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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has both strongly supported the constitutional separation of religion and government and vigorously defended free speech for more than 100 years. It has appeared before this Court in numerous First Amendment cases both as direct counsel and as *amicus curiae*, including in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), which raise issues similar to those presented in this case. The ACLU of Massachusetts is a state affiliate of the national ACLU.

SUMMARY OF ARGUMENT

The City of Boston has three flagpoles near its City Hall that generally display the flags of the United States of America (along with the POW/MIA flag), the Commonwealth of Massachusetts, and the City itself. The City, however, allows private parties to request permission to temporarily display other flags on the third flagpole, typically in connection with events those parties organize for the public. For years, the City invariably

[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel have made any monetary contributions intended to fund preparation or submission of this brief.

granted these requests. In the twelve years leading up to this dispute, it approved all 284 requests to display flags representing a broad array of groups—without denying a single request.

Until this case. When petitioners Harold Shurtleff and Camp Constitution (collectively, "Camp Constitution") sought permission to display for a single hour on a single day a flag depicting a Latin cross in connection with a public event, the City denied the request. It explained that it did so because the flag was described on the group's application as "the Christian flag." In the opinion below, the First Circuit upheld the City's action. The court reasoned that, rather than excluding a speaker from a designated public forum for private speech, the City was engaged in government speech—and was therefore free to discriminate against particular viewpoints as it saw fit.

That ruling contravenes this Court's public-forum precedents and, if upheld, would dangerously expand the government-speech doctrine. Through its policies and practices, the City designated its third flagpole a public forum for temporary flag displays by private parties. Having done so, the City is bound by the constitutional principles governing public forums. Those principles prohibit the City from denying private speakers access to the forum based on their viewpoints, including religious viewpoints. The First Circuit, however, allowed the City to avoid the prohibition against viewpoint discrimination by erroneously reclassifying a forum for private speech as nothing more than a venue for government speech.

The First Circuit not only misapplied the public-forum doctrine, but also extended this Court's government-speech precedents beyond their appropriate

reach. This case is readily distinguishable from *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), where this Court held that a city park was not a public forum for *permanent* monuments and that such monuments constituted government speech. There, the Court emphasized that a park could not accommodate permanent monuments from every private party wishing to display one. Here, in contrast, the City is plainly capable of accommodating *temporary* flag displays by myriad private parties—as confirmed by its consistent record (before this case) of accepting hundreds of requests without denying a single one.

This case also differs from *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), which concerned messages on specialty license plates issued by the State of Texas. Although private parties proposed plate designs, the State exercised direct control over every aspect of the plates and rejected at least a dozen proposed models. Here, in contrast, the City generally permits private parties to display whatever flags they want. Further, before this case, the City had an unbroken record of rubber-stamping flag-raising applications, often without even seeing the flags in question. Thus, unlike the State in *Walker*, the City is not selecting the messages that it wishes to convey as a speaker. Instead, it is providing a forum for private parties to convey *their own* messages—as long as those messages are not religious. By denying access to a forum to persons expressing religious viewpoints, the City is regulating private speech, not crafting government speech.

The First Circuit nonetheless reasoned that, because private parties must obtain permits from the City before raising their flags, the flags constitute government

speech. But government entities often require private parties to obtain permits before accessing public forums, and the mere fact that a government imposes such a requirement does not transform private expression into government speech. Moreover, the First Circuit's ruling directly conflicts with *Matal v. Tam*, 137 S. Ct. 1744 (2017), where this Court rejected the argument that government registration of trademarks converts marks into government speech. If accepted, the First Circuit's ruling would allow the government to censor private speech simply by requiring parties to obtain government permission before using a public forum.

Finally, *amici* note that the City denied Camp Constitution's request based on a concern that displaying a religious flag near City Hall would violate the Establishment Clause. The City's concern was understandable, as displaying a Christian flag (or any religious flag) on government property, especially near a city hall, would in many cases raise serious Establishment Clause problems. Those problems are not present here, however, because the City designated its third flagpole a forum for temporary flag displays by private parties, and the forum has functioned as intended by accommodating numerous speakers and viewpoints. In these circumstances, it would not violate the Establishment Clause to allow Camp Constitution to display its flag for a single hour, on terms no different than those applicable to scores of other private parties before it.

To the extent the City wishes to avoid any misperception that it is endorsing religion, it can address that concern through alternative means that do not offend the Constitution. For example, although a disclaimer on its own would not necessarily cure an Establishment Clause violation, the City could post a notice stating that

it does not endorse the messages conveyed by private flags. The City also could solicit input from the public about which flags the City itself should display. What the City may not do, however, is designate its flagpole a public forum for private speech and then deny access to an otherwise eligible speaker based on viewpoint.

ARGUMENT

I. THE CITY DESIGINATED ITS THIRD FLAGPOLE A PUBLIC FORUM FOR TEMPORARY FLAG DISPLAYS BY PRIVATE PARTIES.

A. The central question in this case is whether, when the City granted 284 applications in a row to temporarily display private flags on its third flagpole, it designated the flagpole a forum for private speech, or whether it engaged in government speech. If the City was speaking, "the Free Speech Clause has no application." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* Thus, when the government speaks, it is permitted to express certain viewpoints to the exclusion of others, provided it complies with other constitutional principles. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

If, however, the City opened its flagpole as a forum for temporary displays by private speakers, it is barred by the Free Speech Clause from discriminating based on viewpoint. *Summum*, 555 U.S. at 469. When the government regulates private speech on government property, this Court applies a "forum based" approach that depends on the nature of the forum. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (citation omitted). "In a traditional public forum—parks, streets,

sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Id.*

The government also "may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Summum*, 555 U.S. at 469. Examples include municipal auditoriums and meeting facilities at state universities. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547-52 (1975). If the government creates a designated public forum, it must comply with the same restrictions that apply in traditional public forums—including the prohibition on viewpoint discrimination. *Summum*, 555 U.S. at 469-70.

Finally, the government may create nonpublic forums that are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* at 470. Examples include a school system's internal mail facilities and the Combined Federal Campaign to solicit donations from federal employees. *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983). In such forums, the government has "more flexibility" to regulate speech. *Minn. Voters Alliance*, 138 S. Ct. at 1885. However, regulations still must be "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Cornelius*, 473 U.S. at 806.

B. In some cases, it may be "difficult to tell whether a government entity is speaking on its own behalf or is

providing a forum for private speech." *Summum*, 555 U.S. at 470. But this is not such a case. The government creates a designated public forum if it "intentionally open[s] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. To ascertain the government's intent, this Court looks to the government's "policy and practice," as well as "the nature of the property and its compatibility with expressive activity." *Id.* Here, those factors demonstrate that the City designated its third flagpole a public forum for temporary flag displays by private speakers.

First, the City's written policies expressly open the flagpole to private speech. The policies explain that members of the public may hold events at certain properties near City Hall, including on "the City Hall Flagpoles" themselves. Pet. App. 133a. The policies add that the City "seeks to accommodate *all applicants* seeking to take advantage of the City of Boston's *public forums*." Pet. App. 137a (emphasis added). Although the City's use of the term "public forum" is not dispositive, that characterization is entitled to some weight, unless there is evidence it is a sham. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.") (cleaned up). Here, there is no evidence that the City used the term "public forum" as a pretense. The City's use of that term thus supports the conclusion that it intentionally opened its flagpole to private speakers.

Second, the City's practices confirm that it designated its flagpole a forum for private speech. In

theory, the City would review each flag-raising request by a private party for consistency with the City's own message. Pet. App. 149a. In practice, however, the City rubber-stamped the requests with little discussion or review. Pet. App. 149a-150a. As noted above, over the twelve years before this case, the City granted all 284 flag-raising requests by private parties—without denying a single request. Pet. App. 142a-143a, 149a-150a. And it typically did so *without even seeing the proposed flags' content*. Pet. App. 149a-150a.

Moreover, those 284 approved flag-raising applications represented a diverse range of speakers. To take a few examples, the events celebrated various nationalities or cultures (*e.g.*, Albania, Brazil, Ethiopia, Italy, Panama, Peru, Portugal, Puerto Rico, Mexico, Cuba, Turkey, China, and Tibet), as well as a number of civic, political, or social groups (*e.g.*, the Chinese Progressive Association, the National Juneteenth Observance Foundation, the Bunker Hill Association, and Boston Pride). Pet. App. 142a-143a, 173a-187a. The diversity of these flags underscores that the City generally opened its flagpole to private speech.

Third, the City's flagpole can easily function as a public forum for temporary flag raisings by private parties—which distinguishes this case from *Summum*. There, this Court considered whether a city park was a public forum for private parties to display *permanent* monuments. 555 U.S. at 478-80. The Court explained that "public parks can accommodate only a limited number of permanent monuments" because such monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Id.* at 478-79. The Court added that "[a]lthough some public parks can accommodate and may be made

generally available for temporary private displays, the same is rarely true for permanent monuments." *Id.* at 480. The Court thus concluded that, "as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property." *Id.* at 480.

In contrast to the permanent displays in *Summum*, the flag raisings here are temporary in duration. Each flag raising in the record lasted no more than one day. *See* Pet. App. 173-187a. And Camp Constitution asked to display its flag for only a single hour on a single day in connection with its event. Pet. App. 131a. Given the fleeting nature of these displays, the City is fully "capable of accommodating a large number of public speakers without defeating the essential function" of its flagpole. *Summum*, 555 U.S. at 478. In fact, the City proved itself capable of accommodating all 284 prior flag-raising requests. Pet. App. 142. And given that those 284 requests spanned twelve years, the City accommodated them with room to spare, and no private party "monopolize[d]" the flagpole. *Summum*, 555 U.S. at 479.

Because the City designated the flagpole a public forum and operated it consistent with that intent, the City is "bound by the same standards as apply to a traditional public forum." *Perry Educ. Ass'n*, 460 U.S. at 46. To be sure, the City was "not required to create the forum in the first place." *Widmar*, 454 U.S. at 267-68. But once the City did so, the Constitution prohibited it from enforcing certain exclusions from the forum. *Id.*

Of particular importance here, the Constitution prohibited the City from denying use of the flagpole to private speakers based on the viewpoints that they express. *Summum*, 555 U.S. at 469-70. This prohibition extends to denying use of the forum to persons who

express religious viewpoints. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-110 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-95 (1993).

Here, the City violated that prohibition. Specifically, the City denied Camp Constitution's request to temporarily display a flag because the group described its flag as "Christian." Pet. App. 155a. Based on that description, the City was concerned that Camp Constitution was "promoting a specific religion" and that allowing the flag display would violate the Establishment Clause. Pet. App. 153a-155a. *Amici* do not question the City's good faith in making that judgment. But under this Court's precedents, the City's denial constituted viewpoint discrimination—and as explained below, allowing Camp Constitution to temporarily display the flag would not have violated the Establishment Clause. In these circumstances, the City was not entitled to open a forum and then deny access to Camp Constitution because it planned to express a religious viewpoint.

C. In the opinion below, the First Circuit held that the City did *not* designate its flagpole a forum for private speech, and that the City was therefore free to engage in viewpoint discrimination. Pet. App. 27a-30a. The court reasoned that the City did not intend to open the flagpole to "any and all proposed flag designs." Pet. App. 28a. The court observed that the City nominally screened flag requests and that "all 284 flags previously flown were flags of countries, civic organizations, or secular causes." Pet. App. 29a. The court concluded that "the City's permission procedures evince selective access to the third flagpole, and '[t]he government does not create a designated public forum when it does no more than

reserve eligibility for access to a forum to a particular class of speakers, whose members must then, as individuals, obtain permission.'" Pet. App. 29a (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 667 (1998)).

That reasoning was deeply flawed. To start, the test for whether the government designated a public forum is not (as the First Circuit suggested) whether the government opened the forum to "any and all" possible messages. Pet. App. 29a. If that were true, the government could argue that by prohibiting expression of any viewpoint, it did not create a forum at all. That would allow the government to evade the prohibition on viewpoint discrimination.

Instead, the test for a designated public forum is whether the government "generally" opened property for expressive use by part or all of the public. *Widmar*, 454 U.S. at 267; *accord Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (a designated public forum is "property that the State has opened for expressive activity by part or all of the public"). In *Widmar*, for example, a state university generally opened its facilities to student groups, except for purposes of religious worship or teaching. 454 U.S. at 267-68. By doing so, this Court held, the university created a forum and was bound by constitutional principles, which prohibited excluding religious student groups. *Id.*; *see Cornelius*, 473 U.S. at 802-03 (discussing *Widmar*).

Similarly, here, the City generally opened its flagpole to flag displays by private speakers. Having done so, it was bound by the same principles that apply in traditional public forums, including the prohibition on viewpoint discrimination. Thus, the fact that the City excluded a

speaker with a religious viewpoint does not (as the First Circuit reasoned) show that the City did not open a public forum at all. Instead, it shows the City denied access to a public forum on the basis of viewpoint, which is constitutionally verboten.

The First Circuit also was wrong to characterize the City's practice as reserving access to "a particular class of speakers." Pet. App. 29a. The City did not deny Camp Constitution's request because the group fell outside the class of speakers eligible to use the flagpole. In fact, the flagpole is generally open to members of the public, including civic organizations like Camp Constitution. Pet. App. 132-133a. Instead, the City denied the request because it was concerned that Camp Constitution was "promoting a specific religion." Pet. App. 155a. Under this Court's precedents, and even assuming the City held sincere but mistaken Establishment Clause concerns, that denial constituted viewpoint discrimination. *Good News Club*, 533 U.S. at 109-110; *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 393-95.

II. THE CITY WAS NOT ENGAGED IN GOVERNMENT SPEECH.

Despite the considerations above, the First Circuit concluded the City was engaged in government speech and was therefore free to discriminate based on viewpoint. In so holding, the court examined three factors derived from *Summum* and *Walker*: namely, (1) the history of the property and speech at issue; (2) whether an observer would attribute the speech to the government; and (3) whether the government effectively controlled the messages. Pet. App. 14a-27a.

In applying those factors, however, the First Circuit disregarded the City's policy and practice of designating

its flagpole a forum for private speech. That error infected the court's consideration of each factor—leading it to incorrectly conclude that the City has free rein to discriminate against particular viewpoints. That decision illustrates why this Court warned that the government-speech doctrine "is susceptible to dangerous misuse" and called upon courts to "exercise great caution before extending [the] government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

Regarding the first factor ("historical use of flags"), the First Circuit observed that "governments have used flags throughout history to communicate messages and ideas." Pet. App. 17a. But the court erred in allowing that general history to overshadow the specific context and practice here. While the historical use of property is certainly a relevant factor, this Court has recognized that the government may depart from history by opening property that has "not traditionally been regarded as a public forum." *Summum*, 555 U.S. at 469. That is precisely what the City did here. Through the policies and practices discussed above, the City designated its third flagpole a forum for temporary flag displays by private parties. Given that designation, the way that governments historically have treated flagpoles does not control here.

Turning to the second factor, the First Circuit posited that "an observer would attribute the message of a third-party flag on the City's third flagpole to the City." Pet. App. 17a. In so holding, the First Circuit focused exclusively on "the physical attributes" of the display and "general information" about its location. Pet. App. 20a. In particular, it gave nearly dispositive weight to the fact that the third-party flag was in "close proximity" to the

Massachusetts and United States flags and that all three flags were near City Hall. Pet. App. 18a-19a.

Again, however, the First Circuit's analysis ignores the City's policy and practice of opening its third flagpole to private speakers on a regular basis. Under this Court's precedents, that policy and practice suffice to show that the City designated the flagpole a public forum. *Cornelius*, 473 U.S. at 802.

To the extent that this Court conducts an observer-based analysis, the result should be the same. Under that analysis, the relevant question is "whether a *reasonable* and *fully informed* observer would understand the expression to be government speech, as distinct from private speech." *Summum*, 555 U.S. at 487 (Souter, J., concurring) (emphasis added). Importantly, a reasonable observer would know the relevant "history and context"—not just "the information gleaned simply from viewing the challenged display." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring). Such knowledge would include the "text" of any written "policy," *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308, as well as how the space "has been used over time by private speakers of various types," *Capitol Square*, 515 U.S. at 781 (O'Connor, J., concurring).

A reasonable observer would therefore know that the City's policies allow private parties to hold events at the City's flagpole and describe the flagpole as a "public forum[]." Pet. App. 133a, 137a. An observer also would know that, over the years, the City has approved nearly 300 flag-raising applications by private parties and that the relevant flags represent a broad array of national, cultural, political, and civic groups. Pet. App. 173a-187a (listing flags). Equipped with such knowledge, a

reasonable observer would not (as the First Circuit posited) view a particular flag display in isolation and then infer from the setting that the City itself was speaking. Instead, an observer would recognize that the City provided a forum for a series of diverse, private speakers to convey their own messages.

Regarding the third factor, the First Circuit reasoned that the City "maintains control" of the messages conveyed by flag raisings because it requires private parties to "apply to the City for a permit" and obtain "the City's permission" before raising a flag. Pet. App. 22a. According to the First Circuit, the City's "final approval authority" "suffices to show" that it exercises "effective control," such that the messages conveyed by the flags constitute government speech. Pet. App. 24a.

That reasoning proves too much, as it suggests that any decision to deny access to a forum would convert the forum into a venue for government speech. It is often the case that private parties must obtain government permission before using a forum, if only to allow the government to manage the forum or confirm that parties are eligible to use it. But the mere fact that the government requires such permission "does *not* transform the speech engaged therein into government speech." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 171 (2d Cir. 2020). For example, in *Widmar*, student groups had to obtain permission to conduct meetings in university facilities, yet this Court nowhere suggested that such approval converted student meetings into government speech. 454 U.S. at 265. Instead, the Court held the university had "created a forum generally open for use by student groups." *Id.*

Similarly, in *Tam*, this Court squarely rejected the argument that federal registration of a trademark converts the mark into government speech. 137 S. Ct. at 1758. The Court explained that "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.*

To hold otherwise would dramatically expand the government-speech doctrine and eliminate basic First Amendment protections. For example, under the First Circuit's logic, a city could deny parade permits to groups whose viewpoints it finds objectionable. *But see Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (striking down ordinance that effectively increased permit fee for controversial speakers). And the federal government could deny copyright protection to books, movies, or other creative works that it deems offensive. *But see Tam*, 137 S. Ct. at 1760 (describing that result as "most worrisome").

Thus, the bare fact that the government imposes a permitting or approval requirement does not transform private expression into government speech. Instead, for expression to constitute government speech, the government generally must exercise "*direct control*" over the content of the messages at issue. *Walker*, 576 U.S. at 213 (emphasis added). That is, the government must affirmatively "select[]" the messages it wishes to convey when speaking to the public. *Summum*, 555 U.S. at 473.

For example, in *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 553-54 (2005), a federal statue created a committee to design advertising campaigns for beef. However, Congress and the Secretary of Agriculture provided guidance on the content of the ads;

agricultural officials attended meetings at which the ads were discussed; and the Secretary could approve or reject "every word used in every promotional campaign." *Id.* at 561. In those circumstances, the Court concluded the government "effectively controlled" the messages conveyed by the ads "from beginning to end." *Id.* at 560.

Similarly, in *Summum*, a city displayed certain monuments donated by private entities in a public park. 555 U.S. at 472. There was no evidence, however, that "the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors." *Id.* at 472-73. Rather, the City "selected those monuments that it want[ed] to display for the purpose of presenting the image of the City that it wishe[d] to project to all who frequent the Park." *Id.* at 473. In those circumstances, the Court concluded the City "effectively controlled" the messages. *Id.*

This Court also addressed the issue of control in *Walker*, 576 U.S. at 213-14, "which likely marks the outer bounds of the government-speech doctrine," *Tam*, 137 S. Ct. at 1760. There, the Court highlighted several facts showing that Texas exercised "direct control" over the messages conveyed on specialty license plates. 576 U.S. at 213. Texas had "sole control" over every detail of the plates, including design, typeface, and color. *Id.* Texas "actively exercised" that authority by rejecting "at least a dozen proposed designs." *Id.* And Texas placed the designs it accepted on "government-mandated, government-controlled, and government-issued IDs" that identified "TEXAS" as the issuer of the IDs. *Id.* at 214.

Here, in contrast, the City does not come close to exercising direct control over the messages conveyed by private-party flags. As noted, the City purports to review

each flag-raising request for consistency with the City's "message, policies, and practices." Pet. App. 149a. In reality, however, the City generally grants requests as a matter of course, without much discussion. Pet. App. 149a-150a. In fact, the City's "usual practice" is to not even "*see* a proposed flag before approving a flag raising." Pet. App. 150a (emphasis added). And the City has "never requested to review a flag or requested changes to a flag in connection with approval." Pet. App. 150a.

The City's track record confirms that it generally "will allow any event" to take place. Pet. App. 149a. It approved 284 flag-raising requests in a row without denying a single one, and the flags represented a broad array of national, cultural, political, and civic groups. Pet. App. 142a, 149a, 173a-187a. Thus, far from selecting its own messages, the City generally allows private speakers to communicate whatever messages they choose. This case therefore falls far beyond the "outer bounds of the government-speech doctrine," *Tam*, 137 S. Ct. at 1760.

The First Circuit concluded, however, that the City exercised direct control because all 284 prior requests concerned flags representing a "country, civic organization, or secular cause," rather than a religion. Pet. App. 26a. But that observation only demonstrates the City's lack of editorial control. Rather than selecting particular messages, the City broadly permits private speakers to communicate messages of their choosing, whether they be national, civic, or secular—as long as the messages are not religious. That is regulation of private speech, not government speech.

III. THIS CASE DOES NOT PRESENT AN ESTABLISHMENT CLAUSE VIOLATION.

Finally, *amici* note that the City denied Camp Constitution's request based on a concern that displaying a religious flag on the City Hall's flagpole would violate the Establishment Clause. Pet. App. 154a-55a. The City's concern was understandable given the proximity of the display to the City's seat of government. *See County of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 599 (1989). However, in the particular circumstances here, the City's concern was misplaced because the City designated its flagpole a forum for temporary displays by private parties.

When the government creates a public forum, it generally does not violate the Establishment Clause merely to allow religious speakers to use the forum on the same terms that apply to non-religious speakers. *See Good News Club*, 533 U.S. at 113; *Rosenberger*, 515 U.S. at 842-43; *Lamb's Chapel*; 508 U.S. at 395; *Widmar*, 454 U.S. at 271. "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 515 U.S. at 839. Neutrality is "respected, not offended" when the government simply grants religious and non-religious speakers equal access to a forum. *Id.*

Here, through its policies and practices, the City designated its flagpole as a public forum for temporary flag displays by private parties. In these circumstances, it would not offend the Establishment Clause to allow Camp Constitution to temporarily display a religious flag on the flagpole, just as scores of other groups have temporarily displayed non-religious flags. Such a fleeting display, as part of a series of other brief private displays,

would not express a message of religious favoritism or endorsement.

To be sure, in other circumstances, displaying a religious flag would raise serious Establishment Clause concerns. For example, if one or more religious groups "dominate[d]" the flagpole, limiting the ability of other groups to access it, the purpose of the forum could be thwarted, raising Establishment Clause problems. *See Widmar*, 454 U.S. at 275. Or, for instance, had the City created a public forum for the purpose of promoting religious messages, the Establishment Clause concerns would be obvious. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868 (2005). And it would raise such concerns if the City designed a forum to allow presentation of religious messages to a captive audience, like children in public schools. *See Santa Fe*, 530 U.S. at 311.

None of those circumstances, however, is present here. The City thus has no valid Establishment Clause interest in denying Camp Constitution's request to temporarily raise a flag on a flagpole that the City designated a public forum.

To the extent the City wishes to avoid any misperception that it is promoting religion—or indeed, any message expressed by a private flag—it has ample alternatives to accomplish that goal without offending the Constitution. For example, although a disclaimer alone would not cure an actual Establishment Clause violation, the City could post a sign next to its third flagpole, disclaiming any endorsement of the messages conveyed by private speakers. *See Capitol Square*, 515 U.S. at 7 (O'Connor, J., concurring) ("[A] disclaimer helps remove doubt about state approval of respondents' religious message.").

Alternatively, the City could adopt a policy similar to the one in *Summum*. 555 U.S. at 472-73. That is, rather than generally opening its flagpole to private speakers, the City could take suggestions from the public and select only those flags that "present[] the image of the City that it wishes to project." *Id.* at 473. What the City may not do, however, is what it did here: designate its flagpole a public forum for a wide range of private speakers and messages, and then deny access to an otherwise eligible private speaker based on the speaker's viewpoint. The Constitution squarely forbids that approach.

CONCLUSION

The judgment of the First Circuit should be reversed.

Respectfully submitted,

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