

No. 20-1800

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**In the Supreme Court of the United States**

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HAROLD SHURTLEFF AND CAMP CONSTITUTION

v.

CITY OF BOSTON AND ROBERT MELVIN, IN HIS  
CAPACITY AS COMMISSIONER OF THE CITY OF BOSTON  
PROPERTY MANAGEMENT DEPARTMENT

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

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**BRIEF OF AMICI CURIAE THE  
JEWISH ALLIANCE FOR LAW AND  
SOCIAL ACTION, THE EPISCOPAL CITY  
MISSION, GLBTQ LEGAL ADVOCATES  
AND DEFENDERS, INC., JETPAC  
RESOURCE CENTER, INC., KESHET, INC.,  
MASSEQUALITY, AND UNITARIAN  
UNIVERSALIST MASSACHUSETTS  
ACTION NETWORK, INC.,  
IN SUPPORT OF RESPONDENTS**

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae are Massachusetts nonprofit organizations committed to social and economic justice and advocating for communities that have been historically marginalized, discriminated against or oppressed. Most are faith-based organizations that nevertheless recognize that the separation of church and state is essential to promote equality and inclusiveness. Amici are largely headquartered in or around Boston, some steps from City Hall. Amici's members and staff regularly observe the flag poles at City Hall and have attended the flag raising ceremonies at the heart of this case. Amici are thus uniquely positioned to describe for the Court how the messages conveyed by flags flying outside City Hall are perceived by Bostonians, particularly those of minority groups or faiths.

Amici are troubled that the City of Boston could be compelled to engage in religious speech against its wishes by being required to fly religious flags. And amici are gravely concerned at the prospect of the City being forced, again contrary to its wishes, to display flags on its City Hall flag poles that convey messages of divisiveness, discrimination or hate.

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<sup>1</sup> This amicus brief is filed with the consent of the parties. Counsel for the petitioners and respondents have granted blanket consent for the filing of amicus briefs, in accordance with this Court's Rule 37. Pursuant to Rule 37.6, amici and their counsel represent that no party to this case or their counsel authored this brief in whole or in part, and that no person other than amici and their counsel paid for or monetarily contributed toward the preparation or submission of this brief.

**SUMMARY OF ARGUMENT**

The picture painted by Petitioners of the flag raising ceremonies that take place at City Hall is almost unrecognizable to amici, all of whom are based in Massachusetts. According to Petitioners, the City of Boston (“City”) has relinquished control of the flag pole standing just outside the main entrance of City Hall, allowing virtually anyone who asks to use the pole to communicate their chosen, private messages. Brief for the Petitioners (“Pet. Br.”) 21. Essentially, Petitioners intimate that the City has replaced its flag pole with a soapbox: a venue for all and sundry to argue their cause to the passing crowds. Pet. Br. 21, 27–29. They would have the Court believe that flags flying on the City’s flag pole are perceived no differently than a protest on City Hall Plaza or countless other forms of private speech. *See* Pet. Br. 57.

Amici urge the Court to take a close look for itself. The context of Boston’s flag raisings—the space where they occur and ceremonies that accompany them—plainly demonstrates that, while the City may have opened a portion of City Hall Plaza to the public for expressive purposes, it has reserved the flag poles for its own speech.

That is certainly the experience of amici, all of whom are Massachusetts nonprofit organizations familiar with Boston’s physical, historical and political landscape. From amici’s unique perspective, it is clear that the City’s flag raising events are an exercise of government speech.

The physical space surrounding the flag poles on City Hall Plaza, an area known as Government Center, is synonymous with Massachusetts government, both past and present. The area is ringed with

government buildings and sits just across from historic Faneuil Hall on the popular Freedom Trail. The flag poles are visible from multiple vantage points in Government Center and Faneuil Hall, and observers identify them with the City's government. The City's flag raising ceremonies reinforce that perception. Indeed, the City maintains video recordings of a number of City Hall flag raising ceremonies from the period relevant here. Those ceremonies have all the trappings of an official, City event.

Bostonians recognize the flags flying above the entrance to City Hall as the City's own speech. Flags, themselves deeply symbolic, have been used historically by governments to convey their chosen messages. That is true of Boston, where the City has used flag raising ceremonies to promote and foster messages of diversity and inclusiveness. Given the physical, historic and political context of the City's flag raising events, any reasonable observer would connect the flag raisings with the City, and not with the group that requested them. In fact, the flags often fly over an empty Plaza, with no event visible underneath. Without any other context, an observer would have no choice but to associate the flag's message with the City. And finally, the City maintained the ultimate control over its flag raisings, by deciding whether to raise a flag at all. Thus, the court below correctly determined that when the City raises a flag at City Hall, or chooses not to, it is speaking for itself.

**ARGUMENT****I. The Context In Which The City's Flag Raisings Occur Unites Them In The Public Mind With Government**

Context is critical to this Court's First Amendment analysis. It matters, for example, where the expressive activity takes place and what that space looks like. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (space was 2.5 acre public park); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204, 212 (2015) (space was government-issued license plates displaying "TEXAS" in large letters). It matters whether the expressive activity occurs in isolation, or surrounded by other symbols. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 579–82, 587, 616 (1989) (nativity scene stood alone, while Hanukkah menorah was surrounded by other seasonal and patriotic symbols). The history of the space also matters. *See Walker*, 576 U.S. at 210–11 (license plates had historically communicated government's messages); *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments display was presented in context of state's political and legal history). Here, a close examination of the context—what City Hall Plaza looks like, what other government symbols are present, and what happens during an actual flag raising—reveals that the City was engaged in government speech whenever it raised flags over City Hall Plaza.

**A. City Hall Plaza Is the Heart of a Heavily Travelled Area, Closely Associated with City, State, and Federal Government**

The concrete structure of Boston City Hall sits in an expanse of red brick known as City Hall Plaza. App. to Pet. for Writ of Cert. (“Pet. App.”) 166a–167a. City Hall Plaza is located at the heart of a Boston neighborhood aptly called Government Center. Pet. App. 162a. As can be seen from the photographs and architect’s rendering submitted by Petitioners, City Hall Plaza is ringed with buildings, many of them occupied by government offices. Pet. App. 161a, 171a. Commuters frequently enter the Plaza from the newly refurbished Government Center subway stop—a glass enclosure located on the right in the rendering—that serves two busy subway lines. Pet. App. 171a.<sup>2</sup> Office buildings overlook the Plaza to the left and the right. Pet. App. 161a, 171a. The building on the left is the 26-story John F. Kennedy Federal Building. Pet. App. 161a, 171a. Unseen in Petitioners’ materials, but across Cambridge Street, is Center Plaza, another office complex with retail space on the ground floor. *MBTA Government Center Map*, *supra* note 2. Rising above Center Plaza is the John Adams Courthouse, home to the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, with the Suffolk Superior Court towering next to it. *Id.* Steps away are the McCormack and Saltonstall Buildings,

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<sup>2</sup> A map of Government Center from the Massachusetts Bay Transportation Authority (MBTA) depicts the location of various government office buildings and Boston landmarks in relation to City Hall Plaza. See Mass. Bay Transp. Auth., *Government Center Station Neighborhood Map* (April 2012), <https://old.mbta.com/uploadedfiles/services/subway/GC%20Neighborhood%20Map.pdf> (hereinafter, *MBTA Government Center Map*).

where numerous state agencies have their offices. *Id.* And just a few further steps away, at the top of Beacon Hill, stands the Massachusetts State House, crowned with its familiar Golden Dome. *Id.* Essentially, Government Center serves as a hub for anyone seeking city, state and federal government services.

But that is not the neighborhood's only feature. City Hall sits within sight of many of Boston's (and the Nation's) most historic landmarks along the famed Freedom Trail. Across Congress Street lies Faneuil Hall, the Cradle of Liberty where Samuel Adams and other patriots fanned the flames of revolution.<sup>3</sup> One block away is the Old State House, scene of the Boston Massacre.

With its proximity to the Freedom Trail and other notable attractions, City Hall is also the heart of a major tourist area. Faneuil Hall Marketplace is among Boston's busiest tourist attractions. *Id.* Indeed, in 2016—the year before Petitioners requested their flag raising—Faneuil Hall Marketplace ranked as the eighth-most-visited tourist attraction in the United States, with roughly 15 million annual visitors.<sup>4</sup> Next to Faneuil Hall is the Holocaust Memorial, its abstract smokestacks just visible to the left in Petitioners' photographs. Pet. App. 161a, 171a; *MBTA Government Center Map*, *supra* note 2. Tourists and locals alike traveling the Freedom Trail make their way past these venerable landmarks in full view of

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<sup>3</sup> Nat'l Park Serv., *Faneuil Hall*, <https://www.nps.gov/bost/learn/historyculture/fh.htm> (last visited Dec. 18, 2021).

<sup>4</sup> *Faneuil Hall 8th Most Visited Tourist Attraction in U.S.*, BOSTON25 NEWS (Sept. 27, 2016, 12:58 PM), <https://www.boston25news.com/news/faneuil-hall-8th-most-visited-tourist-attraction-in-us/450996678/>.

City Hall. *MBTA Government Center Map*, *supra* note 2. In short, this is a heavily traveled area that is closely associated with city, state and federal government, both past and present.

**B. Observers See the City’s Flags Flying Together, in Close Proximity to Multiple Government Symbols and from Multiple Vantage Points**

The City Hall Plaza flag poles—which the City owns and controls and where Petitioners asked the City to fly the Christian flag—are located just outside City Hall’s main entrance, which bears a large replica of the City’s official seal. Pet. App. 62a, 146a, 161a. There are three poles, each standing approximately 83 feet tall. *Id.* at 141a, 161a. The first flies the United States flag and the National League of Families POW/MIA flag. *Id.* at 141a. The second flies the Massachusetts state flag. *Id.* at 141a–142a. The third generally flies the City’s official flag. *Id.* All three poles are in close proximity and their flags, when raised, fly together. *Id.* at 161a, 171a.<sup>5</sup>

Over the open plaza and from the surrounding buildings, the flag poles are prominent from multiple vantage points. *Id.* at 161a, 171a. They can be seen by commuters leaving the Government Center subway stop, by tourists walking the Freedom Trail or visiting Faneuil Hall, and by workers from the surrounding offices. The flag poles can be seen by pedestrians

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<sup>5</sup> To aid in the Court’s review, a better view of the City Hall flag poles from the perspective of someone standing on City Hall Plaza is available online. *Boston City Hall*, GreatBuildings, [http://www.greatbuildings.com/cgi-bin/gbi.cgi/Boston\\_City\\_Hall.html/cid\\_1865904.html](http://www.greatbuildings.com/cgi-bin/gbi.cgi/Boston_City_Hall.html/cid_1865904.html) (last visited Dec. 18, 2021) (hereinafter, *Boston City Hall Photograph*).

walking along busy Cambridge and Congress Streets, and by drivers and their passengers travelling those same thoroughfares. They can certainly be seen by anyone walking into City Hall to transact business or meet with city officials.

The City uses the area around the flag poles for two types of events. *Id.* at 85a. A third party can request to use the public space around the poles on City Hall Plaza for virtually any purpose, without raising a flag. *Id.* at 85a; 1st Cir. Joint App. (“JA”) vol. I, at 138. Indeed, parts of City Hall Plaza have historically been used for myriad private events including a circus, concerts, rallies, and protests.

In addition to such uses of City Hall Plaza, third-parties sometimes request—as Petitioners did here—to raise a flag on the City’s pole, specifically the pole that generally flies the City’s flag. Pet. App. 85a. Often, the flag-raising will be accompanied by an event using the surrounding space. *Id.* But the City considers these two distinct uses, with different governing criteria. JA vol. I, at 135–136, 138. If the City denies a flag raising request, it will nonetheless offer the applicant an opportunity to have their related event on City Hall Plaza. JA vol. II, at 300.

While flag raisings may be accompanied by events on City Hall Plaza, many observers will see only the raised flags, and not the related activity. The flags can be seen from greater distances given their height, when events taking place at the base of the poles may be obscured by other structures. Pet. App. 141a, 161a. In addition, the flags are often left up after the group that assembled for the flag raising has dispersed. JA vol. II, at 569–70. As a result, the flags often fly when there is no other activity on the Plaza at all. A passing observer thus sees only the three

“official” flags, flying together from City-owned flag poles, on City Hall Plaza, steps away from City Hall itself.

### **C. City Hall Flag Raisings Are Official City Ceremonies, Designed to Convey the City’s Message**

Flag raisings on City Hall Plaza are part of the local political culture and include all the trappings of an official City ceremony. A crowd gathers in the shadow of City Hall, around a podium often emblazoned with the City’s seal. Pet. App. 146a; JA vol. I, at 236–37, vol. II, at 299, 371. City employees are present, sometimes with the Mayor and other elected officials. JA vol. I, at 137, 225, 228, 237, vol. II, at 299. Organizers and officials make speeches. JA vol. I, at 225, 237, vol. II, at 299. And ultimately the flag is raised, often jointly by a city official, organizers and participants. JA vol. I, at 227–28. An observer would, no doubt, conclude that the flag raisings are official City ceremonies, with all the usual fanfare.

The record contains only a few photographs of the City’s past flag raisings. However, the City’s official videographer, Boston City TV, maintains a video archive and YouTube channel containing videos of a variety of City events.<sup>6</sup> Among those events are flag raisings, including many mentioned in the record and relied on by Petitioners. Those videos provide significant context—from a government source, and party

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<sup>6</sup> See *Watch Boston City TV*, CITY OF BOS., <https://www.boston.gov/departments/broadband-and-cable/watch-boston-city-tv> (last updated Jan. 27, 2021) (with links to video archive and YouTube channel); see also Boston City TV, YOUTUBE, <https://www.youtube.com/channel/UCImopNmmU11qfuWBbiXdowQ> (last visited Dec. 18, 2021).

to this action—confirming that flag raisings are official ceremonies, meant to convey the City’s formal messages of welcome and to commemorate dates and events important to various Boston communities.<sup>7</sup>

Amici highlight the following examples:

### 1. Dominican Republic Flag Raising

In August, 2016, the City held a “Dominican Republic Flag Raising Ceremony,” one of its many—often annually repeated—flag raisings to commemorate the contributions of the numerous cultural communities in Boston. *See* Pet. App. 175a; *see also id.* at 173a–187a (listing flag raisings).<sup>8</sup> A video of the ceremony is available through Boston City TV, which describes it as follows: “Mayor Walsh participates in a flag raising ceremony for the Dominican Republic, which celebrates its 153rd anniversary of independence. The [M]ayor also proclaimed August 12, 2016 as Dominican Republic Reclamation of Independence Day in the City of Boston.”<sup>9</sup>

In the video, former Mayor Martin J. Walsh reads from the City’s proclamation, extolling the many virtues of the Dominican community in Boston. As he reads, there are shots of the Dominican flag raised on the City’s flag pole, a podium with the seal of the City flying a smaller Dominican flag, and an enthusiastic crowd waving Dominican flags. After acknowl-

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<sup>7</sup> The Court can and should look to the videos maintained in the City’s archive to better understand the subject matter at issue. *See, e.g., Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 816 n.8 (2011) (Alito, J., concurring).

<sup>8</sup> *See* Boston City TV, Dominican Republic Flag Raising Ceremony, YouTube (Aug. 12, 2016), <https://www.youtube.com/watch?v=G2rAYZsFZ1g>.

<sup>9</sup> *Id.*

edging other elected officials in the crowd, including three Boston City Councilors, the Mayor declared the date officially Dominican Republic Restoration of Independence Day in the City of Boston.

## 2. Transgender Flag Raising

In April, 2017, the City conducted a “Transgender Flag Raising Ceremony.”<sup>10</sup> *See* JA vol. I, at 137 (“We’ve raised the transgender flag to show that the city is inclusive and welcoming.”). A video of the ceremony is again available through Boston City TV, which describes it as follows: “City Hall Plaza raised the transgender flag in solidarity with residents in the community. The event is in response to an anti-transgender ‘free speech’ bus that made an appearance outside City Hall.”<sup>11</sup>

The video opens on a podium at the base of the City Hall Plaza flag poles. The podium bears the City’s seal. Mayor Walsh walks to the podium to applause from the gathered crowd. Mayor Walsh begins his remarks by saying, “I figured we’d have a little flag-raising today when we know we have visitors from – wherever they’re from – come here to our

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<sup>10</sup> *See* Boston City TV, *Transgender Flag Raising*, YOUTUBE (Apr. 7, 2017), <https://www.youtube.com/watch?v=YDrlebHxTHQ>.

<sup>11</sup> *Id.*; *see also* Steve Annear & Meghan E. Irons, *Anti-Transgender Bus Rolls into Boston, Is Promptly Greeted by Protests*, BOSTON GLOBE (Mar. 30, 2017, 11:56 AM), <https://www.bostonglobe.com/metro/2017/03/30/free-speech-bus-rolls-into-boston-greeted-protests/ujfRVB33mfeNez6P0rvlLL/story.html> (noting that Mayor Walsh raised transgender flag in response to “Free Speech” bus parked at City Hall, bearing message “It’s biology: Boys are boys . . . and always will be. Girls are girls . . . and always will be. You can’t change sex.”).

city and we wanted to just send a message that we are an inclusive, open city.” The Mayor then welcomed several elected officials, including Boston City Councilors. The Mayor proceeded to make a short speech, in which he said it was “important for us, to every now and then, send a message. To let people know that we will not be intimidated by discrimination or harassment. And we will not tolerate these kinds of actions.” After some additional comments, Mayor Walsh concluded that the City would continue to fly the transgender flag “with pride in our hearts.” The Mayor then asked a member of his scheduling staff, Alexandra Zafris, to help him raise the flag. They raised the flag together, to applause from the crowd.

### 3. LGBT Pride Flag Raising

In June 2017, the City conducted an “LGBT Pride Flag Raising Celebration.”<sup>12</sup> A video of the ceremony is again available through Boston City TV and described as follows: “Mayor Walsh and Boston Pride kick off Pride Week, a week of events dedicated to celebrating the LGBT community, with the raising of the LGBT flag on City Hall Plaza.”<sup>13</sup>

The video once again opens on a shot of a podium, displaying the City’s seal, at the base of the flag poles. The national anthem plays and Mayor Walsh and others salute the United States flag. The camera pans to show the raised United States and Massachusetts flags.

The Mayor’s LGBTQ liaison, Sam Chambers, welcomes attendees to City Hall Plaza and conducts a

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<sup>12</sup> Boston City TV, *LGBT Pride Flag Raising 2017*, YOUTUBE (June 9, 2017), <https://www.youtube.com/watch?v=iZ9Ypk3W-Cc>.

<sup>13</sup> *Id.*

brief moment of silence. He then introduces Mayor Walsh. After a few introductory remarks, Mayor Walsh acknowledges several elected officials and others in attendance, including three Boston City Councilors. Another City Councilor is acknowledged later in the video. The Mayor then begins the body of his remarks, opening with, “City Hall is proud to be the first municipality to proudly fly the rainbow flag and we will continue to fly it every single year.” The Mayor refers to the flag again as he closes his remarks, stating: “We’re going to continue to fly this flag and the transgender flag with pride in our hearts.” The mayor then reads a proclamation, declaring Friday, June 2, 2017 through Sunday, June 11, 2017 to be Boston Pride Week in the City of Boston. After several organizers and participants speak, the LGBT liaison to the Boston Police Commissioner—a Boston Police officer in full uniform—is recognized. The speeches continue, until the Mayor presents a citation to Linda DeMarco, a Boston Pride volunteer and official, and declares June 2, 2017 to be Linda DeMarco Day in the City of Boston. The Mayor then raises the Pride flag with members of the Boston Pride committee and a series of elected officials. The video ends with a shot of the United States, Massachusetts, and Pride flags, flying together.

## **II. The City, Bostonians, and Other Reasonable Observers All Recognize Flags Flying Over City Hall Plaza As The City’s Own Speech**

Given the context in which flag raisings occur at City Hall, it comes as no surprise that the City, its inhabitants and visitors regard the flags flying over City Hall Plaza as the City’s speech. That understanding derives from the historic use of flags to

convey government messages, the City’s explicit objectives in raising flags on City Hall Plaza, how those flags are perceived by observers, and the City’s complete control and discretion over which messages to endorse.

**A. Flags Are Deeply Symbolic and Historically Used by Government to Convey Its Messages**

This Court has often recognized the symbolic power of flags, particularly as a governmental expression of identity, unity and power. As the Court stated, “[t]he very purpose of a national flag is to serve as a symbol of our country; it is, one might say, ‘the one visible manifestation of two hundred years of nationhood.’” *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (quoting *Smith v. Goguen*, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting)). This Court has described national flags as “[p]regnant with expressive content,” *id.*, and flags generally as a “short cut from mind to mind,” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). “Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Id.* When the government raises a flag, therefore, it is a deeply symbolic and expressive moment.

This symbolism—for the government and observers—is illustrated by events involving the federal government’s fluctuating stance on flying the rainbow Pride flag. In 2017, during the Trump administration, an LGBTQ advocate asked the National Park Service to fly a Pride flag at the

Stonewall National Monument in New York.<sup>14</sup> The Monument, of course, has deep significance for the LGBTQ community as the site of the Stonewall Uprising, “a milestone in the quest for LGBTQ civil rights.”<sup>15</sup> As one advocate put it: “It was something that was necessary. When you have a national gay monument, you have to fly the rainbow flag, especially when you have a flag pole on your property.”<sup>16</sup> Initially, the Park Service agreed. But when there was publicity about the Pride flag being permanently displayed for the first time on federal property, the Park Service reneged. Suddenly, it claimed that the Monument’s flag pole did not belong to the federal government but rather belonged to the City of New York.<sup>17</sup> It turned over the Pride flag it had purchased to the City of New York and left the decision whether to raise it to the city.<sup>18</sup>

Several years later, in 2020, the Biden administration reversed course, agreeing to install a perma-

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<sup>14</sup> Rob Hotakainen, *Emails Show Scramble to Dump Stonewall Pride Flag: ‘Oy vey’*, E&E News (June 24, 2019, 12:09 PM), <https://www.eenews.net/articles/emails-show-scramble-to-dump-stonewall-pride-flag-oy-vey/>.

<sup>15</sup> Nat’l Park Serv., *Stonewall National Monument*, <https://www.nps.gov/ston/index.htm> (last visited Dec. 18, 2021).

<sup>16</sup> Hotakainen, *supra* note 14.

<sup>17</sup> *Id.*; see also Josh Lederman, *Trump Admin Tells US Embassies They Can’t Fly Pride Flag on Flag Poles*, NBC NEWS (June 7, 2019, 2:45 PM, updated June 7, 2019, 3:14 PM), <https://www.nbcnews.com/politics/national-security/trump-admin-tells-u-s-embassies-they-can-t-fly-n1015236> (noting that Trump Administration officials denied US diplomats’ requests to fly Pride flag during Pride month on embassy flag poles, reversing Obama Administration decision).

<sup>18</sup> Hotakainen, *supra* note 14.

ment flag pole and fly the Pride flag at the Monument.<sup>19</sup> Other Biden administration officials followed suit. For example, in 2021, the federal Department of Energy raised a Pride flag over its offices for the first time.<sup>20</sup> The Department posted a video of the flag raising, in which Secretary Jennifer Granholm states, “Flags are symbols, right? Flags are a statement about who we are.” She continues, “Every DOE employee who walks under this flag will know that we are all about making sure that all of us have a place at the DOE table.” Other Department officials agreed, stating that “[r]aising the flag at DOE really shows to all of us that this is an important issue that we should be paying attention to, that we should recognize the diversity of all of us.”<sup>21</sup>

Two different federal administrations took two different views and expressed those views through their decisions to raise, or not to raise, a flag. Clearly, both administrations were aware of the symbolism inherent in government flying a flag over public property. And both understood the power of their choice to express their views through a flag, or not.

### **B. The City Uses the City Hall Flag Poles to Convey Its Own Official Message**

Like the federal government, the City has used the flag poles that it owns and controls to “speak for itself.” *Summum*, 555 U.S. at 467 (quoting *Bd. of*

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<sup>19</sup> Rob Hotakainen, *NPS to Allow Permanent Display of Rainbow Flag at Stonewall*, E&E NEWS (Oct. 5, 2021, 12:28 PM), <https://www.eenews.net/articles/nps-to-allow-permanent-display-of-rainbow-flag-at-stonewall/>.

<sup>20</sup> Dep’t of Energy, *DOE Takes Pride in Progress* (June 23, 2021) <https://www.energy.gov/articles/doe-takes-pride-progress>.

<sup>21</sup> *Id.*

*Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)). Generally, Boston flies its own flag on the City Hall flag pole. Pet. App. 141a–142a; *Boston City Hall Photograph*, *supra* note 5. Obviously, that is government speech.

On the relatively rare occasions when the City flies a flag other than its own, it is part of an official ceremony in which the City expresses a message represented by the third party’s flag. At each of the flag raisings portrayed in the videos, for example, the Mayor offers Boston’s official message of welcome and inclusion.<sup>22</sup> Indeed, he presents proclamations and citations, recognizing contributions to the City and commemorating important events.<sup>23</sup> And the Mayor does all this a few yards from the seat of City government, at a podium bearing the City’s seal and in the center of a neighborhood that has been associated with government since before the Founding.<sup>24</sup>

The City’s website confirms that the City conducts flag raisings at City Hall to promote its own messages. Pet. App. 143a. According to the City, “[w]e commemorate flags from many countries and communities” because “we want to create an environment in the City where everyone feels included, and is treated with respect. We also want to raise awareness in Greater Boston and beyond about the many countries and cultures around the world. Our goal is to foster

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<sup>22</sup> *Dominican Republic Flag Raising*, *supra* note 8; *Transgender Flag Raising*, *supra* note 10; *LGBT Pride Flag Raising 2017*, *supra* note 12.

<sup>23</sup> *LGBT Pride Flag Raising 2017*, *supra* note 12.

<sup>24</sup> *Dominican Republic Flag Raising*, *supra* note 8; *Transgender Flag Raising*, *supra* note 10; *LGBT Pride Flag Raising 2017*, *supra* note 12.

diversity and build and strengthen connections among Boston’s many communities.” *Id.* (emphases added).<sup>25</sup>

The City clearly understood that it was speaking through its flag raising ceremonies when it rejected Petitioners’ proposed event. In its letter to Petitioners explaining the decision, the City cited a “policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles.” Pet. App. 153a. Indeed, the City explicitly invoked the Establishment Clause. *Id.* at 154a. Of course, the Establishment Clause precludes *government* speech endorsing religion, but not *private* speech that does the same. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O’Connor, J.).<sup>26</sup> The City plainly understood that it was speaking through the flags flown at City Hall, otherwise there would have been no need for Establishment Clause concerns.

If there were any doubt that the City used these ceremonies to communicate its own speech, the video of the Transgender Flag Raising dispels it. That video, supported by independent reporting, indicates

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<sup>25</sup> The United States appears to agree that the choice to commemorate a flag or an historical event is the government’s own and it is free to allow some private speakers, but not others, to participate in the official ceremony. United States Br. 12–13 (“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.”).

<sup>26</sup> By contrast, there is no similar constitutional limitation on which non-religious “causes” governments may adopt or champion when they speak. *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1988) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view.”).

that the Mayor organized the ceremony in direct response to what the City described as an “anti-transgender ‘free speech’ bus.” The Mayor explicitly said that he wanted to “send a message” that Boston is an “inclusive and open city.” Indeed, he said it was “important” to send a message that Boston would “not be intimidated by discrimination and harassment.” And he said that Boston would continue to fly the transgender flag “with pride in our hearts,” a sentiment he echoed at the LGBT Pride Flag Raising.<sup>27</sup> There can be no clearer indication that the City deliberately used the medium of its flag pole to communicate with both the organizers of the “free speech” bus and its own citizens.<sup>28</sup>

**C. Any Reasonable Observer Would  
“Closely Identify” a Flag Flying Over  
City Hall Plaza with the City**

Flags rising high over City Hall Plaza are “closely identified” with the City government by any reasonable observer. *See Walker*, 576 U.S. at 212 (quoting *Sumnum*, 555 U.S. at 472). The space itself is closely associated with government. City Hall Plaza sits in the middle of Government Center and is ringed by federal, state and city offices. Pet. App. 161a, 171a;

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<sup>27</sup> *Transgender Flag Raising*, *supra* note 10.

<sup>28</sup> Petitioners cite the City’s flying of the Vatican flag over the Boston Common to allegedly show that the City had previously flown other flags affiliated with religions. Pet. Cert. 18 n.5; Pet. Br. 17 n.6. But their example proves too much. As Petitioners assert, the City flew the flag “in connection with the 1979 visit to Boston of Pope John Paul II, four years prior to diplomatic recognition of the Vatican by the United States.” *Id.* That context demonstrates that Boston was engaging in political speech by flying the flag: urging the federal government to recognize the Vatican as a sovereign city-state.

*MBTA Government Center Map*, *supra* note 2. Indeed, the area has been associated with government since the Nation's founding, when the Sons of Liberty gathered at Faneuil Hall to protest their treatment at the hands of the British Crown. Today the City's three flag poles tower over City Hall Plaza in close proximity, standing together in a group. The flags of the United States and the Commonwealth of Massachusetts always fly on two of the flag poles, lending their authority to the flag flying on the third pole.

For many observers—employees working in the surrounding office buildings, tourists glimpsing the flags while walking the Freedom Trail toward the Holocaust Memorial, and drivers on adjacent Congress Street—the flags are the only part of the Plaza they can see. The flags fly 83 feet above the Plaza and can be seen from a variety of vantage points. Pet. App. 141a; *Boston City Hall Photograph*, *supra* note 5. Many observers can see the flags but not any activity on the Plaza itself. Indeed, the flags often fly when there is no associated activity on the Plaza. JA vol. II, at 569–70. They can be left up after the related ceremony has ended and the group assembled for it has dispersed. *Id.* Given the lack of any other context, a viewer would have to associate the flags exclusively with the City.<sup>29</sup>

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<sup>29</sup> The fact that the public identifies the City Hall flag poles with the City government is likely the very reason Petitioners were not satisfied with the City's offer to hold an event on City Hall Plaza, at which they could display the Christian flag however they saw fit. Raising a flag up the City's flag pole does not simply make it far more visible; it conveys a *qualitatively* different message—namely that the speech represented by the flag is the government's own. *See Walker*, 576 U.S. at 212–213

With “one eye on the Establishment Clause,” *Sumnum*, 555 U.S. at 486 (Souter, J., concurring), the City had to be concerned that flying the Christian flag would be seen as an endorsement of the Christian faith, to the exclusion of all others. *See* JA vol. I, at 136 (City official testified that the City denied Petitioners’ application “[b]ecause we had used the flag poles as government speech and didn’t want that to be projected as an endorsement by the city of a particular religion”). This the City could not do, and for good reason. *See Allegheny*, 492 U.S. at 590 (“this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization”); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“The Clause was also designed to stop the . . . Government from asserting a preference for one religious denomination or sect over others.”).

Consider the experience of an observer who belongs to a minority faith, walking by a Christian flag flying over an empty City Hall Plaza, in tandem with the United States and Massachusetts flags. What conclusions would that person draw about their standing in the City, about their welcome and political power? *See Allegheny*, 492 U.S. at 590 (Establishment Clause guarantees “religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’” (quoting *Wallace*, 472 U.S. at 52)); *see also Sch. Dist. Abington Twp. v. Schempp*, 374 U.S. 203, 209 (1963)

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(observing that Texans “prefer[] a license plate design to the purely private speech expressed through bumper stickers” because license plates “convey government agreement with the message displayed”).

(expert testified that reading some parts of New Testament as part of mandatory Bible reading in public school could be psychologically harmful to Jewish students and had caused “divisive force” in school). The same is true—and perhaps more so—for a person who professes no faith at all. That isolating experience could not be addressed with more flags, representing more and different religions. *See Schempp*, 374 U.S. at 212 (non-adherents stated that mandatory, public school Bible reading “threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating those values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals” of non-adherents).

Even more troubling to amici is that Petitioners’ logic would require the City Hall flag poles to be thrown open to all speech. Boston, like most places, is no stranger to provocative or even hateful speech in its public spaces. For example, in 2019, Boston watched the so-called “Straight Pride” parade march on City Hall Plaza.<sup>30</sup> In 2017, Boston watched extremists gather at a “Free Speech” rally on Boston Common.<sup>31</sup> Boston also watched counter-protesters

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<sup>30</sup> John Hilliard, Sarah Wu, Brian McQuarrie & Aimee Ortiz, *Protesters Jeer Straight Pride Parade Marchers Along Route to City Hall*, BOSTON GLOBE (Aug. 31, 2019, 8:03 PM), <https://www.bostonglobe.com/metro/2019/08/31/counterprotesters-rally-across-city-from-straight-pride-parade-starting-point/qFStqXFPcWoOWAaxkDyDfl/story.html>.

<sup>31</sup> Globe Staff, *Tens of Thousands March for Unity, Overwhelming ‘Free Speech’ Rally*, BOSTON GLOBE (Aug. 19, 2017, 3:25 PM), <https://www.bostonglobe.com/metro/2017/08/19/protestors-co>

confront both groups.<sup>32</sup> This is the push and pull of free speech in a traditional public forum. An observer would understand that the signs and flags carried by one group or another—no matter how provocative or hateful to the observer—belonged to the group carrying them.

Not so with the City Hall flag poles. Imagine a Nazi flag or Ku Klux Klan flag being flown over the entrance to City Hall.<sup>33</sup> The image of such symbols of hate occupying the same space as the City's blue flag is jarring. *See Boston City Hall Photograph, supra* note 5 (view of the flag poles from City Hall Plaza). An observer would not associate that hateful symbol with an unseen group, whose event may have concluded earlier that day, or who may not be visible from the observer's vantage point. The observer would associate that flag and its message with their

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unterprotestors-gather-around-boston/IUaev6rwHP0qhbbcZhKa3I/story.html.

<sup>32</sup> *See, e.g., id.*

<sup>33</sup> The Nazi swastika, in particular, is one of the most evocative symbols of modern history. *See, e.g.,* National Holocaust Memorial Museum, Transcript of Interview with Helen Goldkind, at 56–57 (Feb. 21, 2001), [https://collections.ushmm.org/oh\\_findingaids/RG-50.106.0139\\_trs\\_en.pdf](https://collections.ushmm.org/oh_findingaids/RG-50.106.0139_trs_en.pdf) (When asked what sights, sounds or smells triggered her memories of the war, Holocaust survivor, Helen Goldkind, replied, “A swastika. You know when I see a swastika I feel I am in danger. It’s—it sounds crazy to other people, because other people are not affected at all by a swastika. That swastika cannot hurt you. But what it represents to me means something else.”). While occasional observance of such symbols of hate is a price paid for a free society, *see Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977), nothing in the Constitution compels the government to present such speech as its own.

government.<sup>34</sup> For this reason, it would be easy to imagine that the City would end its flag raising ceremonies entirely if it was required to open its flagpoles to all private speech. *See Sumnum*, 555 U.S. at 480 (“where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place”).

#### **D. The City Retains Complete Discretion Over the Messages Conveyed on Its Flag Pole**

Confirming its status as a vehicle for government speech, the City retains complete discretion over the messages communicated by its flag pole. Indeed, the flag pole generally displays only one City-controlled message: the official flag of the City of Boston. Pet. App. 141a–142a.

Petitioners, however, make much of the raw fact that the City has conducted 284 flag raising ceremonies over the twelve-year period from June 2005 through June 2017. Pet. Br. 27–29; Pet. App. 142a. This is misleading. A more careful review of the City’s flag raisings over that twelve-year period reveals that the City has been far more selective than Petitioners acknowledge.

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<sup>34</sup> Even the Christian flag—which is designed to be ecumenical and is displayed in Christian churches of different denominations—may have developed unwanted associations. For example, Christian leaders were dismayed to see the Christian flag brought to the Senate floor by rioters during the January 6, 2021 assault on Congress, thus associating the flag with a sad chapter in the Nation’s history. Ken Camp, *Christian Nationalism Clearly Evident in Capitol Riot*, BAPTIST STANDARD (Jan. 7, 2021), <https://www.baptiststandard.com/news/nation/christian-nationalism-clearly-evident-in-capitol-riot/>.

To begin with, the City did not fly 284 unique, third-party flags during that period. The City flew only 50 unique flags. Pet. App. 173a–187a. Virtually all of those flags were flown annually, to commemorate some special day or event, important to the relevant community. *See, e.g., id.* at 173a, 175a, 176a, 177a, 178a, 179a, 180a, 181a, 185a, 186a (Portuguese flag raising conducted annually in June, to commemorate Portugal Day).

Of those 50 unique flags, over 90% were national or regional flags. *Id.* at 173a–187a. Only a handful were for “causes.” *Id.* Moreover, the national and regional celebrations and causes represented by the flag raisings were often the subject of some other form of official recognition, such as a proclamation or a holiday. For example, the Dominican Republic flag raising video shows the Mayor proclaiming August 12, 2016 as Dominican Republic Reclamation of Independence Day in the City of Boston.<sup>35</sup> The June 2017 Pride Flag Raising is the same: it shows Mayor Walsh proclaiming the week of June 2 through June 11, 2017 to be Pride Week in Boston.<sup>36</sup> Similarly, three of the other “causes” recognized official City holidays: Veterans Day, Columbus Day, and Bunker Hill Day.<sup>37</sup> In short, the flag raisings were not held for the benefit of random groups or essentially anyone who applied. *Cf. Walker*, 576 U.S. at 219–20 (license plates bearing such varied messages as “I’d Rather Be Golfing” and “I am a Texas Realtor” deemed govern-

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<sup>35</sup> *See Dominican Republic Flag Raising*, *supra* note 8.

<sup>36</sup> *LGBT Pride Flag Raising 2017*, *supra* note 12.

<sup>37</sup> Bunker Hill Day, which commemorated the 1775 Battle of Bunker Hill, was a holiday in Suffolk County—where Boston sits—for many years, until it was discontinued in 2010.

ment speech). The flag ceremonies recognized groups or occasions linked in some official way with the City.

Most importantly, the City has always retained absolute discretion over which flags to fly. *See Walker*, 576 U.S. at 213 (that Texas maintained “final approval authority” over its specialty license plates indicative of government speech). At the time Petitioners applied to raise the Christian flag, the City did not have a written flag raising policy. Pet. App. 140a, 155a. But it did not need one. A City official reviewed flag raising requests, and he had “final say” over whether the City would agree to the request. JA vol. I, at 124. When the City adopted a written policy in 2018, it explicitly retained “sole and complete discretion” to approve flag raising requests. Pet. App. 159a; JA vol. I, at 286. The City may not have chosen or changed the colors or symbols of those flags. But that would have been nonsensical, particularly for the sovereign nation flags that formed the overwhelming majority of flags flown. The choice for the City was whether to fly the flag at all. That is the ultimate control.

**CONCLUSION**

The court of appeals correctly confirmed that flags flown on the City Hall Plaza flag poles constitute the City's own speech. The judgment of the court of appeals should be affirmed.

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