [should] not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473. To be faithful to that objective, a more realistic assessment of the government speech doctrine would, at a minimum, require examination of whether it is being asserted as a pretext to exclude certain disfavored speakers from an otherwise available forum before it could be used as a successful defense to a First Amendment challenge.

Courts, of course, are no strangers to evaluating the issue of pretext or to consideration of the broad range of facts that may be indicative of when pretext is present. *See, e.g., Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457-58 (2006); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 736-39 (2010) (Alito, J., dissenting). Based on other contexts in which pretext is judged, circumstances relevant to the question of pretext here would include whether the policies relied upon by the government appear to be a *post hoc* litigating

position. *See, e.g.*, *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) ("We are disquieted . . . by an employer who 'fully' articulates its reasons for the first time months after the decision was made."); *see also Christian Legal Soc'y*, 561 U.S. at 737 (Alito, J., dissenting) ("As is recognized in the employment discrimination context, where issues of pretext regularly arise, substantial changes over time in [an] employer's proffered reason for its employment decision support a finding of pretext.") (internal quotation marks and citations omitted). The presence or absence of practical limitations related to how the medium at issue is used, *see Summum*, 555 U.S. 479 ("Speakers, no matter how long-winded, eventually come to the end of their remarks; . . . monuments, however, endure."), would similarly help reveal whether the government's "proffered explanation is unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 246 (1981) (citations omitted).

Words, actions, or other background evidence tending to establish animus toward the excluded speaker are also traditionally relevant in assessing pretext. *See, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55-56 (1st Cir. 2000) (discussing "discriminatory comments" by decisionmakers as evidence of pretext); *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), (text and effect of ordinances revealed discriminatory motive) ("The design of these laws accomplishes instead a 'religious gerrymander', an impermissible attempt to target petitioners and their religious practices.") (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The facts here present a straightforward example of anti-religious animus by the City. By the City's own admission, the flag was rejected not because of its extrinsic features but simply because it was religious. With such facts, it should be beyond cavil the City's actions contravened the principle established by this Court that "once the government allows a subject to be discussed, it cannot silence religious views on that topic." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (citation omitted) (statement of Gorsuch, J., with whom Thomas, J., joins, respecting the denial of certiorari.). Yet, the First Circuit legitimized the City's invidious discrimination through an expansive and unprecedented interpretation of the government speech doctrine. Therefore, the First Circuit's "*Summum/Walker* test" should be rejected as not only unfaithful to this Court's own decisions but also as tending to permit the exercise of wanton governmental animus toward religious speakers.

III. BROADER SOCIETAL CHANGES UNDERSCORE THE NEED FOR JUDICIAL PROTECTION OF RELIGIOUS SPEECH.

The City's censorship here of religious speech does not occur in a vacuum, but instead in a broader societal and cultural context in which religion is increasing marginalized and disfavored. Accordingly, judicial protection of religious speech is needed now more than ever.

At one time, it was easy for this Court to remark that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Two decades ago, though,

one historian observed: "Although the United States is far more religious than most European countries, it is also less religious than it once was." Gertrude Himmelfarb, *One Nation, Two Cultures* 96 (2001). With that trend, came a host of other societal changes. *Id.* at 96-98. Recent polls confirm that this move away from religion continues. *See, e.g.,* "In U.S., Decline of Christianity Continues at Rapid Pace," Pew Research Center (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ ("[T]he religiously unaffiliated share of the population, consisting of people who describe their religious identity as atheist, agnostic or 'nothing in particular,' now stands at 26% [in 2019], up from 17% in 2009."); *see also* Scott Neuman, "Fewer Than Half of U.S. Adults Belong to a Religious Congregation, New Poll Shows," NPR.org (Mar. 30, 2021), https://www.npr.org/2021/03/30/982671783/fewer-than-half-of-u-s-adults-belong-to-a-religious-congregation-new-poll-shows ("Fewer than half of U.S. adults say they belong to a church, synagogue or mosque, according to a new Gallup survey that highlights a dramatic trend away from religious affiliation in recent years among all age groups.").

As the views of the population at large change, the risk that religious speech will be excluded by political leaders from the public square increases. Popularly elected officials have an attenuated fear of any political repercussions when religious speakers are censored,[2] and so marginalization becomes more

[2] In a 2014 Pew Research Center survey of Boston metro area adults, only 44% of respondents said they have an "absolutely certain" belief in God, while 43% said they attend religious services "seldom" or "never" and 66% said they "seldom" or "never" read religious scripture. *Religious Landscape Study*,

likely. *Cf. Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2269-71 (2019) (Alito, J., concurring) (discussing history of Blaine Amendments enacted in waive of animus toward Catholic immigrants).

Furthermore, recent examples of governmental clashes with religious beliefs and practices that found their way to this Court are hardly rare. *See, e.g., S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) ("Since the arrival of COVID-19, California has openly imposed more stringent regulations on religious institutions than on many businesses.") (Statement of Gorsuch, J., with whom Thomas and Alito, J.J., join); *Little Sisters of the Poor Saints Peter and Paul Home v. Penn.*, 140 S. Ct. 2367, 2384-86 (2020) (holding, against challenge from certain states, that the federal government had the power under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018) (finding state civil rights commission engaged in "clear and impermissible hostility toward the sincere religious beliefs motivating [the business owner's] objection" to baking cake for same sex wedding); *Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016) (remanding dispute over ACA's contraception mandate and religious exemptions); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735-36 (2014) (holding Religious Freedom Restoration Act required the

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"Adults in the Boston metro area," Pew Research Center (2014),https://www.pewforum.org/religious-landscape-study/metro-area/boston-metro-area/.

government to accommodate religious or moral objections to the ACA's contraception mandate).

Given this tide toward diminishing respect for faith by many governmental actors, judicial vigilance aimed at protecting religious speech becomes more vital. The First Circuit's "*Summum/Walker* test" enables, rather than curtails, such discrimination and should therefore be rejected as the proper articulation of the government speech doctrine.

CONCLUSION

For the above-stated reasons, the decision of the First Circuit should be reversed, and the case should be remanded for entry of judgment in favor of Petitioners on their First Amendment claims.

Respectfully submitted,

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