No. 20-1800

IN THE

Supreme Court of the United States

HAROLD SHURTLEFF, ET AL.,

Petitioners,

V.

CITY OF BOSTON, MASSACHUSETTS, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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

Counsel for Petitioners

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

ARGUMENT

This case begins and ends with forum analysis. Where a private speaker challenges exclusion from government property, the Court's forum analysis is the starting point. Is the government property a traditional public forum? If not, has the government—by policy or practice—designated the property a public forum for private speech? Or, has the government designated the property a public forum limited to speech on certain topics or by certain speakers? If the answer to any of these questions is "yes," then forum analysis determines the validity of the government's exclusion of the private speaker by applying the applicable level of constitutional scrutiny. (Br. Pet'rs 23–42.) Only if the answer is "no" should the government speech doctrine be considered.

Here, the answer to the traditional public forum question is "no," but "yes" for the designated public forum, and alternatively "yes" for the limited public forum questions. The City, by policy and practice, designated its City Hall Flag Poles a public forum for private flag raising events, accessible to all through a minimal application process with only ministerial oversight. Alternatively, to the extent the City's policy or practice limits the Flag Poles forum to flag raisings commemorating one of Boston's diverse communities (e.g., Argentinians, Caribbean Americans, or credit union members), or a significant date (e.g., Bunker Hill Day, Juneteenth, or Marcus Garvey Day), or a cause (e.g., Pride, Walk for Peace, or organ donation), the City has created a limited public forum, for which Camp Constitution's proposed flag raising to commemorate Boston's Christian community and the

federally recognized Constitution Day and Citizenship Day satisfied all legitimate criteria. And because the City's exclusion of Camp Constitution from the Flag Poles forum was unconstitutional viewpoint discrimination under any standard, and otherwise cannot satisfy strict scrutiny applicable to content-based restrictions in a designated public forum, the forum analysis ends the case.

The City's brief avoids the forum analysis inquiry of its policies and practices by starting with the government speech doctrine. (City Br. 22–40.) Based on *this* record, the City's starting point is backwards. The City fails to overcome the errors of the First Circuit's rigid "three-part *Summum*/*Walker* test" and its predetermined outcome by focusing on how *other* governments have historically used *their* flagpoles. (Br. Pet'rs 42–61.) The City contorts the record and the undisputed facts to recategorize past flag raisings based on newly minted, litigation-borne distinctions, but still cannot make government speech fit the facts. The Court should not only reject the City's contortion, but should also take the opportunity to restrain the government speech doctrine before it encroaches on private speech any further.

And the City concedes that all its chips are on government speech. (City Br. 48–49.) The City presents no defense under the forum doctrine—no compelling interest, no narrow tailoring, no viewpoint neutrality, and no reasonableness—and no defense of its prior restraint. By its silence, the City has conceded Camp Constitution's First Amendment arguments.

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

I. THE CITY'S CONTRIVED, LITIGATION-BORNE DISTINCTIONS DO NOT TRANSFORM HUNDREDS OF PRIVATE FLAG RAISING EVENTS INTO GOVERNMENT SPEECH.

The City cannot hang its case on the preposition "at" when the unbroken history of *every* flag raising event was "on" the City Hall Flag Poles, and where the written application form and guidelines, internal procedures, and stipulated facts do not use "at" to limit access to the Flag Poles *as flagpoles*. Nor can the City rewrite history to limit the flag raisings to City action commemorating ethnic communities or recognized days of remembrance. Neither argument has merit.

A. The City eschewed any actual distinction between *at* and *on* the Flag Poles in its policies and practices providing for the use of the Flag Poles for private flag raising events.

To avoid the legal consequence of having designated its City Hall Flag Poles as one of "Boston's public forums" for "all applicants," the City strains to impose an after-the-fact limitation on Flag Poles access based on a feigned difference between "[t]he area at the base of the flagpoles" (which the City concedes is a public forum) and the Flag Poles

themselves—*as flag poles*. (City Br. 40–42.) This newly minted distinction is contrary to the undisputed facts and untenable as a matter of law. The Court should reject the City's litigation-borne distinction. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 871–72 (2005).

First, the City's written Event Application incorporates Guidelines stating up front that they are "for any Person or Group Requesting the *Use of* Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or *the City Hall Flag Poles*." (Pet. App. 135a–136a (emphasis added).) The "public forums" for "all applicants" policy included in the same Guidelines (Pet. App. 136a–137a) applies to the *use of* the *Flag Poles*, not merely a patch of City Hall Plaza *at* the Flag Poles. The fact that the Guidelines also state in small print that they apply to all events at the various City venues and the Flag Poles (Pet. App. 136a) does not alter the primary language of the Guidelines. To be sure, applicants *using* the Flag Poles for a flag raising event must do so *at* the Flag Poles. For the same reason, the extra "at" in the listing of available City venues on the website event application page (Pet. App. 133a) does not alter the express provision for the *use of* the Flag Poles in the written Guidelines containing the "public forums" for "all applicants" policy. Moreover, the written Event Application section listing the available "public

forums" for "all applicants" excludes the extra "at" before the City Hall Flag Poles checkbox.[1]

Second, the City's 2018 internal operating procedures for all events at the City's public forums—expressly including flag raising events—identify the Flag Poles venue as the "City Hall Plaza Flag Pole" (C.A. App. 555, 557), confirming that the City intends the Flag Poles forum to include use of the third flagpole that regularly and frequently accommodates private flags. (Pet. App. 142a.) Flag raising events are always *at* the Flag Poles and are always *on* the Flag Pole.

Third, the parties stipulated that "[t]he City has made available designated City properties for the public to hold events including . . . City Hall Flag Poles . . . ." (Pet. App. 132a.) The stipulation does not include "at" as a qualifier or limitation on the available of the Flag Poles for events.

Finally, the totality of the written and online applications, guidelines, procedures, and party stipulations identify City Hall Plaza and the City Hall Flag Poles as two distinct forums. (Pet. App. 132a–137a, 141a; C.A. App. 555, 557.) It would have been superfluous to name the Flag Poles as one of "Boston's public forums" if the intent was merely to identify some patch of the Plaza grounds *at* the Flag Poles,

---

[1] As shown in Camp Constitution's brief, the City confirmed in discovery that it still maintains the policies reflected in the written Event Application, incorporating the Guidelines containing the "public forums" for "all applicants" language. (Br. Pet'rs 29–30 & n.8.)

because those grounds were already covered by the identification of City Hall Plaza. The same documents identify the North Stage separately from City Hall Plaza, though incorporated into the Plaza, presumably to indicate its availability for use as a stage, just like the Flag Poles are separately identified to indicate their availability for use as flagpoles. (*Cf.* City Br. 41.)

B. The City's recategorizing past flag raisings as "national" or "day of observance" does not transform the overwhelmingly private flag raisings into government speech.

The City attempts to obscure the reality of the flag raisings forum by recategorizing past flag raisings to fit the City's new narrative. The City goes so far as to invite the Court to ignore an entire year of flag raisings—2018—on the false pretense that Camp Constitution *only* relies on the factual record of flag raisings preceding its 2017 application. (City Br. 7 n.2, 10 n.5.) While Camp Constitution does not need the 2018 flag raising records to make its case (the 284 flag raisings preceding Camp Constitution's application are sufficiently compelling), it has relied and continues to rely on the 2018 flag raising records

to debunk the City's litigation-borne narrative of tightly controlled government speech.[2]

To be sure, the 2018 flag raising records illuminate the futility of the City's attempt to prove government speech by recategorizing the prior flag raisings as "national" and "day of observance" events. (City Br. 7–10, 29–30, 43.) These categories have nothing to do with whether the flag raisings were private speech or government speech, and the 2018 flag raising records show why.

In 2018 there were 50 flag raisings. (C.A. App. 389–444.) Of that total, 33 were "national" flag raisings,[3] 15 were "day of observance" flag raisings,[4]

---

[2] *See, e.g.*, Br. Pet'rs 9–10 (describing flag raisings in 2018 and 2019), 18–19 (describing 2018 written flag raising policy); C.A. App. 389–444 (records of 2018 flag raisings submitted by joint appendix to First Circuit below); C.A. App. 445–538 (records of flag raising requests including in 2018 submitted by joint appendix to First Circuit below).

[3] City Br. 8 ("flags representing other nations, territories, ethnicities or multinational entities"); C.A. App. 392–93 (e.g., Lithuanian, Dominican, Irish, etc.).

[4] City Br. 9–10 (identifying "day of observance" flag raisings); C.A. App. 392–93 (e.g., Black History, Malcolm X, Bunker Hill Day, etc.), 394, 398, 401, 402, 404, 405, 407, 410, 411, 420, 421, 425, 432, 434, 441, 444.

and 1 was neither.[5] More importantly, however, 39 of the 50 flag raisings (78%) were initiated by private speakers, while only 11 were initiated by the City.[6] (C.A. 394–444.) This distinction between privately requested and City sponsored flag raisings is the distinction that matters in characterizing the Flag Poles forum, and it is not even close—the overwhelming majority of the 2018 flag raisings were privately initiated, not City sponsored. Thus, the 2018 flag raising records confirm the City's maintenance of a public forum for private flag raisings. And, given that many flag raising events repeat year after year—especially the "national" flag raisings (City Br. 8), there is no reason to doubt that the 284 recorded flag

---

[5] C.A. App. 392–93 (Metro Credit Union), 433. The Metro Credit Union Flag raising was a "purely private flag on a random day" event that the City claims never happens on the Flag Poles. (City Br. 30; *Metro First Financial in MA to Receive Juntos Avanzamos Designa*, Metro Credit Union (Sept. 11, 2019), https://www.metrocu.org/news/metro-first-financial-in-ma-to-receive-juntos-avanzamos-designa (announcing "Juntos Avanzamos Flag Raising Ceremony" to celebrate Metro Credit Union's receiving the "the *Juntos Avanzamos* (Together We Advance) designation by the National Federation of Community Development Credit Unions").)

[6] The City's Property Management Department (PMD) handled all applicants, including City departments, seeking to use the City's public forums for an event, including a flag raising, using the PMD's single, common application system. (Pet. App. 140a; C.A. App. 258:11–265:18, 552–560.) Of the 50 flag raisings in 2018, the 11 City initiated events are identified by the Address (e.g., 1 City Hall Square), E-Mail Address (e.g., @boston.gov), and Description fields of the Event Application records. (C.A. App. 397, 400, 403, 404 (Boston EMS), 410 (Boston Office of Veteran Services), 420–21 (same), 432 (same), 434, 441 (Boston Office of Veteran Services), 444 (same).)

raisings prior to Camp Constitution's denial were also overwhelmingly private.

Amici Local Government Organizations filed a brief in support of the City, but nonetheless confirm that Boston's Flag Poles forum is readily distinguishable from other local governments' uses of their own flagpoles. The survey appended to their brief "demonstrates that Boston has flown an unusually large number of third-party flags" (Br. Loc. Gov't Orgs. 4), and that "Boston is unusual in the number of third-party requests it has entertained and granted." (*Id.* at 18–19.)

The Amici's brief indicates many local governments do not permit the raising of third-party flags, and those that occasionally do have policies that do not open their flagpoles as public forums. Camp Constitution has never argued that the truly occasional raising of a third-party flag opens a government flagpole to the flags of all comers.[7] But here, where Boston's longstanding policy and practice regularly and frequently accommodated the private flag raisings of "all applicants," Boston has intentionally opened its Flag Poles as a public forum for private speech. The Court's forum analysis begins and ends the inquiry, and the City cannot hide its censorship of Camp Constitution's Christian

---

[7] The City's recasting of the questions presented feigns that the hundreds of overwhelmingly private flag raisings on the City Hall Flag Poles happened only "occasionally" (City Br. I), even though the 50 flag raisings in 2018 averaged almost one per week. (C.A. App. 392–93.)

viewpoint behind the inapposite government speech doctrine.

C. The City ignores the critical distinction between temporary and permanent displays.

In advancing inapposite distinctions, the City attempts to sidestep the relevant distinction between permanent and temporary displays (City Br. 45–46) in the Court's forum analysis, which distinction was critical to the Court's government speech finding in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (using "permanent" 14 times, "a monument to remain" once, "temporary private displays" once, and contrasting a permanent monument to the temporal nature of private speakers). (Br. Pet'rs 45–48.) While this Court found that the *Summum* permanence factor was not dispositive to the Texas specialty license plates in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213–14 (2015), it does not follow that the permanence factor is unimportant to the Boston Flag Poles forum here. If *Summum* has any application to this case, then the lack of permanence of the private flags militates against government speech. (*See, e.g.*, C.A. App. 394–444 (predominantly 2-hour or shorter flag raising durations).) *Compare United Veterans Memorial & Partiotic Ass'n of the City of Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 475 (S.D.N.Y. 2014) ("United Veterans' flags are displayed for long periods of time (until they become tattered) and then promptly replaced [such that] their presence at the Armory is nearly as constant as that of the park monuments in *Summum*."), *aff'd*, 615 F. App'x 693 (2d

Cir. 2015), *with Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018) ("[D]rawing on the Court's reasoning in *Summum*, which also involved the use of public land—we find it significant that the food vendors participating in the Lunch Program are a merely temporary feature of the landscape, and quite visibly so.").

II. CREDITING THE CITY'S CONTRIVED CATEGORY DISTINCTIONS WOULD ESTABLISH THE FLAG POLES AS A LIMITED PUBLIC FORUM FOR PRIVATE SPEECH TO WHICH THE CITY UNCONSTITUTIONALLY DENIED CAMP CONSTITUTION ACCESS.

Even if the City has limited flag raisings to commemorating Boston's diverse communities or recognized days of remembrance, the City at a minimum established the Flag Poles as a limited public forum. The City's denial of Camp Constitution's flag (commemorating the Christian community and a nationally recognized event) *solely* because the application used the word "Christian" was viewpoint censorship.

A. Whether the City created a limited public forum for private flag raisings on the Flag Poles instead of a designated public forum is fairly included within the questions presented and properly before the Court.

The questions presented essentially ask whether, under the Court's forum doctrine, the City has designated its City Hall Flag Poles a public forum for the flag raising events of private speakers like Camp Constitution, or whether, under the Court's government speech doctrine, all private flag raisings on the Flag Poles constitute government speech. (Pet. ii–iii; Br. Pet'rs i–iii.) Contrary to the City's waiver assertion (City Br. 48–49), these questions fairly and necessarily include the subsidiary question of whether the City, by policy or practice, has created any forum for private speech on the City Hall Flag Poles, including a limited or nonpublic forum.

The inseparability of the limited or nonpublic forum question from the designated public forum question is evident from the progression of the Court's forum doctrine decisions. Within these decisions, generally recognizing three forum categories—"traditional public forums, designated public forums, and nonpublic forums," *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (Br. Pet'rs 25–26)—the Court has used the term and concept of a "limited" public forum in association with both the designated public forum category, where "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited," and the nonpublic forum

category, where content-based restrictions must be viewpoint neutral and reasonable given the purposes of the forum. *Id.* In earlier cases, such as *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the Court associated the term "limited" public forum with a designated public forum "created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." 460 U.S. at 45–46 n.7; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("In addition to traditional public fora, a public forum may be created by government designation . . . for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."). In later cases, however, the Court has associated the term "limited" public forum with the nonpublic (third) forum category. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." (cleaned up)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–107 (2001) (same); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (same); *see also Am. Freedom Def. Initiative v. King Cnty., Wash.*, 136

S. Ct. 1022, 1023 (2016) (Thomas, J., dissenting) ("But if the government creates a limited public forum (also called a nonpublic forum)—namely, a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects—then speech restrictions need only be reasonable and viewpoint neutral." (cleaned up)).

Whether a "limited" public forum is a subcategory of designated public forum or equivalent to a nonpublic forum, the question of whether the City created a limited public forum for flag raisings and, if so, whether the City has unconstitutionally excluded Camp Constitution from it, is properly before the Court under S. Ct. R. 14.1(a).

Moreover, the Court's "traditional rule" is to reject waiver of any argument "'pressed or passed upon'" below. *See U.S. v. Williams*, 504 U.S. 36, 41 (1992). In addition to briefing to this Court the argument that the City's exclusion of Camp Constitution's flag from the Flag Poles forum was unconstitutional under the alternative limited public forum analysis (Br. Pet'rs 39–40; Reply Br. Supp. Pet. 12–13), Camp Constitution pressed the argument in the First Circuit below. (Appellants' Br. 53–54; Reply Br. of Pls.–Appellants 16 n.5.) Thus, the City's waiver argument fails.

B. Camp Constitution's flag raising request satisfied all criteria the City now claims were applicable to flags approved by the City.

The City is free to reserve to itself the use of its Flag Poles for its own purposes. (City Br. 24–25.) *See Minn. Voters All.*, 138 S. Ct. at 1885–86. But the City is also free to purpose its Flag Poles, or one of the Flag Poles, as a public forum for private flag raisings, *id.* at 1885, whether exclusively or in addition to the City's own use.[8] Thus, the City's having purposed its Flag Poles to "commemorate flags from *many* countries and *communities*," "to create an environment in the City where *everyone* feels included, and is treated with respect," "to raise awareness in Greater Boston and beyond about the *many* countries and *cultures* around the world," and "to foster *diversity* and build and strengthen connections among Boston's *many communities*" (Pet. App. 143a (emphasis added)), does not answer the question of who is speaking when flags are raised. Forum analysis still requires inquiry into whether the City, by policy and practice, has intentionally opened the Flag Poles as a public forum for private flag raisings, even if the City has intended to limit the

---

[8] Camp Constitution also does not dispute that the City, having opened a public forum, is free to close it in good faith. (City Br. 46–48.) But the City's denial of Camp Constitution's request was not a closure of the forum because flag raisings continued as usual (C.A. App. 389–444), and the City's recent, admittedly impermanent closure (City Br. 7 n.1, 21, 46) irrelevant to Camp Constitution's claims.

forum to flag raisings consistent with particular purposes.

The City, by longstanding policy and practice, has intentionally designated its Flag Poles as one of "Boston's public forums" for private flag raisings of "all applicants." But if, despite never having denied a private flag raising prior to Camp Constitution's request, the City has limited access to flag raisings fitting particular purposes—such as commemorating Boston's diverse communities and recognized days of observance (City Br. 29–30)—then the City's limitations only prove the Flag Poles forum to be a limited public forum (*see* Pt. II.A, *supra*). Such limitations, however, do not and cannot transform the overwhelmingly private flag raisings into Boston's government speech.

The City already admitted that Camp Constitution's proposed flag raising event satisfied *all* criteria for approval—if only Camp Constitution had not *called* the flag "Christian." (Pet. App. 155a–157a; Br. Pet'rs 16.) And the City acknowledges in its brief (City Br. 14–15), and stipulated below, that the purpose of Camp Constitution's flag raising request was to observe Constitution Day and Citizenship Day by "commemorat[ing] the civic and social contributions of the Christian *community* to the City, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution." (Pet. App. 130a–131a (emphasis added).) The City for the first time suggests in its brief that Camp Constitution's requested flag raising was comparable to raising "a purely private flag on a random day" and "messages of intolerance and

division," and was incompatible with the purposes of the Flag Poles forum because it "was the first request ever to seek to raise a flag in support of a religion." (City Br. 21, 30.) The City's attempted recharacterization of Camp Constitution's requested flag raising to the Court, despite its record stipulation, is disingenuous *at best*.

Camp Constitution's flag raising request perfectly fit the criteria the City now claims limited access to the Flag Poles forum. September 17 of each year is officially designated by federal law as "Constitution Day and Citizenship Day," commemorating "the formation and signing on September 17, 1787, of the Constitution and recogniz[ing] all who, by coming of age or by naturalization, have become citizens." 36 U.S.C. §§ 106(a)–(b). The law urges state and local governments "to make plans for the proper observance of Constitution Day and Citizenship Day and for the complete instruction of citizens in their responsibilities and opportunities as citizens of the United States and of the State and locality in which they reside." 36 U.S.C. § 106(d).[9] There is no record

---

[9] Over 100 years before the codification of Constitution Day and Citizenship Day in federal law, the Court observed,

evidence that the City or anyone else—ever—sought "to make plans for the proper observance" of the day, at the Flag Poles or anywhere else in the City. There can be no question that commemorating the federally legislated Constitution Day and Citizenship Day satisfies any "recognized days of observance" criterion for flag raisings. (City. Br. I, 3, 20, 43.) There likewise can be no question that "commemorat[ing] the civic and social contributions of the Christian *community* to the City, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution" (Pet. App. 130a–131a (emphasis added)) satisfies the City's stated flag raising purposes to commemorate Boston's many diverse *communities*. (City Br. 29–30; Pet. App. 143a.) Denying Camp Constitution's request because it intended to commemorate a recognized day of observance and one of Boston's many diverse communities from a Christian perspective is rank viewpoint discrimination, and unconstitutional regardless of the classification of the Flag Poles forum as designated, limited, or nonpublic. (*See* Pt. II.A, *supra*.) And even without the viewpoint

---

> If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every constitution . . . contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community.

Holy Trinity Church v. United States, 143 U.S. 457, 468 (1892) (comparing constitutions of Massachusetts and other states to illustrate its point).

discrimination, the City's exclusion of Camp Constitution from its limited public forum was unreasonable in light of the purported purposes of the forum. (*Id.*)

The Court should not countenance the City's mischaracterization of Camp Constitution's flag raising request for another reason: the City cannot claim Camp Constitution's proposed Christian flag would have been raised "in support of a religion" while also claiming that Boston raised myriad foreign nations' flags on the Flag Poles to commemorate the national and ethnic communities represented by the flags rather than the nations themselves. (City Br. 29–30.) If Camp Constitution's raising the Christian flag would necessarily have been in support of Christianity, rather than Boston's Christian community, then Boston's raising of the flags of China, Cuba, and Turkey would necessarily have been in support of those countries, not the Boston Chinese, Cuban, and Turkish communities.

Nor should the Court credit the City's purported vigilance against inconsistent messaging as proof that the myriad "national" flag raisings are the City's government speech. (City Br. 35.) For example, in many years the Boston Chinese Progressive Association has conducted a flag raising with the flag of the People's Republic of China (PRC) to commemorate its National Day (C.A. App. 393, 436; Pet. App. 174a–176a, 179a, 182a–184a, 186a, 187a), celebrating Mao Zedong's 1949 victory in the communist revolution that established China's

currently recognized government.[10] But, usually just days after the PRC flag raising, a competing Chinese flag raising occurs with the flag of democratic Taiwan, also called the flag of the Republic of China (ROC) (C.A. App. 393, 440; Pet. App. 174a–175a, 179a, 182a–184a, 187a), representing the Chinese Nationalist government deposed by Mao's 1949 victory and exiled to the historically disputed territory of Taiwan.[11] Flying the ROC flag is subversive to the PRC, which would make Boston's raising the ROC flag a form of "protest or other speech antithetical to" the message the City purportedly communicates through the PRC flag, which the City claims it strives to avoid. (City Br. 35.) The City cannot claim both flag raisings as its own speech. Surely it does not support the abysmal human rights record of the PRC; nor would Boston want to pit its diverse Chinese constituencies against each other. The competing Chinese flag raisings only make sense as private flag raisings by respective private groups, availing themselves of the City's Flag Poles forum—classic free speech in the marketplace. It cannot reasonably be viewed as government speech

---

[10] *See* Whitney Smith, *flag of China*, Encyclopedia Britannica (Nov. 13, 2018), https://www.britannica.com/topic/flag-of-China.

[11] *See* Whitney, *supra* note 10; Whitney Smith, *flag of Taiwan*, Encyclopedia Britannica (Jul. 25, 2011), https://www.britannica.com/topic/flag-of-Taiwan; Richard Bush, *From Persuasion to Coercion: Beijing's Approach to Taiwan and Taiwan's Response*, The Brookings Institution, 1 (Nov. 20, 2019), https://www.brookings.edu/wp-content/uploads/2019/11/FP_20191120_beijing_taiwan_bush.pdf.

whiplashing the community between competing ideas.

Finally, the City's brief contains its admission that it would be violating Massachusetts criminal law by raising foreign nations' flags on the City Hall Flag Poles, as opposed to merely providing a public forum for private speakers to raise those flags under protection of the First Amendment. (City Br. 34 n.10; Br. Pet'rs 53–54.) If the City satisfies its legal obligation to display the United States and Massachusetts flags *on* City Hall by displaying those flags on the City Hall Flag Poles, *see* Mass. Gen. Laws ch. 2, § 6, then the City violates the legal prohibition against displaying foreign nations' flags *on* City Hall by displaying those flags on the City Hall Flag Poles, *see* Mass. Gen. Laws ch. 264, § 8. The City cannot have it both ways.

* * *

If flag raisings on the City Hall Flag Poles are limited to the "national" and "day of remembrance" criteria the City asserts in its brief, then the Flag Poles are a limited public forum, and the City's exclusion of Camp Constitution from the forum was unconstitutional because it was viewpoint discriminatory and otherwise unreasonable in light of the purposes of the forum.

III. THIS COURT SHOULD RESTRAIN THE GOVERNMENT SPEECH DOCTRINE FROM SWALLOWING THE FORUM DOCTRINE.

While this case can be resolved under the Court's forum doctrine, it also presents the opportunity to set clear parameters around the government speech doctrine so that it does not swallow the public forum and restrict private speech. The First Circuit is not the only lower court to be confused by the "recently minted" government speech doctrine. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (citing *Rust v. Sullivan*, 500 U.S. 173 (1991); *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005); *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

Lower court decisions demonstrate that the *Summum/Walker* analysis begets confusion, particularly with regard to defining a "reasonable observer," what is "closely identified in the public mind," control, and permanence. *See, e.g., Leake v. Drinkard*, 14 F.4th 1242, 1248 (11th Cir. 2021) ("We lack a precise test . . . ." (cleaned up)); *Women for Am. First v. de Blasio*, 520 F. Supp. 3d 532, 545 (S.D.N.Y. 2021) ("[T]he Supreme Court has not articulated a clear test for discerning government speech."); *Vista Graphics, Inc. v. Va. Dept. of Trans.*, 682 Fed. App'x 231 (2d Cir. 2017) (under *Walker*, long history of advertisements at highway rest stops supports government speech finding), *cert. denied*, 138 S. Ct. 304 (2017); *Mech v. Sch. Bd. of Palm Bch. Cnty., Fla.*, 806 F.3d 1070 (11th Cir. 2015) (under *Walker*, long history of advertisements on school fences not

required to support government speech finding), *cert denied*, 137 S. Ct. 73 (2016); *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 177 (Md. App. 2015) (under *Walker*, vanity license plates are private speech); *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1208 (Ind. 2015) (under *Walker*, vanity plates are government speech); *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019) (under *Summum/Walker*, vanity plates are private speech); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018) (finding private speech under *Summum/Walker* reasonable observer test); *Higher Society of Indiana v. Tippecanoe County*, 858 F.3d 1113 (7th Cir. 2017) (foregoing *Walker* for forum analysis to find courthouse grounds a forum for private speech); *Frederick Douglass Found., Inc. v. D.C.*, 531 F. Supp. 3d 316, 333 (D.D.C. 2021) (rejecting government's "belated bid to take ownership of [private] message and insulate it from First Amendment scrutiny via the government-speech doctrine").

The Court's departure from the confusion of the *Lemon* test's "reasonable observer" is underway. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019). This case illustrates why that departure should continue. (*Compare* Br. Pet'rs 56–57, 59–60 (describing what a reasonable observer of the City Hall Flag Poles should know) *with* City Br. 28–30 (disagreeing about what the reasonable observer should know).)

Even as the lower courts are confused, this Court is split over the government speech doctrine. This case presents an opportunity for the Court to clearly

restrain the new doctrine before it encroaches any further on private speech. Under the guiding principle that more speech is better than less speech, the Court should bolster forum analysis as the starting point in challenges to speech restrictions on government property. Only if no forum can be found should government speech be considered.

IV. NO REMAND IS NECESSARY OR APPROPRIATE.

The parties' cross motions for summary judgment were before the district court on a stipulation of undisputed facts (Pet. App. 128a–160a), and the material undisputed facts entitle Camp Constitution to summary judgment. (Br. Pet'rs 23–62.) The undisputed facts establish the City's policy and practice designating the City Hall Flag Poles a public forum for private flag raisings and they show the City unconstitutionally denied Camp Constitution access to the forum under every applicable level of scrutiny.

The City asserts for the first time that reversal of the district court's summary judgment for the City should result in a remand to the district court for further discovery and proceedings instead of summary judgment for Camp Constitution. (City Br. 49–50.) The City's argument, however, is both untimely and meritless. Camp Constitution conducted discovery and developed the summary judgment record in the district court, and the City had every opportunity to do the same. The City cannot justify any further record development at this stage,

or even identify legitimate subjects for further development.

The lone example given by the City—the possible involvement of City personnel in some private flag raisings—is insufficient. Camp Constitution would be entitled to summary judgment even if a City employee always turned the hand crank at flag raising events, although there is no record evidence showing that this is the case, or that any City employee present for flag raising would be identifiable as such. (Pet. App. 143a, 191a.) In any event, providing a hand crank for flag raisings, in and of itself, is no different constitutionally from a government custodian's providing a room key to a private group for a meeting in a government building. Providing a room key does not communicate endorsement of the private group's speech—even if a government employee accompanies the group to the meeting room to unlock the door and stays to lock up after the group is done. *Cf. Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (holding public university's opening meeting rooms for equal access by student groups "does not confer any imprimatur of state approval" on a religious groups' speech). Nor is there any record evidence that the participation by City officials in any private groups' flag raising events was a condition of approval, and a private group's inviting a City dignitary to attend or even speak at its flag raising event would be insufficient to transform the group's event or flag into government speech.

CONCLUSION

For all of the foregoing reasons and the reasons in Camp Constitution's brief, the Court should

reverse and vacate the First Circuit's decision and remand the case for entry of judgment for Camp Constitution on its First Amendment claims.

Dated this January 7, 2022.

Respectfully submitted,

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

Counsel for Petitioners