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IN THE SUPREME COURT OF THE UNITED STATES

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HAROLD SHURTLEFF, ET AL.,)

Petitioners,)

v.) No. 20-1800

CITY OF BOSTON, MASSACHUSETTS,)

ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, January 18, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:
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3 the Petitioners.
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7 supporting reversal.
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9 on behalf of the Respondents.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely.

We'll hear argument first this morning in Case Number 20-1800, Shurtleff versus Boston, Massachusetts.

Mr. Staver.

ORAL ARGUMENT OF MATHEW STAVER
ON BEHALF OF THE PETITIONERS

MR. STAVER: Mr. Chief Justice, and may it please the Court:

After 12 years with 284 flag-raising approvals, no denials, and usually no review, one word caught the attention of a Boston official, the word "Christian" on the application. The flag itself was not the problem. Had it been called anything but Christian, the same flag would have flown for an hour without incident.

The policy does not limit the flagpoles to subject matters or speakers. All applicants are welcome, except religious viewpoints. The 2018 codification places religion in the same category as speech deemed

1 inappropriate, offensive, supporting prejudice
2 or discrimination.

3 To support its admitted viewpoint
4 discrimination, the City raises one defense,
5 that the public forum open for all applicants
6 is really government speech. This Court warned
7 in *Matal* that the government speech doctrine is
8 susceptible to dangerous misuse. This is such
9 a case.

10 The City's flag-raising forum is not
11 government speech under *Walker* and *Summun*. The
12 City, by an unbroken history and practice and
13 policy, expressly declared that the flagpoles
14 are one of its public forums open to all
15 applicants. In doing so, the City long ago
16 crossed the line from government speech to
17 private speech.

18 A reasonable observer would understand
19 this history and the policy. This observer
20 would also see a private event coinciding with
21 a temporary flag-raising event. The City
22 exercised no control over the message, the
23 design, and did not own the flags. The City
24 never requested flags or messages to be changed
25 and usually did not review them. The City's

1 application alone cannot transform private
2 speech into government speech.

3 In light of the practice and policy,
4 the decision below upholding viewpoint
5 discrimination under the guise of government
6 speech is dangerous and should be reversed.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Staver, you begin
9 your brief by arguing that this is a limited
10 public forum and -- or a designated public
11 forum. And do we have to agree with that in
12 order for you to win?

13 MR. STAVER: No, Your Honor. Chief --
14 Justice Thomas, this is viewpoint
15 discrimination under any one of the public
16 forum doctrine, even in a non-public forum. If
17 this is it, it's clearly viewpoint
18 discrimination.

19 So this Court does not need to address
20 the category or the kind of public forum at
21 issue. Viewpoint discrimination is
22 impermissible in every category.

23 CHIEF JUSTICE ROBERTS: Well, that
24 can't be right because, if it's -- if it's a --
25 a government forum and this is government

1 speech, they can certainly discriminate on the
2 basis of viewpoint, right?

3 MR. STAVER: That's correct, if it's
4 government speech.

5 CHIEF JUSTICE ROBERTS: Okay.

6 MR. STAVER: But this is not
7 government speech. It's nothing like Walker,
8 which is the outer bounds of the government
9 speech doctrine. It's nothing like Summum.
10 The City exercised no control. For 12 years,
11 the City ministerially approved all of these
12 applications with virtually no review.

13 CHIEF JUSTICE ROBERTS: The -- the
14 policy that they adopted in the middle of this,
15 I guess, saying that they won't fly flags
16 supporting discrimination, prejudice, or
17 religious movements, what if it just said
18 supporting discrimination or prejudice? Could
19 they do that?

20 MR. STAVER: I think that would still
21 be viewpoint discrimination. Offense, for
22 example, which that would be what it is, is, in
23 fact, viewpoint discrimination, as this Court
24 has already held in *Mattel*.

25 CHIEF JUSTICE ROBERTS: Well, they

1 can't have an official view against
2 discrimination or against prejudice?

3 MR. STAVER: They have an -- a view in
4 terms of whether or not the public is allowed
5 to attend a particular event. But this
6 particular policy not only covers the
7 flagpoles, but it also covers the public forums
8 that are out there in front of City Hall, the
9 designated public forums that are clearly
10 admitted.

11 The City could not prohibit
12 discrimination or discriminatory speech within
13 those designated public fora. For 12 years,
14 you had a unified policy --

15 JUSTICE KAGAN: Mr. Staver, just --
16 just to follow up on -- on the Chief Justice's
17 question, and this is not this case, but it's
18 an important question because we have to set
19 lines and we're giving instruction to cities
20 about how they can create their -- their own
21 policies.

22 And suppose a city thinks two things.
23 It thinks we like this idea of -- of -- of
24 having our flagpole be a public forum and --
25 and -- and having a wide variety of

1 organizations use it to -- to identify
2 themselves and to express messages, so we sort
3 of like this sort of civic organization kind of
4 activity. But, at the same time, we think that
5 there are limits.

6 So -- so the city has a policy of that
7 kind, and then somebody comes to it and says,
8 we'd like to put up this swastika on your pole.
9 Does the city really have to say yes at that
10 point?

11 MR. STAVER: If it's a designated
12 public forum, I think the answer is yes. But,
13 on the other hand --

14 JUSTICE KAGAN: So, really, what
15 you're saying is that a city can't possibly
16 have a kind of open policy like this because no
17 city is going to want to put up a swastika or a
18 KKK flag or something like that. So, really,
19 what you're saying is that this is just a kind
20 of policy that a city can't have?

21 MR. STAVER: No, Justice Kagan. In
22 fact, the City could have a more limited
23 policy. It didn't choose to do that.

24 Now the City's brief tries to indicate
25 certain limitations on categories of subject

1 matters. But that's nowhere to be found in the
2 12-year or 13-year policy, and it's not in the
3 2018 codification of that policy anyway.

4 That is not limited to subject matters
5 or speaker identity. If the City wants to open
6 up a forum but limit it to certain kinds of
7 subject matters or speakers, certainly, the
8 City is capable of doing so.

9 JUSTICE KAVANAUGH: Can the City allow
10 patriotic flags or messages of support and not
11 those that are anti-American? For example, to
12 pick up on Justice Kagan's question, someone
13 wants to fly the al Qaeda flag at City Hall in
14 Boston. You're -- you're saying they would
15 have a right to do so?

16 MR. STAVER: The City, for example --
17 and the Solicitor General's brief goes into
18 that with regards to what the public parks do
19 and the federal public parks in terms of being
20 able to not only use those parks for a wide
21 variety of expressive activities but for their
22 own specific speech as well.

23 Certainly, the City could have a
24 limitation on the subject matters or speakers.
25 For example, the City could limit all the flags

1 to simply flags of other countries recognizing
2 the various constituencies of their
3 communities. But the City has chosen not to do
4 that.

5 JUSTICE BARRETT: Mr. Staver, what if
6 the City said kind of along the lines of what
7 Justice Kagan proposed? Said, you know, we
8 want to endorse certain messages. We like this
9 idea of civic expression at the flagpole. But
10 we want to exercise more control. And Boston
11 has said it's going to do that if it loses this
12 case.

13 Couldn't Boston -- or I guess I should
14 ask you, do you agree that Boston could
15 accomplish that by making the exact same run of
16 flags that it's had up to this point government
17 speech by exercising more control and maybe
18 putting a Boston official next to the flagpole
19 when it -- when it's raised up to show that
20 this is the City speaking?

21 Isn't that another way to do it other
22 than just designate it as a limited public
23 forum, you know, for these categories or
24 subject matters?

25 MR. STAVER: Justice Barrett, that

1 would be a closer call, but, in fact, if the
2 City just simply wanted to use government
3 speech as a guise for censorship, as I believe
4 happened in this particular case that we're
5 speaking --

6 JUSTICE BARRETT: Well, I'm not saying
7 this case. I'm saying, can't the government
8 choose what it wants to say? And if the
9 government makes it clear and it's not, you
10 know, just stamping government speech on it to
11 hide discrimination against private viewpoints,
12 but if the government truly exercises control,
13 wouldn't that be okay?

14 MR. STAVER: If the government truly
15 exercised control. And, in fact, the brief of
16 the local governments show that Boston is an
17 outlier by many respects. Other cities don't
18 open for third-party flags for obvious reasons.

19 Those that do can invite some
20 third-party participation as long as they
21 maintain very specific control of the subject
22 matters and messages and that it's very clear
23 that it is their speech.

24 JUSTICE BARRETT: I have a question
25 about the record. You mention in your reply

1 brief this Metro Credit Union flag.

2 MR. STAVER: Yeah.

3 JUSTICE BARRETT: But that doesn't
4 appear on the list in the City's brief, and I
5 just wonder, is there some dispute about that?

6 MR. STAVER: No, there's no dispute.
7 The -- the list that's in the appendix was the
8 list from 2005 to 2017. The Metro Credit Union
9 is 2018.

10 During that year, there were 50
11 private third-party applications, and Metro
12 Credit Union was one of those. That didn't
13 celebrate any kind of historic event. It
14 wasn't national. It wasn't constituency- or
15 ethnicity-related. It was just simply a
16 private credit union that's, frankly, across
17 the street from where the City Hall is.

18 So contrary to what the City says,
19 there's no evidence they say that anyone just
20 had a random day. That, in fact, is one of
21 those random days. It's not consistent with
22 the City's now-invented categories of national
23 flags and other community recognition.

24 JUSTICE BREYER: So what are we
25 supposed to do about that? I mean, you saw,

1 you know, in the brief, what is the brief of
2 various religious groups, Dark Greens. So,
3 really, look over that 12-year period we've
4 been getting our sample from, 2005 to 2017.
5 There weren't 284 different flags. There were
6 50 different flags and, moreover, because some
7 ran twice or three times --

8 MR. STAVER: Mm-hmm.

9 JUSTICE BREYER: -- I guess.

10 And it says of those 50 different
11 flags, 45 percent -- 90 percent of them, which
12 means 45, I guess, were, like, national flags
13 or regional flags. And then, of the remaining
14 five, we had one for Columbus Day, one for
15 Veterans Day, one for Bunker Hill Day, and the
16 other two might have been gray -- gay pride and
17 something like that.

18 And it says, of course, we didn't go
19 through all this control. There wasn't any
20 need to. I mean, sure, those flags are right.
21 That doesn't show they're going to have every
22 conceivable group, including the KKK and so
23 forth.

24 So what do we do about the record in
25 that? Because that isn't really in the record,

1 I don't think, what I just read you, is it?

2 Maybe it is.

3 And then the other question that I --
4 related that I would have is go to Boston, go
5 look at the city plaza. I mean, you see three
6 flag poles and there are flags. And what do
7 you -- and they're right in front of the City
8 Hall and two of them, one the state, one the
9 national, federal -- national flag. And the
10 third one, I mean, what are you going to think?
11 Of course, you think it has something to do
12 with the city, something.

13 MR. STAVER: Justice Breyer --

14 JUSTICE BREYER: And so -- so they're
15 saying, look, on the one hand, anybody --
16 anybody in his right mind would think it does
17 have something to do with the City. And,
18 number two, there isn't some huge diversity for
19 any group in sight. All there is is the flag
20 -- the flag of Paraguay and -- and a couple of
21 exceptions for groups that we support.

22 MR. STAVER: Justice Breyer, on your
23 last point, taking that first, in the Petition
24 Appendix on page 142 and then also on 145 to
25 146, there is a second flag, and that's why

1 they use the word flagpoles.

2 The one that was at issue here was the
3 flagpole near the other three in front of City
4 Hall. The second flagpole is part of their
5 public forum as well, and it's on Congress
6 Street parallel to the City. And, in fact,
7 it's the Bunker Hill flag, the picture in the
8 appendix, that's actually raised on that
9 Congress Street flagpole.

10 And if you --

11 JUSTICE BREYER: Well, that's just the
12 back of the City Hall, isn't it?

13 MR. STAVER: The background might be
14 the City Hall. It depends upon which way you
15 take the photograph. But it's not in front of
16 the City. And it's not near any other
17 government flags. It stands alone by itself.

18 And as it relates to whether or not
19 certain groups have historically taken
20 advantage of this forum, doesn't mean that the
21 forum was ever limited.

22 In fact, the 2018 policy had the
23 advantage of Matal, Walker, Sumnum, and our
24 litigation and nevertheless decided not to
25 close or limit the subject matters or speakers.

1 In fact --

2 JUSTICE KAGAN: I -- I guess, though,
3 that one of the points that Justice Breyer was
4 making is, if you're on the street in Boston
5 and looking over to City Hall and see these
6 three flagpoles, and now you say there's maybe
7 a fourth, but the three are sort of together,
8 you know, why -- why would you think that this
9 is anything other than government -- than the
10 government flying a flag?

11 MR. STAVER: I think, when you look at
12 that, Justice Kagan, you're going to see, one,
13 that's clearly government speech, as Justice
14 Barrett was referring to in terms of limiting.
15 You have the United States flag always up, and
16 underneath it is always the POW/MIA flag. It's
17 always there. That's clearly the government
18 speech.

19 JUSTICE KAGAN: Right. And then
20 there's the Commonwealth flag. And then
21 there's this third flagpole. And -- and you've
22 been -- you've walked the street many times and
23 mostly you've seen the City of Boston's flag on
24 it, but occasionally you see another flag on
25 it. Why wouldn't you think that this is the

1 City of Boston deciding to put up a substitute
2 flag for its own purposes?

3 MR. STAVER: Because an informed
4 observer would understand the history, the
5 policy, and also see the --

6 JUSTICE KAGAN: Well, that is very,
7 very informed. I mean, that is not your
8 typical person who walks the street in Boston.
9 And, you know, all they know is, I've seen the
10 City of Boston flag here a thousand times, and
11 now I see another flag. It must be the City of
12 Boston decided to do something else today.

13 MR. STAVER: Well, the City -- the --
14 the observer would also see the private event
15 that's coinciding at the same time as the
16 private flag-raising because the private event
17 gathering down there by the base of the flag
18 would happen as in this case was designed to
19 do. Camp Constitution was going to gather
20 around the base while for one hour having an
21 event that would temporarily raise the flag and
22 bring it down.

23 The reason --

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE ALITO: Is it true that one of

1 the flags that has been displayed on this third
2 flagpole is the flag of the People's Republic
3 of China?

4 MR. STAVER: Yes, Justice Alito. In
5 fact, that --

6 JUSTICE ALITO: And -- and Cuba was --
7 the Cuban flag was -- was displayed?

8 MR. STAVER: Correct.

9 JUSTICE ALITO: So, I mean, it might
10 be shocking to somebody walking down the street
11 if they didn't know the background to see some
12 of these national flags flying, wouldn't it?

13 MR. STAVER: Certainly. And then, if
14 you look, for example, at the two --

15 JUSTICE KAGAN: Is that a really
16 certainly? Because there are all the time
17 national flags flying on 16th Street. It just
18 signifies that somebody's come to town. So
19 it's like, you know, the Chinese premier is
20 here.

21 MR. STAVER: There's a second reason
22 why it would be that way, because all the time,
23 when you had the People's Republic of China by
24 a private organization, the Chinese Progressive
25 Association, flying roughly September/October

1 every year, you always have Mr. Chen, a private
2 individual, protesting that flag by raising the
3 Taiwanese flag supporting the pre-Mao rather
4 than the post-Mao revolution.

5 So, certainly, Boston has not one week
6 --

7 JUSTICE SOTOMAYOR: Counsel, I -- I
8 thought, and I may be mistaken, but in one of
9 the briefs, they suggested that your client,
10 the Petitioner, actually complained to the City
11 about flying the Chinese flag at one point.

12 MR. STAVER: That's not in the record,
13 but there was a YouTube video that he took of
14 the raising of the flag, and he put it up on
15 YouTube.

16 JUSTICE SOTOMAYOR: And it was a
17 complaint about the City doing this, correct?

18 MR. STAVER: No, not about the City
19 doing it. About the fact that it's the Chinese
20 Communist flag, not the City, because how
21 Shurtleff knew that the --

22 JUSTICE SOTOMAYOR: I think we're
23 missing an essential point, I believe, that I
24 think Justice Kagan and Justice Breyer are
25 discussing, which is, to an ordinary observer

1 walking past City Hall, if you see a flag on
2 the pole, you think it's City Hall speaking.

3 You're asking us now to import a
4 fiction that this ordinary speaker is going to
5 also look at the event that's occurring and
6 understand that the flag is related only to the
7 event and not an event sponsored by the City.

8 Is that correct?

9 MR. STAVER: Not necessarily. I don't
10 think that the ordinary observer can just be
11 limited to a few seconds' or minutes' snapshot
12 and discount everything else that's gone on
13 before it or that actually is taking place at
14 the same time with the private event taking
15 place.

16 In this case, for example, whether you
17 have the Chinese Progressive Association
18 People's of Republic flag or the other one, the
19 Taiwanese, the Republic of China flag -- I see
20 that I'm --

21 CHIEF JUSTICE ROBERTS: You can finish
22 your thought.

23 MR. STAVER: -- you're -- you're going
24 to have a private event that is happening at
25 the same time. That private event can notify

1 any observer, whether they're familiar or not
2 with the past or the policy, that a private
3 event of a flag-raising is taking place.

4 CHIEF JUSTICE ROBERTS: Thank -- thank
5 you, counsel. I have just one more question.
6 Your friends from the City say that even if
7 judgment should not have been entered in their
8 favor, it shouldn't be entered in your favor
9 either, that the case should be remanded
10 because there are factual issues, particularly
11 concerning whether or not this is a government
12 forum. They say, you know, the mayor was
13 there. Sometimes other government officials
14 participated. Do you dispute that?

15 MR. STAVER: Yes, Mr. Chief Justice,
16 because this has gone on for a number of years
17 of litigation. There was a stipulated set of
18 facts on page 132 of the Petition Appendix.
19 There's a stipulation that the flagpoles are
20 included in their designated properties.
21 There's also stipulation as to why they took it
22 down because of the "Christian" word on the
23 application, the Christian viewpoint.

24 There is no reason to send this back
25 for additional factors to be developed. The

1 City had all the -- plenty of opportunity to be
2 able to develop that record, and this is the
3 record that we have, simple -- simple --

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you, counsel.

6 MR. STAVER: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas, anything?

9 Justice Breyer?

10 JUSTICE BREYER: No, I mean, oddly
11 enough, I'm sure this is a useless question,
12 but you would have thought after reading the
13 SG's brief, if they really want to have
14 government speech, it's not too hard for them
15 to arrange it. And they didn't pay too much
16 attention in the past, like, zero.

17 And can't it be settled? I mean, you
18 would have thought what's past is past. Let's
19 look to the future. See what Boston wants.
20 You might not disagree. I don't know.

21 MR. STAVER: Justice Breyer --

22 JUSTICE BREYER: But it just cried out
23 with an empty record sort of for --

24 MR. STAVER: Well, Justice Breyer, I
25 don't believe the record is empty, but could --

1 JUSTICE BREYER: No, no, but, I mean,
2 you see where I'm going.

3 MR. STAVER: -- could it be settled?

4 JUSTICE BREYER: Yeah.

5 MR. STAVER: We thought that this was,
6 in our view, a straightforward case from the
7 very beginning. The City drafted its own
8 policy, and the City used the word "public"
9 forums. The City said it's open to all
10 applicants. The City acted that way for 12
11 years -- in fact, 13 years -- codified the
12 policy and continued the practice up until
13 October 2021.

14 We thought it was straightforward,
15 but, obviously, the City, under the guise of
16 government speech condoned by the First
17 Circuit, has ultimately engaged in admitted
18 viewpoint discrimination justified by
19 government speech.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 Justice Sotomayor?

22 Justice Kagan?

23 JUSTICE KAGAN: If I could just say
24 one small thing, which is I had the same
25 reaction as Justice Breyer had, but you've

1 answered his question. I just want to say now
2 that Mr. Hallward-Driemeier should also think
3 about that question. Why hasn't this case been
4 settled? All right. That's all I have to say.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 Justice Kavanaugh?

8 Justice Barrett? No?

9 Thank you, counsel.

10 MR. STAVER: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Joshi.

12 ORAL ARGUMENT OF SOPAN JOSHI
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING REVERSAL

15 MR. JOSHI: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 Like any private property owner, the
18 government is entitled to use its own property
19 for whatever lawful purpose it likes, including
20 for expressive purposes, and when the
21 government expresses its own viewpoint, it is
22 never compelled to express competing or
23 alternative viewpoints. Government could not
24 function were that the rule.

25 And, of course, when the government

1 expresses its own viewpoint, it is free to
2 solicit input from and assistance from and even
3 other messages from third parties in helping
4 the government to shape its own message.

5 But this Court has said that, unlike a
6 private property owner or a private speaker,
7 when the government chooses to open up its own
8 property for use by third parties to express
9 their messages, the government cannot restrict
10 access based on viewpoint, including religious
11 viewpoints.

12 Now I admit and this Court has
13 recognized that it can be a really fine line
14 between the government soliciting messages from
15 third parties to help shape its own message on
16 the one hand and serving as a conduit for the
17 third parties to express their own messages on
18 the other.

19 But the record in this case, viewed in
20 the light most favorable to the Petitioners
21 here, suggests that what Boston did at least at
22 the time of the denial of Petitioners'
23 application was the latter and not the former.

24 JUSTICE GORSUCH: Counsel, what --
25 what's at stake in that line between public

1 forums and government speech? On the one hand,
2 you emphasized the government's right and
3 entitlement to edit speech of its own. But
4 what -- what happens when that doctrine goes
5 too far? Why does the government think that
6 this properly belongs on the other side of the
7 line?

8 MR. JOSHI: So, as I said, I think the
9 -- ultimately, the question is always going to
10 be who is speaking. And as this Court told us
11 in -- in *Matal* against *Tam*, the fear is that
12 the government could simply, by putting its
13 stamp of approval, as Justice Barrett mentioned
14 in her questioning, on private speech, it could
15 favor certain speakers over others, and the
16 First Amendment tells us that that's off limits
17 to the government.

18 But, that said, I think, in this
19 particular case, as in all cases, the question
20 is going to be highly fact-bound, and it's
21 going to depend on really the answer to the
22 question who is speaking. In this case, every
23 time one of those 284 flags went up the
24 flagpole, was that Boston speaking each of
25 those times, or was it the third party whose

1 flag it was?

2 JUSTICE GORSUCH: Why does the
3 government come down on that side of the line,
4 though? What are the factors you think that we
5 should be using to guide us in drawing that
6 very difficult line between these two
7 doctrines?

8 MR. JOSHI: I think, ultimately, the
9 -- the factor is what did -- or the -- the --
10 the ultimate question is, what did Boston do
11 when it created the flag-raising program? And,
12 here, we -- I think there are a number of facts
13 in the record that would tip the scales toward
14 believing that -- that Boston created a forum,
15 even if it's a non-public forum.

16 The 284 approvals in a row, of course.
17 The fact that Rooney would approve these in an
18 almost ministerial manner without ever looking
19 at the flags, without requiring that the actual
20 flag design be shown is underscored by the fact
21 that Petitioners' flag apparently would have
22 passed muster but for its description as a
23 Christian flag in the accompanying e-mail. The
24 fact that flags raised in the flag-raising
25 ceremony were, generally speaking, at the

1 request of a third party and not initiated by
2 the City itself.

3 JUSTICE KAGAN: So, Mr. Joshi, suppose
4 you're right as to all of those things, that
5 there was essentially no control from the city
6 government here and -- and that pushes strongly
7 in the direction of, well, it's not government
8 speech if government doesn't control it.

9 But suppose, on the other hand, one
10 thinks that reasonable observers would think
11 that this was government speech. And there
12 might be some arguments about that, but I just
13 want to assume it for the moment.

14 Suppose one goes in one direction and
15 the other goes in the other direction. How do
16 we think about that?

17 MR. JOSHI: Well, I think, first, a
18 reasonable observer ought to be charged with
19 knowledge of the basic contours of the program
20 we're talking about. This Court's cases
21 dealing with forums going back to Widmar and --
22 and Rosenberger and Lamb's Chapel, some of the
23 others, Cornelius, have said that the -- the
24 right unit of analysis is the program to which
25 the plaintiff seeks access. It can't be at too

1 high a level of generality, so it's the
2 combined federal campaign, not the federal
3 workforce. In Lamb's Chapel, it's use of the
4 school rooms after school, not during the
5 school day.

6 And so I think, here, you would have
7 to assume that the reasonable observer is aware
8 that there is such a thing as a flag-raising
9 program.

10 JUSTICE KAGAN: Yeah. I mean --

11 MR. JOSHI: And one of the basic --

12 JUSTICE KAGAN: -- Justice Sotomayor
13 called that a fiction. And I think it -- you
14 know, that's an assumption that does verge on a
15 fiction, right? The person walking by City
16 Hall every day does not know about the contours
17 of the flag-raising program. It just knows, on
18 Monday through Thursday, I saw the City of
19 Boston flag and now I see another flag.
20 Surely, that's just the City of Boston deciding
21 to fly another flag instead of its own flag.

22 MR. JOSHI: So I -- I have two related
23 responses to it.

24 First, I -- I -- I think it's just as
25 likely that an observer might know that there

1 exists some kind of flag-raising program, and
2 when they call into Boston to complain about
3 the flag they see on the flagpole, they're not
4 necessarily complaining that Boston is
5 endorsing that flag, but, rather, they might be
6 complaining that Boston has opened up its
7 flagpole for a use that would permit such a
8 flag to be flown.

9 But, more broadly speaking, I -- I --
10 I think it would be a little bit problematic if
11 we allowed -- and realize I'm speaking on
12 behalf of the United States here -- but we take
13 this Court's cases to say that the First
14 Amendment should not allow a government to
15 evade the strictures of the First Amendment and
16 the prohibition on viewpoint discrimination
17 simply by being innovative in -- in its program
18 or by fooling the public or by having a secret
19 program on the side that only a few people know
20 about.

21 The fact is, once the government or
22 the City of Boston here in particular, has
23 chosen to open up its flagpole for use by third
24 parties, the First Amendment imposes certain
25 restrictions on -- on how it can run that

1 program.

2 JUSTICE KAVANAUGH: You -- you listed
3 certain factors, I think three, the 284
4 approvals, they were approved in a ministerial
5 fashion, the flags were flown at the request of
6 a third party. Were there more you were going
7 to say there?

8 MR. JOSHI: Yes, Justice Kavanaugh.
9 Another one is that these flag-raising were
10 generally accompanied by a flag-raising
11 ceremony at the base and often by an associated
12 event in City Hall.

13 This Court in Krishna Consciousness,
14 one of the several Krishna Consciousness cases,
15 mentioned that separation from a -- a
16 traditional public forum could help make you
17 think that it's government speech as opposed to
18 a -- a forum itself.

19 It's the same application forum that
20 people use in -- I think this is at Pet. App.
21 148 -- Boston says that they process
22 applications the same.

23 If you go to the website today that
24 lists the new 2018 policy, it directs you to
25 exactly the same application you would fill out

1 if you wanted to host an event on a concededly
2 designated public forum.

3 And, of course, Boston's own desires
4 for the program itself, which is celebrate
5 diversity and foster connections among Boston's
6 many communities. They didn't pick the --

7 JUSTICE KAVANAUGH: That makes the
8 doctrine, though, seem quite circular in the
9 sense that it is a public forum because of what
10 they've done and it'll be easy, presumably, and
11 why don't you tell me what you think Boston
12 would need to do to change this from a public
13 forum to something that's not a public forum
14 where they could permissibly exercise control.

15 MR. JOSHI: Yes. So it -- I do think,
16 to directly answer your question, it should be
17 rather easy for the government to change
18 things. This Court expressly recognized that
19 in Perry and in a line of cases --

20 JUSTICE KAVANAUGH: And -- and what --
21 what specifically do you think they'd need to
22 do?

23 MR. JOSHI: I -- as we suggest in --
24 in the back of our brief, they could do a
25 couple of things. Obviously, government

1 property can be used both for government speech
2 and to create a forum, even if it's a limited
3 or a non-public forum.

4 And so Boston could take a two-track
5 approach like that. Most of the time, it does
6 use the flagpole for its own flags. But, if it
7 wanted to preserve this kind of flag-raising
8 program in which third parties could raise
9 their flags, they could limit it, as we suggest
10 and as Mr. Staver pointed out, to flags of
11 countries.

12 JUSTICE GORSUCH: Could it --

13 MR. JOSHI: Of course, they --

14 JUSTICE GORSUCH: -- could it limit it
15 only with the purpose of discriminating against
16 religious viewpoints?

17 MR. JOSHI: I don't believe that would
18 be appropriate. This Court has said that even
19 in a non-public forum, viewpoint discrimination
20 is impermissible.

21 And we read Rosenberger, Lamb's
22 Chapel, and Good News Club to suggest that
23 prohibiting all religious viewpoints is
24 nonetheless viewpoint-based discrimination. So
25 I don't think that would be an available tool.

1 JUSTICE BARRETT: Mr. Joshi, I want to
2 follow up on Justice Kagan's questions about
3 what an informed observer might think about
4 seeing this flag because I agree with her, this
5 really is a fiction, and this goes to Justice
6 Souter's concurrence in *Summum*, trying to
7 figure out how much the -- the observer, the
8 informed observer, knows.

9 It seems to me that when you think
10 about the three factors from our case law,
11 control does almost all of the work because,
12 really, it's the informed observer knowing
13 about the degree of control that the government
14 exercises that, if we're creating this fiction,
15 makes the informed observer think or not think
16 that the speech is actually uttered on behalf
17 of the government.

18 Would you agree that control is the
19 most important factor?

20 MR. JOSHI: I think that's right.
21 Control is the most factor -- most important
22 factor, excuse me. And -- and that's because
23 all of the factors in *Summum* and *Walker* are
24 just that. They're factors to determine who is
25 speaking. And when you're asking the question

1 who is speaking, generally, the person speaking
2 has exercised some degree of control over the
3 message that's being conveyed.

4 JUSTICE ALITO: What if the -- what if
5 the City exercised complete control in this
6 sense? It has a policy that says anybody can
7 put up whatever message they like on a big
8 billboard that we have in front of City Hall,
9 except that we will review all of these
10 messages and we will exercise complete
11 discretion in deciding whether we will allow
12 the message to be put up, and in exercising
13 that discretion, the City disallows any message
14 with which it disagrees.

15 Now, there, there's complete control.
16 Do you think that's government speech?

17 MR. JOSHI: I think that's sort of
18 difficult to -- to answer, and I'll just give
19 you a couple of the things that -- that --

20 JUSTICE ALITO: How can it be possibly
21 difficult to answer? Suppose that it was a --
22 a -- a speaker's platform in a park and they
23 say you -- anybody can speak here, but you have
24 to give us your speech in advance, and we're
25 going to exercise complete control over what

1 you say. If we don't like your speech at all,
2 we're going to reject it. If it's got some
3 things we don't like, we're going to edit it.
4 Other than that, you can say anything you want
5 subject to our complete control.

6 That's government speech?

7 MR. JOSHI: That's obviously not
8 government speech and obviously forbidden and,
9 in particular, you said a public park, where
10 that -- that is --

11 JUSTICE ALITO: Well, let's say it's
12 in front of City Hall. It's not --

13 JUSTICE SOTOMAYOR: But -- well, but
14 --

15 JUSTICE ALITO: -- a public park.
16 It's on public land in front of City Hall.
17 My -- my point is control can't be the be all
18 and end all because censorship involves
19 control. Censorship -- that's exactly what
20 censorship is.

21 MR. JOSHI: You're -- you're
22 absolutely right. I'm not going to fight you
23 on that. But I guess what I'm saying is that
24 one can imagine the City, if it chooses to,
25 say, on its website post articles about Boston

1 and how great Boston is, they might not want to
2 write all of them. They might say submit your
3 essays, but this is on our website and it's
4 going to be from our viewpoint, and if we agree
5 with your viewpoint of why Boston is great,
6 we'll publish your article that you've
7 submitted to us on our website.

8 I think that looks a lot more like
9 soliciting third-party views to shape a
10 government message. And so, to the extent the
11 billboard example would be similar, that very
12 well might be government speech.

13 But I think, in most cases, if what
14 the city is doing or if what the governmental
15 body is doing is simply inviting a diversity of
16 viewpoints, then it's no longer government
17 speech, and then it really does look like
18 putting a stamp of approval.

19 I guess an analogy I would give you is
20 the difference between, say, a host symposium
21 in which you're sort of curating who's going to
22 speak, you might be inviting a diversity of
23 views but within a narrow band and -- and
24 you're exercising a lot of control versus
25 hosting an open mic night where you're just --

1 you have the mic available, you're serving as a
2 conduit, and third parties can come up and give
3 their views.

4 And I think that's the key question in
5 this case, was Boston hosting a symposium of
6 flags in its communities, or was it more like
7 an open mic night?

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE BREYER: If that's the key
10 question, then how do we answer it? Because I
11 don't find anything -- look, I look at the
12 record. You thought 173, 180-something, and,
13 hey, it says Lithuanian, Dominican, Tibet,
14 Ireland, United Nations, Vietnamese, Poland,
15 Haiti, dah, dah, dah, dah, dah.

16 As I look through that, it's certainly
17 90 percent national flags, and then they have a
18 few others, okay?

19 So -- and then that -- and then that
20 isn't even in the record, I don't think, any of
21 this stuff. I think this is somebody printed
22 it or something. And -- and so what am I
23 supposed to do? What I'd like to do is say,
24 send it back and find out what they actually
25 did. But that doesn't seem necessarily

1 possible. I don't know. That's why I'm asking
2 you. I really don't know.

3 MR. JOSHI: So --

4 JUSTICE BREYER: What do I do?

5 MR. JOSHI: -- so -- so I'll -- I'll
6 answer those in turn. First --

7 JUSTICE BREYER: Yeah.

8 MR. JOSHI: -- I -- I -- I do think
9 that list of flag-raising is in the record and
10 2018 --

11 JUSTICE BREYER: Oh, okay.

12 MR. JOSHI: -- that included the Metro
13 Credit Union. That's also in the record.

14 JUSTICE BREYER: Yeah. You have one,
15 Metro Credit Union, and you have 99 of -- of
16 their favored countries. I don't know if China
17 is their favored country up there or not,
18 but -- but -- but, nonetheless, they have
19 countries and regions --

20 MR. JOSHI: Yeah.

21 JUSTICE BREYER: -- 90 percent. So
22 what? We say 90 percent, there you have
23 10 percent that's other things, and, therefore,
24 you're not government speech? Or the opposite?
25 At 73 percent, that would have made a

1 difference.

2 Is that the kind of holding you want?

3 MR. JOSHI: I -- I -- I -- I don't
4 think that would be appropriate --

5 JUSTICE BREYER: No.

6 MR. JOSHI: -- or -- or even
7 relevant --

8 JUSTICE BREYER: Right, right.

9 MR. JOSHI: -- Justice Breyer. I
10 think the point is that even if -- even if you
11 accept that although it doesn't exactly match
12 their past practice and they haven't codified
13 it, but even if you accept that what the City
14 wanted to fly were flags of countries and flags
15 commemorating holidays, that doesn't
16 necessarily mean it's government speech.

17 It could still be a non-public forum
18 in which it invites Boston's communities to --
19 to raise the flags of their countries of
20 origin. It could still be a non-public forum
21 in which Boston -- you know, third parties are
22 invited to come and celebrate holidays.

23 And if that's what they were doing,
24 then they would have to be viewpoint-neutral.
25 So country flags, they'd have to fly the

1 Vatican. Celebratory day flags, they'd have to
2 fly a Columbus Day flag.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 One question. What about the issue
6 that your friends on the other side say is
7 really still open? They say that the record
8 will show when it's developed that the mayor
9 came to a lot of these things or some other
10 governmental representative, said that they're
11 often in connection with governmental
12 proclamations, you know, the -- the -- the
13 people of Italy or whatever and all that, and
14 it's the Italian flag. Does that change your
15 analysis about whether it's government speech
16 or not? In other words, it's in conjunction
17 with other governmental activities.

18 MR. JOSHI: Had that been in the
19 record, it -- it may well have because that
20 would suggest a degree of governmental control,
21 involvement, perhaps initiation. But, in -- in
22 this particular case, first of all, I don't
23 think that's in the current record on summary
24 judgment. And I'm -- I'm an appellate lawyer,
25 not a trial lawyer, but my understanding is you

1 usually can't reopen these things.

2 But, second, I will say that the City
3 itself seems to understand the difference
4 between when it wants to speak on the flagpole
5 and when third parties speak pursuant to the
6 flag-raising program. And I'll just give you a
7 couple of examples.

8 The district judge mentioned a couple
9 of times that the City had raised a pink
10 transgender flag. That's not in the list of
11 flags in the Petition Appendix that Boston
12 provided to Petitioners during the litigation
13 that starts at Pet. App. 173A.

14 Likewise, this is not in the record,
15 but it's common knowledge that I think in 2014
16 then-Mayor Walsh raised the flag of the
17 Montreal Canadiens, a hockey team that I think
18 had just defeated the Boston Bruins in a
19 playoff series. That flag is not --

20 CHIEF JUSTICE ROBERTS: Well, I can
21 understand why it wasn't put in the record.

22 (Laughter.)

23 MR. JOSHI: But -- but that flag's
24 not -- you know, not in the list of flags
25 either. And I think that just shows that

1 Respondents understand when they're using their
2 flagpole to speak and when flags are being
3 raised pursuant to this program.

4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas?

6 Justice Breyer?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Yes. Counsel, in
10 your response to the question of deciding
11 whether control is the only factor, I think
12 your answer to Justice Alito has to be no
13 because, in your response, you started to focus
14 in on forum a lot, because your response was,
15 in a park, they couldn't do the kind of content
16 or viewpoint discrimination that they might be
17 able to do at the flagpole.

18 Am I right about that?

19 MR. JOSHI: It's correct that a park
20 is a traditional public forum. So even --

21 JUSTICE SOTOMAYOR: So the nature of
22 the forum is important. So do you agree with
23 your -- with Petitioner that forum is
24 irrelevant in this case? And if you do, why is
25 it irrelevant in this case?

1 MR. JOSHI: I -- I don't think it's
2 irrelevant, but I do think that you have to
3 look at the program that Boston created. So
4 it's not flags in general, although that is
5 relevant, but I think you have to look at the
6 particular program that the City created, which
7 is a flag-raising program in which it seemed
8 to, from its actions, invite a diversity of
9 views.

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: So, Mr. Joshi, I don't
14 want to put words in your mouth, but if it's a
15 program that is attempting to invite a
16 diversity of views, that believes in civic
17 speech, civic organizations, essentially,
18 you're saying, once you have that kind of
19 program, the city loses all control over it,
20 even if the city wished to maintain control,
21 like, kind of the outer edges of the program --
22 and, again, I -- I don't want to talk about the
23 facts of this case; I want to talk about sort
24 of other cases -- like, a city couldn't do that
25 and keep out the KKK flag?

1 MR. JOSHI: I -- I disagree. I think
2 it could, and -- and I think, to a certain
3 degree, this case, at least below, was
4 litigated as a binary choice between government
5 speech on the one hand and a designated public
6 forum on the other. But I think that ignores
7 the fact that this Court has recognized there
8 are limited forums or non-public forums in
9 which content-based and even speaker-based
10 restrictions on the use of governmental
11 property for communicative purposes are
12 acceptable as long as they're reasonably
13 related to the purpose of the forum.

14 And so that's why in our brief we
15 suggest that the City could still have this
16 program while excluding things like the KKK
17 flag. If the program is reserved for flags of
18 countries from which Boston's community members
19 originate or -- or have, you know, ancestors,
20 then they wouldn't have to fly them.

21 JUSTICE KAGAN: Right. I -- I guess I
22 was suggesting that that's -- that's a much
23 more limited program than the one that I was
24 positing, which is a program that's meant to
25 say, you know, we want to hear from every --

1 all -- all different members of our community
2 on the things that they care about, you know,
3 not just, like, which country they're from, so
4 they can put up whatever flags they want to.
5 But we're -- we're going to draw some lines.
6 Essentially, you're saying they can't do that.

7 MR. JOSHI: I'm saying they can draw
8 the lines based on content and based on even
9 speaker status or identity. So, for example,
10 nonprofits only or -- I think, Justice
11 Kavanaugh, you mentioned al Qaeda -- a no
12 terrorist rule seems pretty reasonable to me.
13 So that would probably pass muster. But they
14 can't draw lines based on viewpoints.

15 So, if the program is such that, for
16 example, a group could raise a Black Lives
17 Matter flag, they probably would have to be
18 able to raise a Proud Boys flag. I mean,
19 that's just what the First Amendment demands,
20 even in a non-public forum.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 JUSTICE BARRETT: I just want to

1 return to the control question in the colloquy
2 that you had with Justice Alito. So the -- the
3 factors from our case law are the history, the
4 way an informed observer would perceive it, and
5 the control. And it doesn't seem to me that
6 either history or how an informed observer
7 would perceive it necessarily suss out this
8 question of whether the government is using it
9 as a cover.

10 So you said, in figuring out if the
11 government is using this as a cover for
12 censorship, you know, we would be asking is
13 this more like a symposium, you know, where --
14 where a diversity of views on a particular
15 topic are solicited and welcome.

16 Is that a subset of the control
17 factor? I mean, none of our cases that I can
18 think of are really getting at that question of
19 sussing out government just trying to put a
20 stamp of approval on speech to weed out certain
21 disfavored speeches. At least not Sumnum,
22 Walker, and -- oh, what was the other one? The
23 license plate --

24 MR. JOSHI: Tam.

25 JUSTICE BARRETT: Tam, oh, yeah, the

1 -- the trademark. So how do you suss it out,
2 you know?

3 MR. JOSHI: I think it's ultimately
4 going to be really fact-bound. I guess I would
5 point the Court to Forbes, the Arkansas
6 Educational --

7 JUSTICE BARRETT: Mm-hmm.

8 MR. JOSHI: -- Television Commission
9 against Forbes. There, the Court made clear
10 that a public broadcaster who's exercising
11 editorial control, a sort of curation of what
12 programs to air, that's government speech. And
13 -- and the Court said that expressly. Even
14 though the programs are created by third
15 parties, the -- the editorial control was
16 government speech, but a candidate debate in
17 particular was a non-public forum in which
18 viewpoint discrimination was prohibited.

19 And that's the kind of analysis --
20 unfortunately, it is fact-bound -- that has to
21 be brought to bear in every case. You know,
22 but -- but, again, you -- you have to look at
23 the particular program. Imagine Sumnum, for
24 example. Those three factors that you
25 discussed were discussed in Sumnum and pointed

1 toward government speech.

2 But imagine if the City of Pleasant
3 Grove also simultaneously reserved a corner of
4 that same park for a Monument of the Week
5 program. I think the Court might have had --
6 in which all comers could come and put their
7 monument up for a week as long as it satisfied
8 certain size criteria and then took it down and
9 it was returned to them.

10 I think the Court might have had a
11 different reaction to whether that piece of it
12 was government speech, and that would be sort
13 of regardless of whether a passerby would know
14 that that corner was for the Monument of the
15 Week or was for the permanent display.

16 JUSTICE BARRETT: So returning to
17 Justice Kagan's hypothetical about how such a
18 program might be structured, would Justice
19 Kagan's envisioned program work if, to
20 celebrate, you know, all of the commitments and
21 ideals of various civic organizations, the City
22 of Boston sits down, asks what's going to be
23 expressed, and says, yes, this is an idea that
24 Boston can get behind, and a government
25 official participates in the flag-raising,

1 participates in the ceremony, communicating
2 that, yes, Boston is happy to celebrate and
3 communicate pride in Juneteenth, but, no,
4 Boston is not going to participate in a
5 flag-raising for the Proud Boys? Is that a way
6 to structure Justice Kagan's program?

7 MR. JOSHI: Absolutely. I think that
8 would be government speech. With -- with that
9 level of control, that level of planning, and
10 that initiation, I think that would be
11 governmental speech.

12 JUSTICE BARRETT: So the difference is
13 the government involvement? Like, it would be
14 difficult to set up the parameters for, say, a
15 limited public forum, as Justice Kagan was
16 proposing, but if the government gets so
17 involved in it that it's standing outside
18 endorsing that speech, then it would be
19 government speech?

20 MR. JOSHI: I think that's right. The
21 difference between a symposium and an open mic
22 night.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Hallward-Driemeier.

1 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

2 ON BEHALF OF THE RESPONDENTS

3 MR. HALLWARD-DRIEMEIER: Mr. Chief
4 Justice, and may it please the Court:

5 The sole issue here is whether the
6 City's decision to lower Boston's flag from the
7 City Hall flagpole and raise another in its
8 place is the City's own speech. If so, then,
9 as *Summun* held, the City is free to select the
10 views it wants to express.

11 If, however, the flag-raising were
12 private speech and the flagpole had become a
13 public forum, then the City agrees that it
14 cannot exclude Petitioners' flag.

15 Thus, whether the flag-raising were
16 government or private speech is dispositive.
17 The facts here are at least as supportive of
18 the City as in *Summun*. And Petitioners'
19 counter-arguments rest upon a caricature of the
20 actual events.

21 First, *Summun* held that exercising
22 final approval authority constituted effective
23 control. Petitioners stipulated at Pet. App.
24 149a that before "final approval," any
25 flag-raising, Commissioner Rooney "must review

1 whether the City's decision to raise a flag is
2 consistent with the City's message." As in
3 Sumnum, there is no record of prior denials but
4 also no record of flag-raising inconsistent
5 with the City's message. And, unlike Walker,
6 there are no purely private messages.

7 Second, Sumnum looked to the general
8 practice of governments erecting monuments.
9 And, similarly here, governments speak from
10 government-owned flagpoles. That is what the
11 observer would expect. Whereas Pleasant Grove
12 made no express statement of its message, here,
13 the City has. It has a specific policy with
14 respect to foreign flag-raising, and it has
15 issued resolutions in connection with others.

16 Third, as in Sumnum, the -- it would
17 defeat the flagpole's essential function as the
18 City's bully pulpit to treat it as a public
19 forum. The City cannot effectively use its
20 flagpole to communicate its own message if it
21 must remain neutral and also carry the opposite
22 message.

23 Private parties are free to wave their
24 flags on City Hall Plaza or even raise a
25 temporary flagpole there, but they cannot

1 commandeer the City's flagpole to send a
2 message the City does not endorse.

3 I welcome the Court's questions. And
4 I'm happy to address some of the questions --

5 CHIEF JUSTICE ROBERTS: Well --

6 MR. HALLWARD-DRIEMEIER: -- that have
7 been raised.

8 CHIEF JUSTICE ROBERTS: -- do I
9 understand you to be saying that, to some
10 extent, the City approves of every flag that
11 flies?

12 MR. HALLWARD-DRIEMEIER: The -- it has
13 to confirm that raising a flag is consistent
14 with the City's message. That's the
15 stipulation.

16 CHIEF JUSTICE ROBERTS: All right.
17 Well, I -- I -- I don't know, there may be some
18 dispute about it. But does the mayor of Boston
19 really approve of the Montreal Canadiens?

20 MR. HALLWARD-DRIEMEIER: So the -- the
21 mayor of Boston made a bet with a fellow mayor
22 and lost the bet and agreed to raise the
23 Canadiens flag. The -- the Bruins flag would
24 have had to rise in -- in Montreal if the
25 Bruins had won.

1 The -- what's -- what's critical here
2 is that in, of course, 90 percent, as Justice
3 Breyer has mentioned, of the flags that are
4 raised are foreign national flags and -- and
5 that -- it's not any individual flag that's the
6 City's message. The City's statement of its
7 goals is clear. It's the collective. It's the
8 diversity of the flags.

9 JUSTICE ALITO: You now say that your
10 policy is -- will put up the -- the national
11 flag of any group in the community that has
12 roots in that country, plus we'll put up flags
13 for city holidays, and then there are a few
14 others that don't seem to fall into either of
15 those categories. But was there any mention of
16 this policy as you set it out in your brief
17 until you filed your brief?

18 MR. HALLWARD-DRIEMEIER: Your Honor,
19 that is the -- the -- those are the buckets
20 that the flag-raising fall into.

21 JUSTICE ALITO: I mean, that's what
22 you've reverse-engineered. But, when you have
23 explained what your policy was, it was nothing
24 like that. There's nothing like that on the
25 application.

1 When you rejected the flag in question
2 here, if I remember correctly, all that Mr.
3 Rooney said was, we will put up non-secular
4 flags. When he got the -- and that was the
5 advice. That wasn't just something that he
6 himself dreamed up. That was the advice he got
7 from your Law Department.

8 And then your Rule Number 1 of your
9 seven rules, and I haven't been able to find
10 the other rules, is basically that we will put
11 up flags that are -- we will -- we will not put
12 up flags that are inappropriate or
13 discriminatory or religious flags from which
14 one can infer we'll allow anything else.

15 MR. HALLWARD-DRIEMEIER: So, Your
16 Honor, to be clear, the -- the City policy,
17 which appears at Joint Appendix 569, states
18 that the City, through its Commissioner, may
19 allow raising of flags to commemorate an event
20 or occasion. And that's -- that's one bucket
21 that we've described, these holidays or other
22 similar events or occasions.

23 Also, on the City's website, there is
24 a statement of the goals of the flag-raising
25 program, and it says, we commemorate, we, the

1 City, commemorate flags of many countries. We
2 want to create an environment in which everyone
3 feels included. We also want to raise
4 awareness in Boston beyond -- about the many
5 countries and cultures of the world. Our goal
6 is to foster diversity by celebrating the
7 communities within Boston.

8 So -- so the foreign nation
9 flag-raising is described in the goals. It's
10 on the City's website. The -- the policy
11 states we do this in commemoration of events or
12 occasions. And so the categories we've given
13 are explicit there.

14 And, moreover, the rules are actually
15 a subcategory. The policy incorporates the
16 rules. And then, under the rule -- under the
17 policy, the first rule is that we, the City,
18 will not put up a flag that is discriminatory,
19 offensive, or that supports religion.

20 It's -- the -- the City is going to
21 stay silent, neutral, with respect to religion.
22 We're not going to support a religion. Neither
23 will we offer something that is derogatory of
24 religion. And that's consistent with the
25 principles of the Establishment Clause.

1 JUSTICE ALITO: Well, is that -- is it
2 consistent with the principles of the Free
3 Speech Clause if you say anybody can speak,
4 except we are going to monitor what is said and
5 we're not going to allow religious speech? I
6 mean, the Court has said you can't do that in
7 Rosenberger and other cases.

8 Plus, we're not going to allow speech
9 that is offensive, and we've said that that's
10 viewpoint discrimination in -- in our two most
11 recent cases that have a bearing on this.

12 MR. HALLWARD-DRIEMEIER: And -- and --
13 and the -- the parties' stipulation makes clear
14 that religious events are allowed in the public
15 forum in the City Hall plaza around the
16 flagpoles. Religious events are allowed.

17 The City's own speech will not support
18 a religion. So the First Amendment doesn't --

19 JUSTICE ALITO: Well, I -- I
20 understand that. But, when you say anybody can
21 speak, by putting up a flag, with these few
22 exceptions, are you not creating a forum for
23 private speech rather than speaking on --
24 speaking your own mind?

25 MR. HALLWARD-DRIEMEIER: No, Your

1 Honor, I -- I do believe that the fact that
2 we're talking about the government's own
3 flagpole in front of the government's seat of
4 power, where governments have historically
5 spoken, it's the government's bully pulpit,
6 everyone would think that is the government
7 speaking.

8 We're not taking anything from the
9 public when the government says we will speak
10 here in certain ways. One of the ways we, the
11 City, speak there is to allow the flag-raising
12 of -- of foreign national flags to celebrate
13 the diversity of the communities in Boston.

14 It's not those governments. It's the
15 communities in Boston.

16 JUSTICE ALITO: But do you think the
17 fact that it is a flagpole in front of City
18 Hall is dispositive?

19 MR. HALLWARD-DRIEMEIER: I think it is
20 almost dispositive, Your Honor, because I do
21 think that all observers would understand that
22 that is the City speaking.

23 Again, 90 percent of the time, the
24 City of Boston flag there or more flies there
25 next to the flags of the United States and the

1 Commonwealth. The fact that occasionally --
2 and, again, physically, the City must lower its
3 own flag and provide the crank to allow another
4 to go up in its place.

5 The City maintains physical as well as
6 regulatory control over the flagpole.

7 JUSTICE ALITO: But what is the
8 difference between that and a program that
9 allows people to speak in front of City Hall
10 and say whatever they want but not certain
11 things that the City is going to rule out?

12 MR. HALLWARD-DRIEMEIER: I -- I think
13 --

14 JUSTICE ALITO: That's government
15 speech?

16 MR. HALLWARD-DRIEMEIER: No, Your
17 Honor, it's not, because that's a traditional
18 public forum. And I think that --

19 JUSTICE ALITO: Well, only on your
20 property on -- right in front of City Hall.

21 MR. HALLWARD-DRIEMEIER: Well, most
22 public forums --

23 JUSTICE ALITO: Let's say you hadn't
24 --

25 MR. HALLWARD-DRIEMEIER: -- are

1 government property.

2 JUSTICE ALITO: -- you've designated
3 it as a public forum, but let's say it -- it's
4 not, but you allow it for that one purpose.

5 MR. HALLWARD-DRIEMEIER: I -- I think
6 most public properties, including in front of
7 City Hall, would be a public forum because that
8 is where the -- the -- the citizens can protest
9 their government. That is their right.

10 And so, in Sumnum, what the Court
11 insisted on in terms of permanence, et cetera,
12 was something was being removed from the
13 public, taken from the public. Otherwise, this
14 park is public forum. Something's being taken
15 away. Nothing's being taken away from the
16 public when the City of Boston says we and only
17 we will decide what we say from our flagpole
18 because --

19 JUSTICE SOTOMAYOR: Counsel, could I
20 just ask a question? Because I've wondered
21 about this from the beginning of the case. I
22 thought we were ruling on whether the First
23 Circuit on the basis of the summary judgment
24 motion and the evidence before it, whether that
25 policy was constitutional or not.

1 But you've been arguing not the old
2 policy but the new one that changed during this
3 litigation. What are we ruling on?

4 MR. HALLWARD-DRIEMEIER: Well, Your
5 Honor, the parties stipulated that the written
6 policy, which was written down in October of
7 2018, was the same as Boston understood the
8 policy to be at the time of the --

9 JUSTICE SOTOMAYOR: Yeah, but what you
10 understand and what you did are two different
11 things, and assuming that I think there's a
12 difference between the two, what am I ruling
13 on?

14 MR. HALLWARD-DRIEMEIER: Well, Your
15 Honor, I -- I -- I -- I think -- the parties
16 have stipulated that it's the same policy. We
17 believe it was the same policy.

18 The -- the -- the fact that Mr. Rooney
19 cited the Establishment Clause, I think, is
20 further evidence that he thought it was the
21 city speaking because the Establishment Clause
22 would only limit the city speaking. And so
23 I -- I think --

24 JUSTICE SOTOMAYOR: Well, he can speak
25 for himself on this point, but you're believing

1 that we're ruling on the policy as it's written
2 today, not the policy that we understand the
3 summary judgment history related to, correct?

4 MR. HALLWARD-DRIEMEIER: Well, the --
5 because the parties stipulated that the two
6 were the same, I think that there's no
7 difference between them, Your Honor.

8 JUSTICE KAVANAUGH: On the
9 Establishment Clause point, it seems to me that
10 maybe the root cause of this, as some of the
11 amicus briefs suggest, is actually a mistaken
12 view about the Establishment Clause, that when
13 you have government property that's opened for
14 a forum for speech or for use, that there is a
15 mistaken understanding that has existed that if
16 you allow a bunch of secular groups and then
17 allow a religious group to use it, that you've
18 violated the Establishment Clause by doing
19 that. And it seems like we've had case after
20 case after case that has tried to correct that
21 misimpression of the Establishment Clause, and
22 that seems to me what the root cause is here.

23 I think the Becket Fund amicus brief
24 is pretty helpful on that. I'd be curious of
25 your thoughts about that.

1 MR. HALLWARD-DRIEMEIER: I -- Your
2 Honor, I think that the Establishment Clause
3 was cited by the City because the -- the City
4 did not want to be accused of having endorsed a
5 religion. The -- the proposal was --

6 JUSTICE KAVANAUGH: Exactly. And --
7 and the --

8 MR. HALLWARD-DRIEMEIER: The proposal
9 was --

10 JUSTICE KAVANAUGH: Exactly. And --
11 and the --

12 MR. HALLWARD-DRIEMEIER: -- to fly the
13 Christian flag, but then the City thought that
14 it was the City's own speech. And if the City,
15 speaking for itself, was to say we are flying
16 the Christian flag, we the City, are flying the
17 Christian flag, not one that has had its
18 religious intentions removed through the force
19 of history but one that is right out there, we
20 are flying it as the Christian flag, that that
21 might raise Establishment Clause concerns, I
22 think, was legitimate.

23 JUSTICE KAVANAUGH: But isn't the
24 answer to that what we've said repeatedly,
25 which is equal treatment of religious groups

1 vis-à-vis secular groups, religious speech,
2 religious organizations? Someone -- there's an
3 open gym policy and a religious group wants to
4 use it, and they're excluded because they're
5 religious. We've had cases like that. Isn't
6 the answer to that to say equal treatment of
7 religious groups or religious speech is not an
8 Establishment Clause violation --

9 MR. HALLWARD-DRIEMEIER: It --

10 JUSTICE KAVANAUGH: -- to reiterate
11 that?

12 MR. HALLWARD-DRIEMEIER: It is
13 absolutely clear that if this is a -- a public
14 forum of any type, of any type, limited or --
15 or general designated, the City does not
16 maintain that it has a basis to exclude
17 religious speech. And it's also clear that the
18 City does not exclude religious groups from
19 proposing to raise a flag.

20 In fact, in connection with
21 Constitution Day, the City said it was willing
22 to raise a flag of Camp Constitution in -- in
23 celebration and recognition of -- of
24 Constitution Day, notwithstanding --

25 JUSTICE KAGAN: But you're saying,

1 Mr. Hallward-Driemeier, that we should
2 recognize as government speech a program that
3 basically now says, and -- and -- and
4 previously, we welcome all comers except for
5 the most reprehensible discriminatory speech
6 and religious speech. That's what this program
7 is.

8 And why should we understand that to
9 be government speech, to say everything's good,
10 except religion?

11 MR. HALLWARD-DRIEMEIER: I -- Your
12 Honor, the suggestion that the policy ever said
13 that flag-raising were open to all comers is a
14 mischaracterization of the documents. There --
15 there are documents that relate to seeking a
16 permit to use the space at the flagpoles. That
17 is a designated public forum and is open to all
18 comers. But that --

19 JUSTICE GORSUCH: So, counsel, if I
20 understand your response, and I don't mean to
21 interrupt, but -- but your -- your argument to
22 Justice Kagan seems to hinge on a factual
23 premise. Is this flagpole, in fact, open to
24 all comers, more or less? Is it a public
25 forum?

1 Once you, say, lose there on that
2 point, is your answer to Justice Kagan, you're
3 right, we can't discriminate against religious
4 movements and treat them as other offensive and
5 -- offensive viewpoints?

6 MR. HALLWARD-DRIEMEIER: If the
7 flagpoles had become a public forum, that was
8 not our intent, but if by miscommunication the
9 flagpoles were deemed a public forum, the City
10 acknowledges it cannot exclude religious
11 speech, it cannot exclude offensive speech or
12 discriminatory speech from the flagpole because
13 it -- it has to be viewpoint neutral.

14 JUSTICE GORSUCH: Okay. And -- and
15 then let's just back up again just -- and I'll
16 grant you your -- your premise. In -- in -- in
17 -- what -- what -- what case, what authority
18 would you cite to support that the government
19 can in any circumstances treat religious
20 viewpoints the equivalent of offensive or
21 inappropriate ones?

22 MR. HALLWARD-DRIEMEIER: They --
23 they're not equal, Your Honor. They are just
24 categories of speech that the City will not
25 itself espouse.

1 JUSTICE GORSUCH: How is that not
2 viewpoint discrimination under our case law?

3 MR. HALLWARD-DRIEMEIER: Well, Your
4 Honor, if it's the City itself speaking, then
5 Sumnum said -- and I'm quoting -- the city is
6 free "to select the views it wants to express."

7 So the City, for the City's own
8 speech, can be viewpoint discriminatory. I
9 don't think it's -- "discriminatory" is an odd
10 word to use when describing the government's
11 own speech. The government is simply
12 fashioning its own message. And it has to be
13 allowed to do that or -- or the democratic
14 system breaks down, Your Honor.

15 So that's why I say whether this was
16 government speech or -- or private speech is
17 dispositive of the outcome here because --

18 JUSTICE BARRETT: But you -- you've
19 said that if you lose this case, you would
20 restructure your program so that you would be
21 able to exercise the kind of control to exclude
22 religious flags like, you know, the one that
23 Camp Constitution wanted to fly.

24 How would you propose doing that?

25 MR. HALLWARD-DRIEMEIER: Well, Your --

1 Your Honor, the United States has -- has
2 proposed what they view as a greater level of
3 governmental involvement.

4 JUSTICE BARRETT: I -- I know. I've
5 read the SG's brief. But, I mean, what's the
6 City's position?

7 MR. HALLWARD-DRIEMEIER: I mean, if
8 the Court clarifies that that type of
9 involvement is required, the City is happy to
10 include that in its -- in its program.

11 I think that what we've described is
12 that, in fact, when -- apart from the foreign
13 flags, that -- that is a different, you know,
14 sort of message that the City is sending, that
15 the -- the -- the third-party flags were raised
16 in connection with a City resolution or other
17 recognized public observance.

18 And so I would have no problem, I
19 think the City would have no problem, making
20 that explicit in its policy. This is our
21 speech. We will decide whether and when to do
22 it. One could add the layer of requiring a
23 city official to sponsor it to the city
24 council, to attend the -- the event. Those are
25 -- those are all available. And -- and I think

1 the City would be willing to make clearer, if
2 necessary, that it is the City's speech.

3 But Sumnum talked about not thinking
4 of something as a public forum, if calling it a
5 public forum would -- would make it impossible,
6 sort of defeat its essence and effectively
7 result in the removal of the forum.

8 This -- no city -- Justice Kagan, I
9 think you are exactly right. No city can run
10 the risk of being forced to fly the swastika in
11 front of City Hall. And so you cannot have a
12 public forum at the City Hall --

13 JUSTICE KAGAN: Well, I wonder if you
14 think I'm exactly right if I say the
15 following -- and this really does go back to
16 Justice Kavanaugh's point, because the reason I
17 said, like, why wasn't this settled is because
18 my guess is the same as his, that this all came
19 about because of a mistake by Mr. Rooney, and
20 it's -- it's actually an understandable
21 mistake.

22 You know, we have a line in one of our
23 opinions that says a City Hall can't fly a --
24 you know, can't have a cross on the -- on the
25 roof. And so some -- you know, somebody looks

1 at this, Mr. Rooney looks at this and says
2 isn't this kind of the same thing and prohibits
3 it.

4 And, in fact, it's not the same thing
5 because it's in a flagpole where different
6 flags are coming up and going down all the time
7 and expressing a wide variety of views and
8 organizations and so forth.

9 And so this was a mistake. And -- and
10 why is it that people have not been able to
11 correct this mistake?

12 MR. HALLWARD-DRIEMEIER: Your -- Your
13 Honor, the City would be very happy to discuss
14 settlement. The City proposed -- I don't -- I
15 was not part of those discussions. I just know
16 that they've happened.

17 I -- I think that the suggestions for
18 clarification, greater clarification that the
19 policy is as we represent it to this Court,
20 that it is effectively flags of -- of foreign
21 nationalities and flags raisings in connection
22 with something that is a public holiday or
23 something where the City has passed a
24 resolution stating our support, we -- we would
25 be happy to clarify that policy in that way.

1 What the City cannot afford is the
2 idea that the flagpole has become a place
3 where, to use Your Honor's hypothetical, the
4 swastika flag, to use the example of Walker,
5 the confederate flag, ISIS, al Qaeda, all of
6 these could be flown.

7 And it's not to say that the Christian
8 flag is any of this. As a person of faith,
9 that is not what we are saying. What we are
10 saying is that the outcome in this case has to
11 be the same, whether this is the Christian
12 flag, the Sumnum flag, the Confederate flag as
13 in Walker, or the New York Yankees flag.

14 The City can -- is either compelled to
15 raise all of them or none of them, because it
16 is the City's speech. The City feels that it
17 must retain that control. It felt that it did
18 have that control because the -- the parameters
19 were clear enough.

20 From 2005 up to --

21 JUSTICE ALITO: I really doubt that
22 the City really wants to align itself with
23 every national flag that one -- that members of
24 the community want to fly. And yet you're
25 willing to do that, right?

1 MR. HALLWARD-DRIEMEIER: Well,
2 because -- and this is why I think the policy
3 -- the goals, as explicitly stated on the
4 City's website, are important because they say
5 that it is to celebrate the diversity of the
6 communities in Boston.

7 It's not an inconsistency to put up
8 the PRC flag and then put up the flag of Taiwan
9 because Boston is not celebrating either of
10 those governments.

11 JUSTICE ALITO: If somebody in --

12 MR. HALLWARD-DRIEMEIER: It's the
13 communities --

14 JUSTICE ALITO: If someone in Boston
15 wanted a -- wanted you to put up the North
16 Korean flag, would you do that?

17 MR. HALLWARD-DRIEMEIER: I -- if there
18 was a --

19 JUSTICE ALITO: I don't know what the
20 current flag of Afghanistan is, but if it
21 becomes -- if it's -- becomes the Taliban flag,
22 would you fly that?

23 MR. HALLWARD-DRIEMEIER: If -- if
24 there was a community in Boston that sought to
25 -- they may be refugees from those countries.

1 If they sought to raise a flag, the -- the City
2 would do so in honor of the community here and
3 where they came from. That's the message that
4 the City of Boston is saying.

5 And the fact that the reasonable
6 observer would think that this was the City
7 speaking, Petitioner Shurtleff -- the -- the
8 Massachusetts brief cites his own letter to the
9 editor complaining about saying he's ashamed of
10 Boston for having flown the PRC flag.

11 Based on that, I went and did a
12 search. He published another letter more
13 recently in which he says call your counselor
14 and tell them to stop this.

15 He knows that it's city speech.

16 JUSTICE ALITO: Do you think that
17 every national flag that has religious
18 symbolism has now been drained of its religious
19 significance?

20 MR. HALLWARD-DRIEMEIER: It's not
21 religious symbolism in the context of this
22 flag-raising policy because the policy, as Mr.
23 Rooney made very clear, it's flying -- the --
24 the City is flying the flag because it is the
25 flag of that country.

1 JUSTICE ALITO: No, but I'm just
2 getting at what the reasonable observer would
3 think.

4 MR. HALLWARD-DRIEMEIER: I don't think
5 that the reasonable observer would think
6 because the -- the Boston flagpole was flying
7 the flag of Turkey that the City of Boston had
8 declared itself Muslim. It's flying -- they
9 would also know, if -- if they know anything,
10 that they're flying other nations' flags
11 routinely throughout the year because, if they
12 went to the website, they would see it's about
13 celebrating the diversity of communities in
14 Boston.

15 JUSTICE ALITO: So who can fly a flag?
16 What -- what exactly is your policy now?
17 National flags, city holidays. Anything else?

18 MR. HALLWARD-DRIEMEIER: I -- well,
19 the -- the policy says that it's raising flags
20 to commemorate an event or occasion. That's
21 paragraph 1 of the City policy. This is at --

22 JUSTICE ALITO: At any event or
23 occasion?

24 MR. HALLWARD-DRIEMEIER: Well, Your
25 Honor, it -- it's the City retains the control.

1 And that's explicit, that -- that it's the sole
2 --

3 JUSTICE BARRETT: But this flag was
4 for Constitution Day, right?

5 MR. HALLWARD-DRIEMEIER: It -- it --
6 that's -- so --

7 JUSTICE BARRETT: Why wouldn't that
8 count as an occasion?

9 MR. HALLWARD-DRIEMEIER: And -- and
10 the City said that they would fly a flag for
11 Constitution Day, and they offered that if you
12 had offered the Camp Constitution flag in honor
13 of Constitution Day, that they would have flown
14 it because the City is already supporting
15 Constitution Day.

16 JUSTICE GORSUCH: Right, the -- the
17 City would have flown that very same flag,
18 right?

19 MR. HALLWARD-DRIEMEIER: If it had
20 been presented as the Camp Constitution flag.

21 JUSTICE GORSUCH: It was just,
22 unfortunately, they admitted that there was
23 some religious inspiration behind the flag,
24 right?

25 MR. HALLWARD-DRIEMEIER: Well, they

1 didn't say that there was religious inspiration
2 behind the Camp Constitution flag. They didn't
3 say it was the Camp Constitution flag. They
4 said they wanted to fly the Christian flag.

5 JUSTICE GORSUCH: Yeah, but if it had
6 been presented as the Constitution Camp flag,
7 it would have been approved, I believe --

8 MR. HALLWARD-DRIEMEIER: That --

9 JUSTICE GORSUCH: -- you said a couple
10 of times.

11 MR. HALLWARD-DRIEMEIER: Yes. Yes,
12 Your Honor.

13 JUSTICE GORSUCH: Okay. And so I want
14 to get back to Justice Kagan and Justice
15 Kavanaugh's point. Mr. Rooney apparently
16 denied the -- the -- the -- the request because
17 he thought the Establishment Clause required
18 him to do so.

19 And if that's mistaken and if we all
20 agree that that's mistaken and that was the
21 basis on which the City's application decision
22 was made, what's left to decide?

23 MR. HALLWARD-DRIEMEIER: Well, Your
24 Honor, the City made clear that the City, for
25 the City's own speech, was respectfully

1 refraining from speaking on the subject of
2 religion. That is absolutely consistent with
3 this Court's precedent.

4 JUSTICE GORSUCH: As I understand it,
5 Mr. Rooney said that he thought it was concern
6 about the so-called separation of state, church
7 and state, or the Constitution's Establishment
8 Clause.

9 MR. HALLWARD-DRIEMEIER: And -- and
10 the concern --

11 JUSTICE GORSUCH: And that's from the
12 record. And if -- if that's correct and we all
13 agree that that's a misunderstanding, forget
14 about the future policies or whatever they may
15 be. Why doesn't it resolve this case?

16 MR. HALLWARD-DRIEMEIER: It -- it --
17 it is not an inaccurate understanding of the
18 Constitution that said -- to say that the
19 concern about the separation of church and
20 state leads us --

21 JUSTICE GORSUCH: In a public --

22 MR. HALLWARD-DRIEMEIER: -- as the
23 government to be --

24 JUSTICE GORSUCH: -- I thought you
25 agreed --

1 MR. HALLWARD-DRIEMEIER: -- silent.

2 JUSTICE GORSUCH: -- in a public
3 forum, you had --

4 MR. HALLWARD-DRIEMEIER: Oh, I'm
5 sorry.

6 JUSTICE GORSUCH: -- that Boston would
7 -- and assume a public forum.

8 MR. HALLWARD-DRIEMEIER: Yeah.

9 JUSTICE GORSUCH: Okay? Assume a
10 public forum and the record shows that the
11 denial was made based on a misunderstanding of
12 the Establishment Clause with respect to public
13 forums. Why isn't that just the end of this
14 case?

15 MR. HALLWARD-DRIEMEIER: It -- it --
16 Your Honor, if it's a public forum, the City
17 acknowledges it has no basis to exclude. The
18 Establishment Clause would not provide a basis
19 to exclude a religious flag from a public
20 forum. I want to be very clear. The City does
21 not think so.

22 The fact that he cited the
23 Establishment Clause was because he believed it
24 was the City's speech. And the Establishment
25 Clause does apply to the government's own

1 speech.

2 JUSTICE KAGAN: I mean, one could add
3 to what Justice Gorsuch just said the fact that
4 it was a public forum doesn't mean it's a
5 public forum for all time in the future, right?
6 The city can decide whether it wants something
7 to remain a public forum.

8 MR. HALLWARD-DRIEMEIER: We think that
9 that --

10 JUSTICE KAGAN: But, if you look at
11 the lack of control over this flagpole, it's
12 hard not to think of it as a public forum. And
13 then it's hard not to think that excluding
14 religious speech from a public forum and -- and
15 -- and -- and particularly excluding it because
16 of this mistaken view -- and, again, I want to
17 say it's not a crazy mistake. You know, a city
18 could not put a cross, in my view, on City
19 Hall.

20 But, in the context of a system where
21 flags go up, flags go down, different people
22 have different kinds of flags, then it is a --
23 a -- a -- a violation of the free speech part
24 of the First Amendment and not an Establishment
25 Clause violation. The end.

1 MR. HALLWARD-DRIEMEIER: Your Honor, I
2 -- I -- I would like to take issue with the
3 idea that there was no control. I mentioned
4 the stipulation in which it was stipulated that
5 he had to review it for whether the City's
6 decision to fly the flag was consistent with
7 the City's message.

8 That was in Mr. Rooney's affidavit as
9 well. There was a deposition taken of Mr.
10 Rooney, and one subject they never asked him
11 about was, what do you do to make sure that
12 it's consistent with the City's message? They
13 never asked that question.

14 And so it's stipulated at 149a that he
15 would review to make sure that the City's
16 decision to fly the flag was consistent with
17 the City's message.

18 JUSTICE SOTOMAYOR: Counsel --

19 MR. HALLWARD-DRIEMEIER: He also --
20 yes.

21 JUSTICE SOTOMAYOR: -- the problem you
22 have with that answer is that the City's -- the
23 City's message was diversity of views and
24 backgrounds. And, clearly, religion was one of
25 them.

1 You have no problem and he had no
2 problem with raising flags that had religious
3 symbols on it. You had no problem with having
4 religious groups speak. His only problem was,
5 as Justice Gorsuch pointed out, was this
6 mistaken belief that the Constitution required
7 that the city not raise a flag that had a cross
8 by a religious group. That -- that's a very
9 different and substantially unsubstantial --
10 I'm sorry, let me rephrase that. That belief
11 is the one that Justice Gorsuch was
12 challenging.

13 MR. HALLWARD-DRIEMEIER: Your Honor, I
14 think that, with respect to the foreign
15 government flags, yes, it's diversity of those
16 -- the national origins of communities within
17 the city.

18 But -- but that's a distinct thing.
19 That's one message and is reflected in the
20 City's goals document that -- that does in a
21 sense require that diversity of those national
22 origins. But, with respect to the other
23 aspects of the program, which were to celebrate
24 events or occasions, doing it on public
25 holidays or in connection with a -- a city

1 resolution, every other flag that they identify
2 is -- is connected with a city resolution.

3 That's true of the EMS flag, the
4 Mother's Day flag, Bunker Hill, Juneteenth,
5 Malcolm X, the Renegades. Then they cite two
6 flags in their reply for the first time in this
7 litigation, Donate Life.

8 There is a federal Donate Life Month.
9 The application -- this is at JA 398 -- refers
10 to the fact that there is going to be state
11 officials at the celebration of Donate Life.
12 Of course, Donate Life is carried out through
13 the Registry of Motor Vehicles and your
14 driver's license. That was a public event.

15 The Metro Credit Union, during
16 Hispanic Heritage Month, the Metro Credit
17 Union, which is a city community lending
18 partner, said we wish to flag -- fly the Juntas
19 Alan Samos flag, Together We Advance, in
20 celebration of the fact that that is the first
21 financial institution recognized for its
22 outreach to the Hispanic community.

23 That too was a public event, Your
24 Honor. They cite it at the last minute, but --
25 and -- and the document that -- that discloses

1 this is both the -- the article that they cite
2 in their brief and also the -- a document
3 produced in discovery, COB 6536.

4 Your Honor, this record shows, as we
5 have demonstrated, that if you take the -- the
6 national flags aside, there is about 10 other
7 flags, and we have demonstrated that they were
8 all in connection with something that had a
9 city message, the celebration of a particular
10 day, an observance, a remembrance.

11 There is not ever a suggestion that
12 the City Hall flagpole was open to all comers.
13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 JUSTICE THOMAS: Mr.
18 Hallward-Driemeier, just the -- briefly. You
19 mentioned diversity several times, and what I
20 don't understand is your definition of
21 diversity because it would seem to me that
22 Christians in Boston would be a part of that
23 diversity calculus.

24 MR. HALLWARD-DRIEMEIER: The -- the --
25 the specific forum of diversity that the City

1 was trying to celebrate was national origin
2 diversity, the references to countries
3 throughout the -- the -- the world.

4 Of course, there are other aspects of
5 diversity. The City can choose to celebrate
6 those aspects of diversity in many ways, and
7 the City does celebrate religious events in
8 other ways. There have been religious events
9 that have happened on city property.

10 The City chose not to start down the
11 road of speaking on the subject of religion
12 from the flagpole. Of course, had they started
13 down that road, then the argument would have
14 been that they had to carry all religious
15 communications because they couldn't prefer one
16 religious communication from the flagpole or at
17 least that would have been the argument.

18 They --

19 JUSTICE THOMAS: So it's --

20 MR. HALLWARD-DRIEMEIER: -- simply
21 chose --

22 JUSTICE THOMAS: -- limited diversity?

23 MR. HALLWARD-DRIEMEIER: -- not to go
24 there.

25 JUSTICE THOMAS: It's limited

1 diversity?

2 MR. HALLWARD-DRIEMEIER: They are
3 celebrating a particular kind of diversity,
4 national origin diversity, Your Honor.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 JUSTICE BREYER: You mentioned the --
8 the website, which had a good statement of the
9 policy. Was that put up before or after this
10 case began?

11 MR. HALLWARD-DRIEMEIER: The -- the
12 policy that --

13 JUSTICE BREYER: No, I'm not saying
14 about the policy. I'm saying, was the website
15 with the policy put up before or after?

16 MR. HALLWARD-DRIEMEIER: The --

17 JUSTICE BREYER: It was either before,
18 after, or instantaneous. I mean, what was it?

19 MR. HALLWARD-DRIEMEIER: So -- so
20 there are just a couple different documents.
21 And to clarify, the policy and the goal and the
22 -- and the rules that are incorporated by the
23 policy was adopted in October of 2018.

24 The website that refers to the goals,
25 it is not in the record at what time that was

1 adopted. In the stipulation of facts, the
2 parties have discussed it in the historic
3 section, not with the new policy and rules, but
4 the -- the record is silent on that.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: No, thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch?
10 Justice Barrett? No?

11 Thank you, counsel.

12 Rebuttal, Mr. Staver?

13 REBUTTAL ARGUMENT OF MATHEW STAVER
14 ON BEHALF OF THE PETITIONERS

15 MR. STAVER: The record does reflect
16 that at the time of 2017, the website was in
17 effect. In fact, that's what Hal Shurtleff
18 used, and the policies specifically written by
19 the City for the 2005 to 2017 include the
20 statement that these are public forums, open to
21 all applicants.

22 And that's the application that still
23 is there, and it's still being used. And it's
24 the same exact guidelines in 2017 as it is now.

25 In 2019 -- and page 30 footnote of our

1 brief, we indicate that during an
2 interrogatory, the City confirmed that all the
3 policies that were on the website in 2017 are
4 still there and they are still used. So in
5 2018 they adopted the policy that's in the
6 Joint Appendix before the court of appeals,
7 beginning at page 569 to 570.

8 That particular policy does not limit
9 subject matters or speakers. It says it's open
10 for any event or occasion. Clearly Camp
11 Constitution celebrating Constitution Day and
12 Citizenship Day was one of those occasions
13 and/or events.

14 That same flag could have flown but
15 for a mistaken view of the Establishment
16 Clause. And that Establishment Clause caused
17 the ultimate problem. To justify that mistake,
18 they argued that it was government speech and
19 they're bound to Censor. But it's very clear
20 that the same flag could have flown with the
21 same exact symbol for the same one-hour event
22 without any incident, had Camp Constitution
23 simply lied and said this is not the Christian
24 flag; it's the camp Constitution flag. They
25 were actually encouraged to actually have a

1 non-religious flag or rename the flag.

2 The reason why it was censored is
3 solely because of the word "Christian," and
4 that is clearly viewpoint censorship. The
5 question here is who was speaking. And by
6 policy and practice, it's very clear, it's not
7 the government. They didn't exercise control.
8 They did ministerial review. They never
9 requested the flag to be changed. They didn't
10 own them. They didn't initiate them. In 2018
11 the policy says that any individual or
12 organization may apply, and the only viewpoints
13 that would be censored would be those that they
14 deemed to be inappropriate, offensive in
15 nature, or those supporting discrimination or
16 prejudice or religious movements.

17 Apparently, you could be an
18 anti-religious movement and be permitted, but
19 what they clearly indicated is, in 2018, what
20 they had done in 2017. And that is it was an
21 "all comers" policy, no subject matters, no
22 speakers limited. But one particular viewpoint
23 they are going to exclude, and that viewpoint
24 happened to be a Christian or a religious
25 viewpoint.

1 They raised the Establishment Clause
2 mistakenly to justify their decision, but this
3 case cannot fall under government speech. The
4 error of the First Circuit was to begin with
5 the idea -- I see that I'm out of time --

6 CHIEF JUSTICE ROBERTS: Finish your --

7 MR. STAVER: The error of the First
8 Circuit, Mr. Chief Justice, was to begin with
9 the notion that you can never have a flagpole
10 forum. And then they crammed everything else
11 into government speech forgoing the traditional
12 analysis of public forum doctrine.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 11:23 a.m., the case
18 was submitted.)

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