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 *AMICUS CURIAE* LIBERTY, LIFE AND LAW FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE* [1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the First Circuit.

LLLF is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits, including amicus curiae briefs in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is an easy case. Or at least it should have been. By its own admission, the City of Boston designated its City Hall Flag Poles as one of several *public forums* for private expression. But the First Circuit employed the *government speech* doctrine to justify its refusal to

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

permit the temporary display of a Christian flag by Camp Constitution, a *private* organization.

The first question is whether a flag displayed in Boston's designated forum should be characterized as government speech or private speech. That distinction is critical when *religious* speech is involved, as it is here. "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995), citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added).

This case easily falls within this Court's three-step framework to analyze restrictions of *private* speech on *government* property—first, determine whether the speech is protected by the First Amendment, then identify the forum (public or nonpublic), and finally, evaluate the reasons for exclusion. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). The key to the first step is characterizing the speech as either government or private speech. "Under our First Amendment cases, the distinction between government speech and private speech is critical." *Walker*, 576 U.S. at 221 (Alito, J., dissenting). The First Amendment restraints on government apply only to private speech—"government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). When the government itself is speaking, it may "select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009).

The First Circuit asked the right threshold question but got the wrong answer.

ARGUMENT

I. COURTS SHOULD BE WARY OF USING THE GOVERNMENT SPEECH DOCTRINE TO CHILL PRIVATE EXPRESSION.

The First Circuit's analysis hinges on the government speech doctrine. This developing doctrine should be carefully restrained to prevent the power and machinery of government from being used to stifle private expression or distort debate on matters of public concern.

Since America is a nation governed by consent of the people, "the democratic process . . . provides a check on government speech." *Walker*, 576 U.S. at 207; *see Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000); *Summum*, 555 U.S. at 467-468; *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2018). The government may "represent its citizens" by taking a position, promoting a program, or implementing a policy. *Walker*, 576 U.S. at 208. Government may directly fund its own message (e.g., *Johanns v. Livestock Mkgt. Ass'n*, 544 U.S. 550 (2005)) or "disburse[] public funds to private entities to convey [its] message." *Rosenberger*, 515 U.S. at 833 citing *Rust v. Sullivan*, 500 U.S. 173 (1991). Funding may be distributed to private speakers to assist indigent citizens, as in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

The line between government and private speech may not be easy to draw. Some overlap is inevitable,

raising constitutional concerns and "present[ing] heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace." R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001). In some contexts, government and private speech overlap or blend in a unique manner. Legislative prayer is a unique blend (Sect. III). License plates are perhaps "the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002).

There is no rigid formula for every context, although past cases suggest helpful criteria. As this Court cautioned in *Matal v. Tam*, "*Walker* . . . likely marks the outer bounds of the government-speech doctrine." 137 S. Ct. at 1760. *Matal* recounted the key criteria used in *Walker*, including the longstanding use of license plates to convey state messages, public identification of license plates with the government, and the state's manufacturing, ownership, design, and direct control over the plates. *Id*. These and other factors help shape the analysis.

II. FACTORS CONSIDERED IN OTHER CONTEXTS COMPEL THE CONCLUSION THAT THE FLAGS ARE PRIVATE SPEECH.

Characterization of speech is relevant in a wide range of contexts: monuments on public property (*Summum*); license plates (*Walker*); government-sponsored program (*Johanns*); government-funded legal services for the indigent

(*Velazquez*); government-funded childbirth (*Rust*); student groups (*Rosenberger*); trademark registration (*Matal*); parades (*Hurley*); libraries; museums; art displays; public television stations; competitive grant programs; legislative invocations. A careful look at various contexts reveals a wealth of factors to consider:

- History
- The government's role, purpose, intent, and funding
    - Government role - sponsor, patron, regulator, revenue raiser, or administrator
    - Government funds its own message
    - Government funds a favored viewpoint or solution to a problem
- Transmission of the message
    - Permanence v. portability
    - Ownership of the means of communication
    - Number of speakers and ability to accommodate
- Responsibility for the message
    - Editorial control
        - Who originates the message?
        - Who designs the message?
    - Who organizes and/or promotes the event?
    - What is the government's application process for participation?
    - Who is the literal speaker?
- How would observers understand the message?

The First Circuit considered only two contexts, the monuments in *Summum* and license plates in *Walker*, and extracted only three factors from those cases—history, an observer's perspective, and control of the message. *Shurtleff v. City of Boston*, 986 F.3d 78,87 (1st Cir. 2021). These factors overlap the four-factor license

plate test developed by the Eighth Circuit in *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (primary purpose, editorial control, literal speaker, ultimate responsibility). The First Circuit relied on *Walker*, which in turn relied in *Summum*. License plates (1) "long have communicated messages from the States"; (2) are reasonably interpreted "as conveying a message on the state's behalf"; and (3) convey messages "effectively controlled" by the state, which retains "final approval authority." *Shurtleff*, 986 F.3d at 88.

Courts should be cautious about importing legal tests developed for a unique context (e.g., license plates) into other dissimilar settings. License plates are not analogous to flags. The flags, unlike license plates, are not owned by the City and bear no seal of government approval. The application process is largely invisible to the general public. The state manufactures license plates, retains ownership, and places its name on them, although the vehicles are privately owned and operated, potentially implicating private speech concerns. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state could not require citizens to use their private property as a "mobile billboard" for the "State's ideological message"). The plates serve an important government function—vehicle identification. The private speakers' agreement with the message (if there is one) does not supersede the state's role. License plate schemes vary widely from state to state, or even within one state. Texas had three schemes, and only one of them was before this Court in *Walker*. 135 S. Ct. at 2244. Some, as in *Walker*, require a level of government editorial control that renders them

government speech. *See also Berger v. ACLU*, 135 S. Ct. 2886 (2015), vacating and remanding *ACLU v. Tata*, 742 F.3d 563 (4th Cir. 2014) (North Carolina "Choose Life" and other specialty license plates require legislative authorization). Individualized vanity plates—which were not before this Court in Walker—present compelling arguments for private speech. *See Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001).

A flag is neither a license plate nor a permanent monument. Both government entities and private organizations use flags to communicate messages. A person observing a private event would not reasonably attribute the message on a temporarily displayed flag to the City. The City has neither editorial control nor authority to approve or disapprove the message—its approval is focused strictly on administrative criteria such as scheduling conflicts.

A. History does not require that flags always be characterized as government speech.

There is no question that "governments have used flags throughout history to communicate messages and ideas." *Shurtleff*, 986 F.3d at 88. Flags identify nations, states, and other political divisions. But the government does not corner the market.

For First Amendment purposes, "speech" sweeps in a wide range of private expression, including artwork, motion pictures, photographs, music[2] —and flags. "The

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[2] *Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984) (photography); *Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) ("pictures, films,

Court for decades has recognized the communicative connotations of the use of flags." *Spence v. Wash.*, 418 U.S. 405, 410 (1974), citing *Stromberg v. California*, 283 U.S. 359 (1931). In *Spence*, where a privately owned flag was used to protest the Viet Nam War, communication occurred "not only [through] the flag but also the superimposed peace symbol." *Spence*, 418 U.S. at 410. A flag is a "primitive but effective way of communicating ideas" and "a short cut from mind to mind." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). *Walker* was about a flag design on a license plate. "The Confederate battle flag is a controversial symbol" that to some observers "symbolizes slavery, segregation, and hatred." 576 U.S. at 234 (Alito, J., dissenting).

History is not an isolated factor. The monuments in *Summum* were placed in a public park, a classic traditional public forum for private speech, but because of their permanence and other factors they were characterized as government speech. In *Walker*, this Court noted that "license plates are not traditional public forums for private speech." 576 U.S. at 214. But the Court was far from unanimous on this factor—or the opinion itself, which split 5 to 4. "The contrast between the history of public monuments, which have been used to convey government messages for

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paintings, drawings, engravings"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (motion pictures, music, dramatic works); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (art, music, literature); *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (books, plays, films, video games).

centuries, and the Texas license plate program could not be starker." *Id.* at 230 (Alito, J., dissenting). In the very different context of legislative invocations, history is a pivotal factor. Legislative prayer is "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). "[A]n unbroken practice...is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

B. The City has intentionally opened a public forum for diverse viewpoints and retained a strictly administrative role.

Government involvement is a key consideration—its purpose, intent, funding, and overall role. Here, the City's association with the private flags is tangential and its role is administrative. The City does not create, own, or control the private flags temporarily displayed in the forum it created. The City has no financial investment in the flags. The private owner creates the flag, applies to use the forum, retains ownership, and sponsors a private event. Flags convey a vast array of diverse messages. The City could not possibly endorse every message without "babbling prodigiously and incoherently." *Matal v. Tam*, 137 S. Ct. at 1758. The purpose of Boston's application process is purely administrative, e.g., to avoid scheduling conflicts.

Purpose. The government may facilitate or fund expression for many purposes—to raise revenue, identify vehicles, encourage an activity in the public interest, or facilitate diverse private expression. The government may fund its own program, as in *Johanns* (beef program implemented a "federal policy of promoting the marketing and consumption of beef and

beef products, using funds raised by an assessment"). 544 U.S. at 553.

In *Summum*, the City's purpose was to create a display about its local history. *Walker* involved a license plate program—a context where the state's purpose varies widely. *See, e.g., Lewis v. Wilson*, 253 F.3d at 1079 ("to give vent to the personality, and reveal the character or views of the plate's holder"); *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008) (raise revenue); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (to "allow private organizations to promote their messages" and "allow private individuals to support [them]").

The purpose of the government property may (or may not) implicate private expression. The purpose of a public airport terminal is "facilitation passenger air travel," not "the promotion of expression." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992). Government-issued license plates identify vehicles and raise revenue, but modern specialty plates may facilitate private speech.

Here, Boston created "an environment in the City where *everyone feels included*, . . . to *foster diversity* and build and strengthen connections among Boston's many communities." *Shurtleff*, 986 F.3d at 83 (emphasis added). The City's own language thus reveals that its purpose is "to encourage a diversity of views from private speakers" rather than to speak for itself. *Rosenberger*, 515 U.S. at 834.

Intent. Boston intentionally designated the "City Hall Flags Poles" as one of several public forums to

facilitate private events and expression. *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45-46 (1983); *Cornelius*, 473 U.S. at 802. Speakers cannot be excluded absent a compelling state interest—and never to suppress the speaker's viewpoint. *Perry*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 799. Even in a limited nonpublic forum, viewpoint discrimination, an "egregious form of content discrimination," is impermissible and restrictions reasonable in light of its purpose. *Rosenberger*, 515 U.S. at 829-830; *Cornelius*, 473 U.S. at 806; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). The government "must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. Boston's explicit intent contrasts with "Texas's policies and the nature of its license plates" in *Walker*, where this Court concluded the state did not intend to designate its specialty license plate program as a forum for private expression. *Walker*, 576 U.S. at 216.

Funding. The government's role may include funding. In *Johanns*, the government funded its own message and policy created by statute (The Beef Promotion and Research Act of 1985), which authorized raising funds through an assessment on cattle sales and importation. 554 U.S. at 553. In *Matal*, this Court cited an example from World War II, when "the Federal Government produced and distributed millions of posters to promote the war effort" but was not required to produce and distribute posters discouraging that effort. 137 S. Ct. at 1758.

When the government sponsors and funds its own message, it may use private participants. *Leake v. Drinkard*, 2021 U.S. App. LEXIS 29323, *14 (11th Cir. 2021) (annual parade). But private parade organizers have comparable rights to craft a message, as in *Hurley*, 515 U.S. 557. The government may selectively fund one viewpoint "dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Government may provide funds to encourage a diversity of views from private speakers, but must not engage in viewpoint discrimination. *Rosenberger*, 515 U.S. at 834; *see Velazquez*, 531 U.S. 533 (purpose was to help indigent people by facilitating private speech, not to promote a government message).

Here, Boston is not funding its own message or a favored viewpoint. On the contrary, the City has opened a wide door for diverse private expression.

Role. There are many roles the government may assume, with varying degrees of discretion. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (patron of the arts with discretion to award grants); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (public television); *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194 (2003) (library books); *Summum*, 555 U.S. 460 (compilation of monuments for historical display). In these cases, the government retained editorial control over the selections without endorsing the private message embedded in any particular item. Here, however, Boston has no editorial control over the message a private entity conveys

through its flag and is not selecting items as part of a collection. Public monuments, libraries, and television stations are not analogous.

Matal cautions against "a huge and dangerous extension of the government speech doctrine" to contexts where the government has a solely administrative role, as it did in that case (registration of trademarks). 137 S. Ct. at 1760. This doctrine is "susceptible to dangerous misuse" because "government could silence or muffle the expression of disfavored viewpoints." *Id.* at 1758. Therefore, this Court "must exercise great caution before extending our government-speech precedents." *Id.*

As Petitioners correctly contended, "the City's permitting process for the raising of third-party flags vests in government officials unbridled discretion to approve and deny protected speech." *Shurtleff*, 986 F.3d at 85. In cases involving nonpublic or limited public forums, a policy that does not provide sufficient criteria to prevent viewpoint discrimination generally will not survive constitutional scrutiny. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (a Sign Code compliance manager who disliked the Church's teachings could potentially deploy the Code to make it more difficult for the Church to advertise the location of its services).

In *Matal*, the purpose of trademark registration was not expressive but administrative, although a particular mark could be created for expressive purposes. The line between government and private speech was not blurred. The same is true here. The City opened a wide door for private expression,

reserving a purely administrative role, but then arbitrarily slammed the door in the face of an applicant who submitted a flag with religious content. The result is blatant viewpoint discrimination.

C. The messages are transmitted by means consistent with private speech.

Permanence. Permanent means of transmission on government property suggests government speech, because it is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Shurtleff*, 986 F.3d at 89, quoting *Summum*, 555 U.S. at 471. "Speakers, no matter how long-winded, eventually come to the end of their remarks . . . monuments, however, endure." *Id*. at 479. Objects that are permanent or not easily moved generally do not qualify as protected private speech. *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (no right to erect newsstands on a public sidewalk); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341, 346-348 (7th Cir. 1990) (no right to display freestanding Chanukah menorah in public area of airport).

But even if "the *Walker* Court explicitly disavowed any suggestion that permanence is a prerequisite for finding government speech" (*Shurtleff*, 986 F.3d at 90), private speech on public property is typically transient, e.g., oral communication or literature distribution. *Summum*, 555 U.S. at 464. The use of portable, temporary, non-obstructive props is often entitled to First Amendment rights on public property. *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005)

(balloons); *Pinette*, 515 U.S. at 761 (cross erected for 16 days on public property that had been opened up for similar temporary displays).

Although a flag could remain in place indefinitely, it is not a permanent structure. It is portable, easily moved after being temporary displayed. Flags are much more analogous to transitory communication and portable props than the permanent monuments in *Summum*. This factor is a strong indication that the flags are private speech.

Ownership of the means of communication. In *Summum*, the City took ownership of [the donated] monument" and Texas owned the license plates in *Walker*. *Shurtleff*, 786 F.3d at 91. *See also Wells v. City & County of Denver*, 257 F.3d 1132, 1139 (10th Cir. 2001) (city owned and maintained holiday display). In this case, private organizations own the flags they display at their events, and Boston "does not require [them] to surrender ownership . . . nor does it require that a flag bear any particular design or logo." *Shurtleff*, 786 F.3d at 91. This factor cuts in favor of private speech.

Ability to accommodate many speakers—time and space limitations. A forum for private expression is commonly open to a large number of speakers, but "public parks can accommodate only a limited number of permanent monuments." *Summum*, 555 U.S. at 478. The City of Boston can accommodate many private groups who hold private events and briefly display their own flags.

Spatial limitations "played a prominent part" in this Court's *Summum* analysis. *Walker*, 576 U.S. at 228 (Alito, J., dissenting). Large structures "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Summum*, 555 U.S. at 479. "[M]onuments can last for centuries and are difficult to move," unlike "small, light, mobile" license plates. *Walker*, 576 U.S. at 232 (Alito, J., dissenting). "[A] State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial." *Id*. at 214.

Boston can accommodate many private organizations who hold flag raising events—not simultaneously but scheduled in advance for brief periods of time. The City explicitly designated it as one of several public forums and extended an open invitation to private speakers. The lack of space and time limitations drive the conclusion that Boston's "City Hall Flag Poles" is a forum for private speech.

D. Private speakers bear ultimate responsibility for the messages conveyed by the flags.

Responsibility for the message requires a broad examination of editorial control. Who originates the message? *See, e.g., Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) ("government determines an overarching message and retains power to approve every word disseminated"). Who designs the message? If an event is involved, who organizes and promotes it? What is the government's application process for participation? Who is the literal

speaker? The Fourth Circuit reasoned that *Johanns* merely "distilled" the Eighth Circuit's four-factor test for license plate cases by focusing on "the government's establishment of the message" and its "effective control over the content and dissemination of the message." *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008), citing *Johanns*, 544 U.S. at 560-562 (emphasis added). These are certainly key factors.

Origin and design. In *Walker*, Texas exercised final authority over each specialty plate. This Court concluded that private parties' participation in "the design and propagation" of the messages "d[id] not extinguish the governmental nature of the message." *Walker*, 576 U.S. at 217.

In *Summum*, the City crafted a message about its pioneer history, selecting monuments based on historical relevance and the donor's ties to the community. The display, comprised of diverse elements, resembled a museum or library; the City did not parrot the words on the monuments. The final display was analogous to a collective whole under copyright law, where the works of several authors are collected and a new work is created. 17 USC 201(c).

Boston has no role in the origin or design of the privately owned flags displayed in its forum. It does not select specific flags to include in a compilation that conveys a single message. Its only "message" is all about inclusiveness and diversity—a message that is undercut by its selective rejection of Camp Constitution's flag merely because it is described as a Christian flag.

Literal speaker. This factor is tricky with license plates. Private vehicle owners display the message, so private speech concerns are implicated, but the state owns the plates. *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) ("the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker"); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) ("a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate"); *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388, 393 (5th Cir. 2014) ("individual driving the car"). *Cf. Choose Life of Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008) (license plates are "reasonably viewed as having the State's stamp of approval . . . owned and issued by the State"); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (2002) ("Virginia continues to own the special plates").

The license plate factors are "instructive but neither exhaustive nor always uniformly applicable." *ACLU v. Tata*, 742 F.3d at 569. These cases are readily distinguished from *Summum*. In *Summum*, the City was "speaking" through the display although private donors created the messages on the monuments. When a monument is donated to a city, the government assumes legal title, possession, and control. and therefore ultimate responsibility. Like a library or museum, the City does not adopt every message on every monument.

Control. In *Summum*, the City's control was evident in its criteria for approval of monuments, including historical significance and the donor organization's connection to the community. *Summum*, 555 U.S. at 466.

License plate schemes vary widely. In *Roach*, the Missouri legislature could pass a bill creating a plate or a private organization could submit an application proposing one. *Roach*, 560 F.3d at 862. Missouri's process was found constitutionally deficient because it granted officials unbridled discretion to decline an application. *Id.* at 870. In Arizona, a statute provided that "[t]he [C]ommission *shall* authorize a special organization plate if the organization" met certain minimal general requirements, such as serving the community. *Stanton*, 515 F.3d at 961. The Texas statutory scheme (*Walker*) included a process that invited public comment, but state law provided that Texas retained "sole control over the design, typeface, color, and alphanumeric pattern for all license plates," including its specialty plates. *Walker*, 576 U.S. at 213.

A recent Eleventh Circuit case illustrates editorial control in the context of an annual "Old Soldiers" parade organized and funded by a city. Participation required an application that "expressly required applicants to describe the kinds of messages they intended to convey at the Parade." *Leake*, 2021 U.S. App. LEXIS 29323 at *15. The City exercised control "as the Parade's organizer by excluding organizations with whose speech the City disagreed." *Id.* at 15-16; *see Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547

U.S. 47, 64 (2006) ("[A] parade organizer's choice of parade contingents . . . is . . . inherently expressive.").

The First Circuit falls short in its efforts to describe Boston's alleged control over the messages disseminated by the private speakers it has invited into what it has characterized as a *public forum*. As detailed in the Petition for Certiorari, the City has expressed its intent to create a broadly inclusive environment where "everyone feels included" and is "treated with respect." Pet. 5-6; App. 143a. This is apparently "the City's desired image." *See Shurtleff*, 986 F.3d at 92 ("The record, taken as a whole, plainly shows a city conscious of the message that it flies on the third flagpole and an accompanying selectivity to tailor that message *to the City's desired image*." (emphasis added)) The City's policies enumerate content-neutral reasons for denial, such as scheduling conflicts, illegality, danger to health and safety, procedural defects—contrary to the First Circuit's assertion that the procedures are designed to ensure "that such flags display approvable messages." *Shurtleff*, 986 F.3d at 90. A new policy, written *after* the City denied Camp Constitution's request, leaves final approval decisions to "the City's sole and complete discretion" (Pet. 20), raising serious concerns about unbridled discretion.

The City contends that its disapproval of the Camp Constitution flag "allows it more appropriately to celebrate the diversity and varied communities within Boston." *Shurtleff*, 986 F.3d at 94. It is strange indeed that exclusion of a particular community—indeed, a religious one—would be called a celebration of

diversity. The City essentially says it disapproves of Christianity. That is anathema to the First Amendment.

E. Observers would readily recognize the flags as private speech.

The "reasonable observer" would no doubt understand *both* the City's essential role in scheduling private flag raising events *and* the private organization's selection of a particular flag. But the First Circuit concludes that both close and faraway observers would attribute the private flags' messages to the City. The close observer would "see a city employee replace the city flag with a third-party flag" whereas the "faraway observer . . . would see those three flags waiving in unison, side-by-side, from matching flagpoles." *Shurtleff*, 986 F.3d at 88. The First Circuit also posits a "symbolic unity of the three flags." *Id*. But a reasonably informed observer would understand the flags in terms of the City's broad goals of inclusion and *diversity*—not "symbolic *unity*." Such an observer would also be familiar with the application process, where the government retains a solely administrative role using content-neutral factors.

When private speech occurs in a context where the government is involved, there is a risk of mixed messages. In *Summum*, the Fraternal Order of the Eagles, a private organization, was responsible for the message on the Ten Commandments monument it donated—but the final compilation "spoke" on behalf of Pleasant Grove City. In a license plate case, the Seventh Circuit asked whether, "[u]nder all the circumstances, would a reasonable person consider the

speaker to be the government or a private party?" *Choose Life of Ill.*, 547 F.3d at 865. To answer that question, the Court proposed three inquiries reminiscent of the Eighth Circuit's four-factor test: "the degree to which the message *originates* with the government, the degree to which the government exercises *editorial control* over the message, and whether the government or a private party *communicates* the message." *Id* (emphasis added). As discussed in Sect. IID, the flags originate with private speakers who retain editorial control and communicate through events they privately sponsor and fund. This case contrasts with *Leake*, where "observers would interpret a parade *promoted, organized, and funded by the government*" as a government message. 2021 U.S. App. LEXIS 29323, *14 (emphasis added). The private flag raising events in Boston's public forum are "promoted, organized, and funded" by private organizations.

III. THE ESTABLISHMENT CLAUSE CANNOT SALVAGE THE CITY'S POLICY. THIS COURT MUST ZEALOUSLY GUARD THE RIGHT TO RELIGIOUS SPEECH.

This Court's decision in *Summum*, which hinged on the distinction between government and private speech, was litigated "in the shadow" of the Establishment Clause. *Summum*, 555 U.S. at 482 (Scalia, J., concurring); *see id.* at 486 (Souter, J., concurring) ("litigated . . . with one eye on the Establishment Clause"). The Establishment Clause was not expressly at issue but lurked beneath the surface and sparked comments from several concurring

Justices. Monuments on government land are presumably government speech, but in certain contexts—"[s]ectarian identifications on markers in Arlington Cemetery come to mind"—there is a common understanding that a display with religious symbolism does not represent the government's chosen view. *Id*. at 487 (Souter, J., concurring). "And to recognize that is to forgo any categorical rule at this point." *Id*. "The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire." *Id*. at 482 (Scalia, J., concurring).

The Religion Clauses are complementary sides of the same coin. Together they form a shield guarding religious liberty from government intrusion. A more principled approach would focus on whether liberty is threatened by the challenged practice. The City advances a policy that intentionally stifles *religious speech*, which is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760 (internal citations omitted).

A temporary flag display does not bind the conscience or coerce support for religion. "[I]t is important to distinguish between governmental authorization . . . and governmental *advocacy*." Emily Fitch, *An Inconsistent Truth: The Various Establishment Clause Tests As Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols*

and Their Applicability Today, 34 N. Ill. U. L. Rev. 431, 455 (2014) (emphasis added). A temporary, passive flag display creates no obligation. Objectors are free to disregard it but have no iron-clad right to be free of all exposure to America's religious heritage.

The City does not advocate its own message, but merely accommodates a transitory message by authorizing a private group to briefly use its property. The government may acknowledge or accommodate religion without transgressing the Establishment Clause. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) (religious employers are exempt from religious discrimination law); *Walz*, 397 U.S. at 673 (church property tax exemption); *Zorach v. Clauson*, 343 U.S. 306, 308 (1952) (public school students allowed time off-campus for religious instruction). The government sometimes *must* accommodate religious belief and practice, and the Establishment Clause is no excuse for the failure to do so. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (university could not exclude religious student group; its "equal access" policy was not incompatible with Establishment Clause); *Rosenberger*, 515 U.S. at 839 (religious speakers must be included in neutral, "broad-reaching government programs").

A long line of unbroken authority in this Court affirms that the Constitution "mandates accommodation" and "forbids hostility" toward religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Officials must scrupulously avoid hostility toward religion or discrimination against religious viewpoints. *Church of*

Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 532 (1995) ("The First Amendment forbids an official purpose to disapprove of a particular religion, or of religion in general."); *Lamb's Chapel*, 508 U.S. at 394 (expression could not be excluded because it dealt with a subject from a religious standpoint). In spite of other distinctions and nuances, landmark Establishment Clauses cases over the past sixty years are consistent on this point: *Salazar v. Buono*, 559 U.S. 700, 719 (2010) ("The Constitution . . . leaves room to accommodate divergent values within a constitutionally permissible framework.") "Benevolent neutrality" is what the Constitution requires. *Walz*, 397 U.S. at 669. There is nothing "benevolent" about Boston's actions. The City's policy, conveniently reduced to writing only *after* refusing a religious flag, "bristles with hostility" toward religion. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

The First Circuit misunderstands this Court's precedents about hostility, adopting instead the mistaken notion that government "neutrality" demands not only neutrality between one religion and another, but "between religion and nonreligion." *Shurtleff*, 986 F.3d at 94. The First Amendment itself rejects this counterfeit "neutrality"—it respects all views but protects religion. The Religion Clauses were "written by the descendants of people who had come to this land precisely so that they could practice their religion freely." *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005). "Despite Justice Stevens' recitation of occasional language to the contrary . . . we have not, and do not, adhere to the principle that the

Establishment Clause bars any and all governmental preference for religion over irreligion" *Van Orden v. Perry*, 545 U.S. 677, 684 n.3 (2005). The First Amendment grants heightened protection to *religious* faith, "too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). The corollary is not true in every respect. Nonbelievers are entitled to deference, but the Religion Clauses protect *religion*. *Id*. at 589.

Legislative Prayer. The Constitution restricts government ties to religion while guarding private religious expression. These complementary concepts intersect in legislative prayer, a time-honored tradition this Court affirmed in *Marsh*, based on historical practice. In this unique context, *private* citizens pray in a *government* setting. Long before the government speech doctrine emerged, this Court described legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. Like the legislative prayer cases, the City Flag Poles forum implicates the government-private speech dichotomy in a context that involves religious expression.

Prior to this Court's ruling in *Town of Greece*, lower courts created a confusing "shorthand" distinguishing sectarian and non-sectarian references that would either thrust courts into forbidden theological territory or squelch the liberties of citizens who volunteer to pray for their governments. Such a classic Catch-22 violates both Establishment Clause and Free Speech principles. The government becomes enmeshed in religion if the prayers are government speech but risks

viewpoint discrimination if they are private speech. The Fourth Circuit plunged government into a theological abyss by limiting legislative invocations to "nonsectarian prayers." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 342 (4th Cir. 2011). The Second Circuit left municipalities in a twilight zone of confusion where—despite their best intentions and efforts to be inclusive—they would "still have trouble preventing the appearance of religious affiliation." *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012).

This Court cleared much of the confusion by rejecting "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard." *Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014). Such a nonsectarian mandate "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech." *Id.* at 581. Moreover, modern prayer policies have become more inclusive, using a neutral selection process to invite a broad spectrum of *private* speakers to pray according to conscience.

Like the legislature prayer cases, this case implicates private *religious* speech in a context where the government is involved. The City—and the First Circuit—clearly rejected Camp Constitution's flag because of its religious description in the application, even though "some of the flags that the City had raised contained religious imagery," e.g., the Turkish and Portuguese flags. *Shurtleff*, 986 F.3d at 84. The City explained its denial by referencing the Establishment Clause (*id.*), but as with the legislative invocations and other cases that acknowledge or accommodate religion,

that explanation falls flat and is constitutionally unacceptable. Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. This Court must zealously guard their right to religious speech.

CONCLUSION

Amicus curiae urges this court to reverse the First Circuit ruling.

Respectfully submitted,

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amicus Curiae