No. 18-1898

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HAROLD SHURTLEFF, *et. al,*

Plaintiffs-Appellants,

v.

CITY OF BOSTON, *et al.,*

Defendants-Appellees.

On Appeal from the United State District Court
for the District of Massachusetts
No. 1:18-cv-11417-DJC

BRIEF OF *AMICUS CURIAE* PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Pacific Legal Foundation states that it has no parent corporation and that there is no publicly held corporation that holds 10% or more of its membership or ownership interests.

CERTIFICATION PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Pacific Legal Foundation certifies (a) that no party's counsel authored the brief in whole or in part, (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) that no person other than *amicus*, its members, and its counsel, contributed money that was intended to fund preparing or submitting the brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), and with consent of all parties, Pacific Legal Foundation (PLF) files this amicus curiae brief in support of Plaintiffs-Appellants Harold Shurtleff and Camp Constitution.

PLF was founded in 1973 to advance the principles of individual rights and limited government. PLF has long defended the right of freedom of speech. PLF has a particular interest in this case because PLF attorneys were counsel of record in the Supreme Court's recent decision in *Minnesota Voters Alliance (MVA) v. Mansky*, 138 S. Ct. 1876 (2018) (striking down Minnesota's "political" apparel ban in polling

places). PLF urges this Court to apply the rationale and holding of *MVA* to conclude that Boston's policy of excluding "non-secular" flags is arbitrary and results in impermissible and haphazard implementation, in violation of the First Amendment. PLF also argues that allowing Camp Constitution to fly the Christian flag would be private rather than governmental speech and that, even if the flagpole is a limited public forum, the exclusion of religious speech from a forum designed to celebrate the city's cultural diversity is both viewpoint-based and unreasonable.

INTRODUCTION AND SUMMARY OF ARGUMENT

The residents of Boston come from a diverse array of cultural, ethnic, social, and religious backgrounds. To help celebrate and commemorate the City's diversity, Boston allows private groups to fly flags on one of the City's flagpoles. The City has allowed a wide variety of groups to use the flagpole. But the City has arbitrarily determined that flags commemorating the religious heritage of its residents cannot be flown. That policy violates First Amendment's guarantee of freedom of speech.

The City claims that flags hanging on the flagpole are governmental speech and that it can therefore exclude whatever flags it wants for whatever reason. But the private nature of the flags and the lack of government imprimatur or endorsement are consistent with private rather than governmental expression.

In the district court below, the parties disagreed strongly as to whether the flagpole was a designated public forum open to all expression, or a limited public

forum set apart for certain distinct purposes. But this Court need not decide what type of forum is in question here. Regardless of the forum, the Constitution limits the types of restrictions that the City can impose. First, the City's restrictions must not be arbitrary or subject to inconsistent application. Determining whether flags contain "non-secular" symbols is an exercise in line-drawing futility and the City has already shown that it cannot consistently enforce that standard. Second, any restriction on speech must be consistent with the purposes of the forum and viewpoint neutral. It is unreasonable to exclude flags honoring religious groups from a forum designed to celebrate the diverse heritage of the City. The desire to skirt away from the boundaries of the Establishment Clause can provide no cover for the City's actions. And by excluding celebrations of religion and only religion, the City has engaged in viewpoint discrimination. This Court should reverse the district court's ruling and let freedom fly in Boston.

ARGUMENT

I

THE FLAGPOLE CEREMONY IS NOT GOVERNMENTAL SPEECH

The government speech doctrine is an "important—indeed, essential" carve-out to the ordinary limits of the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). "[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing." *Id.* at 1757. However, the government speech doctrine

is also "susceptible to dangerous misuse." *Id.* at 1758. "If 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.* The Supreme Court has therefore emphasized that courts "must exercise great caution before extending … government-speech precedents." *Id.* The district court's decision improperly extended government speech precedents in a way that gives Boston great leeway to "silence or muffle the expression of disfavored viewpoints." *Id.*

The Supreme Court set out the characteristics of governmental speech in *Pleasant Grove v. Summum*, 555 U.S. 555, 470 (2009), focusing on the permanent duration of the monument display coupled with the limited availability of space and the inability to accommodate all that wanted to utilize the space. The Court fleshed out the doctrine in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

In *Walker*, the Supreme Court emphasized three factors in reaching its conclusion that vanity plates in Texas were regulable government speech: First, license plates had long been used as a vehicle to "communicate[] messages from the States." *Id.* at 2248. Second, Texas's license plate designs were closely associated with the State. The plate itself was "a government article serving the governmental purposes of vehicle registration and identification," and regardless of the design the

plate always bore the name of the State of Texas. *Id.* The State maintained "direct control over the messages conveyed on its specialty plates" and had in fact "actively exercised this authority" by rejecting dozens of designs. *Id.* Finally, the Court emphasized that Texas had not intended for its license plate program to serve as any kind of a public forum and therefore had not "intentionally open[ed] a nontraditional forum for public discourse." *Id.* at 2250.

Boston's flagpole is far beyond the "outer bounds of the government-speech doctrine" that the Supreme Court has established, *Matal*, 137 S. Ct. at 1760. Here, there is no "unmistakabl[e] sign[al]" that the privately owned flags flying on the flagpole are governmental speech. *Pleasant Grove*, 555 U.S. at 474. To the contrary, numerous factors suggest that the flags retain their private character.

First, and most tellingly, the City's application for use of the flagpole plaza refers to the flagpole as a public forum, anticipating a wide array of speech. JA 48. *See Ridley v. Massachusetts Bay Transp. Auth. (MBTA)*, 390 F.3d 65, 77 (1st Cir. 2004) (crediting the MBTA's own expression of the type of forum that it had created). The City invites "[c]ommunity groups [to] ask permission to fly their country's flag on days of remembrance." JA 54. By calling the flagpole a public forum and emphasizing that community groups are invited to fly foreign flags on the flagpole, the City plainly views the messages on private flags as non-governmental in nature.

Second, there is no evidence that the City exercises "direct control" over the messages "conveyed" by the flags. Boston invites the public to host events on the plaza, and permits a wide variety of events, excluding only illegal, unlawful, or hazardous events. The City "seeks to accommodate *all* applicants seeking to take advantage of the City of Boston's public forums" including the flagpole. JA 48 (emphasis added). The City lists certain reasons that a request to use the flagpole plaza and other public forums may be denied—none of which deal with the content of the speech. *Id.* Moreover, the City exercises no control over the design of the flags that are flown or the messages used to promote the flag ceremony. *See Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) (Adopt-a-Highway program signs were not governmental speech because they showed minimal "editorial discretion" or "creativity" on the part of the state.). Nor does Boston subject the proposed flags to public comment or a public vote as Texas did in *Walker*. 135 S. Ct. at 2245. Thus, the City has not exercised "such tight control that the personalized messages become government speech." *Mitchell v. Maryland Motor Vehicle Admin.*, 450 Md. 282, 295 (2016).

Indeed, there is no reason to think that the City screens the message of the flags any more extensively than "any state or local government entity that decides whether to grant permits to use any public lands." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018). Given this limited review, a flag does not send any

message of governmental endorsement or acceptance. For instance, no reasonable observer would conclude that the City endorsed the governmental system or ideology of Cuba by allowing a Cuban flag to be flown. JA 13. Similarly, allowing the Christian flag to fly would not send a message that the City has endorsed Christianity. *See Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1083 (9th Cir. 2012) (city's policy of leasing public lands to a variety of nonprofits, including religious ones, meant that no "reasonable observer … [would] conclude that the City was engaged in religious indoctrination, or was defining aid recipients by reference to religion").

Third, the circumstances of a flag flying on the flagpole would not lead to the conclusion of governmental endorsement or ratification. Unlike the license plates in *Walker*, which retained their official status and bore the imprimatur of the State of Texas regardless of their design, *Walker*, 135 S. Ct. at 2248, a flag display lacks any such imprimatur. While City officials may choose to be present at some flag raising events, their presence is not a prerequisite. Indeed, when the City does wish to convey its official endorsement of public events, the City gives the speakers a podium with its logo, makes an official appearance, and promotes the event on its website. *See* JA 63 ¶ 12 ("In many cases, requesters have asked for a podium displaying the City seal to be used by speakers at flag-raising events. Such events have also featured City officials as attendees and speakers."). This means that when

the City wants to endorse a message, it does so explicitly. Otherwise, the flagpole ceremony does not convey governmental endorsement. Camp Constitution never requested such "additional assistance" which could lead to the event being "perceived by the public as government speech," and therefore allowing Camp Constitution to fly the Christian flag would not carry a message of endorsement. *See Wandering Dago*, 879 F.3d at 36.

Fourth, because flags are displayed for only a limited period of time, usually for the length of a public event or cultural celebration, ordinary time, place, and manner restrictions are adequate to regulate the flow of flags on the flagpole. It would not be burdensome to allocate use of the flagpole on a content-neutral, first-come-first-serve basis. Indeed, that is what the City does for use of public fora such as City Hall Plaza. Just like the temporary display in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (permitting religious and other displays in Columbus, Ohio's Capitol Square), every group that wanted a chance to have a temporary flag display on the city flagpole could have its turn.

All of these factors support the conclusion that the opportunity to fly a flag on the plaza flagpole is private rather than governmental speech. Rather than giving sufficient weight to these factors, the district court relied on its interpretation of Camp Constitution's subjective intent. App. 9–10. It held that Camp Constitution's unwillingness to fly its flag separately from the flagpole indicates that it sees the

opportunity for the flag ceremony as governmental speech. *Id*. "This is dangerous reasoning." *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting). There is a "big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech." *Id.* Camp Constitution opposes "governmental … condemnation[] of private speech," *id*., and it therefore refused to accept second-class treatment by the City. It should not be penalized for standing up for its right to equal treatment. *See Adair v. England*, 183 F. Supp. 2d 31, 66 (D.D.C. 2002) (Navy could not regulate the speech of certain chaplains while not regulating the speech of others without "communicat[ing] a message that some religious speech is favored over others."). The point of Camp Constitution's lawsuit is to ensure that the State cannot "create[] a mode of expression and then place[] a monopoly on that expression by discriminating" against organizations that can utilize that mode of expression. Jessica Pagano, *The Elusive Meaning of Government Speech*, 69 Ala. L. Rev. 997, 1023 (2018). Furthermore, Camp Constitution did not request official endorsement of the event or the presence of state officials which cuts against the district court's account of Camp Constitution's motives.

Just as the flagpole is distinguishable from the types of speech that the Supreme Court has labelled as governmental speech, it is also distinguishable from what this Court and its sister circuits have found to be governmental. For instance,

in *Sutliffe v. Epping School Dist.*, 584 F.3d 314, 329 (1st Cir. 2009), this Court found that links placed on a government website by governmental officials constituted governmental speech. The Court emphasized that the town "controlled the content of [the] message by exercising final approval authority over the [ ] selection of the hyperlinks on the website." *Id.* at 331 (quotation marks omitted). Boston does not exercise that kind of close control over the flags displayed or the messages that are conveyed.

The Second Circuit's decision in *United Veterans Mem'l & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle*, 615 F. App'x 693, 694 (2d Cir. 2015), is similarly distinguishable. There, the City of New Rochelle delegated to a single group the authority to fly the American flag on a flagpole at the New Rochelle Armory. When the group decided to fly the Gadsden flag instead, the City quickly directed the group to remove it. The City exercised close control over the flagpole by allowing only a single group access to it and immediately stepping in when the group strayed from its past, uncontroversial, conduct. The district court thus correctly determined that "reasonable observers would have perceived the Armory's Gadsden Flag to be government speech." *United Veterans Mem'l & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 475 (S.D.N.Y. 2014), *aff'd*, 615 F. App'x 693 (2d Cir. 2015). Other cases that the City cited below are similarly distinguishable. *See Mech v. Sch. Bd. of Palm Beach Cty.*,

Fla., 806 F.3d 1070, 1074 (11th Cir. 2015) (school board not required to open up advertising space when the ads featured an express message of school endorsement); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (United States and POW/MIA flags flown at Arlington National Cemetery were governmental speech and the government was not required to also fly the Confederate flag or allow private groups to do so.). None of these cases involved a forum that the government had effectively opened up on a neutral basis. Indeed, these cases just show how far the district court strayed from the "outer bounds of the government-speech doctrine." *Matal*, 137 S. Ct. at 1760. The district court erred in finding that the flagpole ceremony was governmental speech rather than private speech.

II

BOSTON'S FLAG POLICY IS ARBITRARY AND UNREASONABLY VAGUE

The parties in this case dispute whether the flagpole is a designated public forum or a limited public forum. Either way, the City's policy should be invalidated as unduly vague and subject to haphazard implementation. *MVA*, 138 S. Ct. at 1888.

Boston claims that it has an unwritten policy that excludes the display of "non-secular flags." JA 33. Assuming this is true, the City sets no criteria for determining what qualifies as "secular," and the array of approved flags shows that the City's

application of its policy has been arbitrary and haphazard. Such an inconsistently applied policy cannot survive constitutional scrutiny because the "opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (quotation marks omitted). Regardless of the type of forum, the City's "policies and practices governing access … must not be arbitrary, capricious, or invidious." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

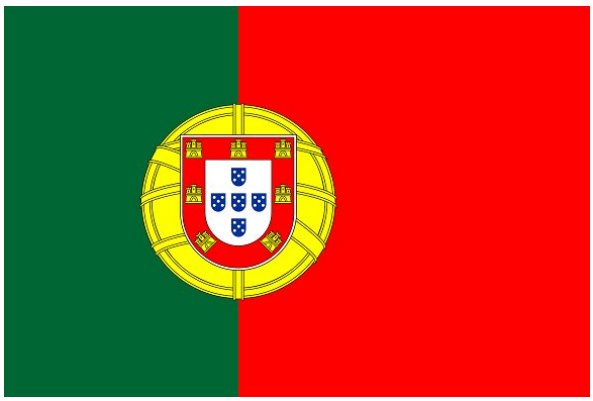
The Supreme Court recently invalidated a similarly open-ended speech restriction in a non-public forum—a polling place—in *MVA*, 138 S. Ct. at 1885, 1888.[1] The Supreme Court held that Minnesota's political apparel ban violated the First Amendment because it was subject to "haphazard interpretations" and the State lacked "some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. Minnesota's interpretation of its law also created a "confusing

[1] In *Ridley*, this Court noted that most of the cases dealing with excessive governmental discretion to regulate speech dealt with "speech in traditional public fora." *Ridley*, 390 F.3d at 94. It concluded that "a grant of discretion to exercise judgment in a non-public forum" must be reviewed under the more deferential non-public forum standard. *MVA*, a case about speech restrictions in a non-public forum, compels reconsideration of that portion of *Ridley*. *Id*. at 95. The polling place in *MVA* was a non-public forum and yet the Supreme Court rigorously reviewed evidence of arbitrariness in the enforcement of the policy to determine whether the law could be "reasonable" in its enforcement. *See infra* at 17–19.

line-drawing problem" requiring "an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot," and inevitably resulting in "erratic application." *Id.* at 1881. In particular, an election judge would have been required to determine which slogans, images, or organizations were "political" in nature. The Court emphasized that the lack of a "discernible approach" doomed Minnesota's arbitrary and vague policy. *Id.*

MVA controls the outcome of this case regardless of the type of forum. Just as Minnesota's attempt to ban all "political" images created a "confusing line-drawing problem" and resulted in "haphazard interpretations," so too does Boston's attempt to ban "non-secular symbols."

Consider some of the flags that the City approved to fly on the flagpole: The City has flown the flag of Portugal even while including on its website a statement by the sponsors of the event that identified expressly religious symbols in the flag as the five wounds of Christ and the thirty pieces of silver that Judas Iscariot received for betraying Christ. JA 49–50.



Flag of the Portuguese Republic

Can a flag with such overt religious symbolism be "secular?"

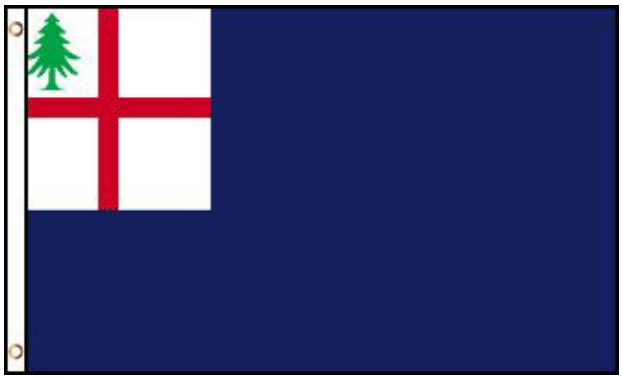
Similarly, for the past two years the City has allowed the Turkish flag to fly on the flagpole even though that flag prominently features the star and crescent—well known symbols of Islam.[2] According to the City's website, that same flag is scheduled to be flown again in October 2019. City of Boston, 2019 Boston City Hall Plaza Flag-Raising Dates.[3]

Flag of the Republic of Turkey

The flagpole annually flies the Bunker Hill Association flag which contains a large red cross in the upper left hand corner of the flag in a fashion substantially similar to the Christian flag.

[2] City Hall Plaza, Turkish Flag Raising Ceremony, Oct. 29, 2017, http://cityhallplazaboston.com/event/turkish-flag-raising-ceremony/ (last visited Jan. 24, 2019); Boston Turkish Festival – Colors of Anatolia, Festival Program, http://www.bostonturkishfestival.org/index.htm (last visited Jan. 24, 2019).

[3] https://www.boston.gov/departments/property-management/boston-city-hall-plaza-flag-raising-dates (last visited Feb. 4, 2019).



Flag of the Bunker Hill Association

Christian Flag

How can one large red cross on a white and blue background be deemed "secular" (Bunker Hill Association) while another large red cross on a blue and white background is "non-secular" (Christian flag)? How can the star and crescent on a flag be acceptable but the cross be unacceptable?

Furthermore, when there are no requests to utilize the flag pole, the City of Boston flies its own flag that contains an expressly religious and non-secular motto translated as "[a]s to our fathers may God be to us."

Flag of the City of Boston

How can Boston condemn flags that are "non-secular" while flying its own flag with religious content? These examples show that Boston has not consistently applied its prohibition on "non-secular" flags and that attempting to do so is an exercise in line-drawing futility.

Moreover, these examples significantly understate the implications of the City's unwritten policy. Dozens of flags and seals throughout the country utilize religious symbolism. Some religiously infused symbols are more subtle than others. For instance, Salem, Virginia, utilizes a dove with an olive branch as its symbols—an image hearkening back to the Biblical story of Noah and the Great Flood. This is

Seal of Salem, Virginia

obvious to those familiar with the book of Genesis, but may be perceived by others as a simple tribute to avian nature.

Can the City Commissioner of Property Management be expected to identify and exclude all such symbols that are not "secular" in nature? After all, many symbols have both secular and religious meanings such as fish or rainbows. The line-drawing problems do not stop there. Many flags or seals have images of historic buildings of religious significance. For instance, the seal of Hingham, Massachusetts, prominently features the city's historic Old Ship Church as well as the word "church" on the seal.

Seal of Hingham, Massachusetts

The seal of Paxton, Massachusetts, similarly features a historic congregational church:

Seal of Paxton, Massachusetts

How do Boston officials determine whether such historic sites qualify as "secular" or not? Further, some flag or seal iconography involves symbols of religious and cultural significance to minority religious groups such as Native Americans. For instance, the flag and seal of the Mashpee Wampanoag tribe features eagle feathers and antlers—objects of ritual significance in many tribal cultures.

Seal of the Mashpee Wampanoag Tribe

If tribal members, descendants of the tribes that dined with the Pilgrims during the first Thanksgiving, sought to utilize their flag as part of a public event honoring

their tribal heritage, would the Commissioner reject the flag as "non-secular?" And how would he decide? After all, the Supreme Court has emphasized that religious symbols can take on different meanings depending on their context. *Compare Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer J., concurring) (upholding a Ten Commandments display after looking at a variety of contextual factors) *with McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871–73 (2005) (invalidating a Ten Commandments display after looking at similar contextual factors).

Not only does Boston's policy require the City Commissioner to have a near encyclopedic grasp of religious symbols, but it also requires him to make nuanced and fact-intensive constitutional judgments for every flag application. The result of such a policy can only lead to "haphazard interpretation[]" or worse. More likely, well-known religious symbols will be excluded, while more subtle or obscure symbols will be allowed to have their day in the sun. Such an "indeterminate prohibition carries with it the opportunity for abuse." *MVA*, 138 S. Ct. at 1891 (internal citations and quotations omitted). Boston's policy "raise[s] concerns about surreptitious viewpoint discrimination." *Am. Freedom Def. Initiative v. Massachusetts Bay Transp. Auth.*, 781 F.3d 571, 582 (1st Cir. 2015). Even if the City is acting from the best of intentions, it "has not supported its good intensions with a law capable of reasoned application. *MVA*, 138 S. Ct. at 1892.

III

BOSTON'S RESTRICTION ON "NON-SECULAR" SPEECH IS IMPERMISSIBLE EVEN IN A LIMITED PUBLIC FORUM

In the alternative, the Court can avoid the difficult need to engage in forum analysis on a different basis. Government restrictions in a limited public forum (Boston's position) must reasonably advance the purpose of the forum and must not discriminate based on the viewpoint or perspective of the speaker. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Boston's policy of excluding "non-secular" viewpoints violates both of those requirements.

A. Boston's Restriction on Non-Secular Flags Constitutes Viewpoint Discrimination

Boston's policy discriminates against viewpoints in several significant respects. First, the "intended purposes" of the flagpole forum is to allow for the display of flags that celebrate the history and culture of the City of Boston. By excluding a category—religion—from this forum, the Boston is communicating that religious heritage is uniquely unworthy of celebration. Exclusion of religion from a forum designed to celebrate cultural identity is thus a form of viewpoint discrimination that elevates secular viewpoints above religious ones by "giv[ing] one side an advantage over another." *Ridley*, 390 F.3d at 91; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (allowing a forum "to be used for the presentation of all views about family issues and child rearing

except those dealing with the subject matter from a religious standpoint" was unconstitutional viewpoint discrimination).

Second, the City's "abrupt change in policy" in response to Camp Constitution's request likewise suggests that the City has engaged in viewpoint discrimination. *See Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989). When Camp Constitution applied to fly its flag, the City had no written policy authorizing the City to reject any flag on the basis of content. JA 14 ¶ 39. The City had in the past allowed the display of flags with religious symbolism and messages (including its own City Flag and the Bunker Hill flag). JA 14–15 ¶ 41. Until Camp Constitution submitted its request, there is no evidence that a "secular" flag requirement existed. However, in response to Camp Constitution's request, the City created a requirement that the flags be secular with the specific goal of excluding Camp Constitution's expression. This suspicious timing supports the conclusion of viewpoint discrimination. *Cf. Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011) (in the employment discrimination context, "[o]ccasionally … an adverse action comes so close on the heels of a protected act that an inference of causation is sensible").

Third, the City's motives are evidence of viewpoint discrimination. "The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying

ideology or perspective that the speech expresses." *Ridley*, 390 F.3d at 82. "[W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1106 (9th Cir. 2018). Similarly, a ban motivated by the potential "listener's reaction" or the public "reaction to speech" infringes on protected speech. *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014); *Matal*, 137 S. Ct. at 1766 ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience."). Boston has allowed flags to be flown that represent cultural groups embroiled in thorny cultural issues such as LGBTQ and transgender rights. App. 2. But it concluded that religious flags are too controversial to be flown. It is therefore motivated by the nature of the message and fear of public opposition. In doing so, the City is ultimately expressing "disagreement with the underlying ideology or perspective that the speech expresses." *Ridley*, 390 F.3d at 82.

Finally, the City's willingness to fly the Bunker Hill Flag with its red cross on white and blue background, but not to fly the Christian flag with its red cross on blue and white background, suggests that the City "would construe [its] guideline to permit [flags] using otherwise identical [imagery]" because of the identity of the group and not the content of the flag itself. *Am. Freedom Def. Initiative*, 781 F.3d at

582. When the City goes beyond the images themselves to consider the message of the group that submitted the flag, it is going "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 538 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)). In each of these respects, the City of Boston was motivated by the viewpoint expressed by the Christian Flag and unconstitutionally prohibited its exhibition.

B. Boston's Restriction Is Not Reasonable Because It Is Contrary to the Purpose of the Forum

When a governmental entity creates a limited public forum, the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). However, the State "must respect the lawful boundaries it has itself set." *Id.* Content based discrimination "may be permissible if it preserves the purposes of that limited forum." *Id.* at 830. Such limits must be "reasonable," and this requirement "requires more of a showing than does the traditional rational basis test." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996); *see also Multimedia Pub. Co. of S.C., Inc., v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993). The government must support its restriction with "evidence that the restriction reasonably fulfills a legitimate need." *Sammartano v. First Judicial Dist.*

Court, in & for Cty. of Carson City, 303 F.3d 959, 967 (9th Cir. 2002); *Eagle Point*, 880 F.3d at 1105.

Specifically, the reasonableness of Boston's actions "must be assessed 'in the light of the purpose of the forum and all the surrounding circumstances.'" *Multimedia*, 991 F.2d at 159 (quoting *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985). That must involve consideration of the "degree and character of the impairment of protected expression." *Id.* "The validity of any asserted justification for the impairment must then be … weighed in the balance against the impartment." Most significantly, "the overall assessment must be undertaken with an eye to the 'intended purposes'" of the forum. *Id.*

The district court failed to sufficiently examine whether the City's restrictions were compatible with the forum that the City had created. Its analysis was cursory and, most significantly, the Court never considered whether the ban on "non-secular" flags was consistent with the "intended purposes of the forum." Far from being consistent, Boston's restriction "might actually interfere with the carrying out of [the] purpose[]" of the forum. *Id.*

At the very least, Boston's actions "show [a] lack of fit between" the purposes of the forum and the policy of excluding religious flags. *Ridley*, 390 F.3d at 90. The flagpole is a forum created for the display of flags that help to commemorate the City's historical and cultural heritage. City of Boston, 2019 Boston City Hall Plaza

Flag Raising Dates (explaining that the purpose of the flagpole forum is to "raise awareness in Greater Boston and beyond about the many countries and cultures around the world" and "to foster diversity and build and strengthen connections among Boston's many communities").[4] Honoring "the civic and social contributions of the Christian community to the City, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution," JA 7, falls well within the parameters of the forum. In order to justify the exclusion of religious heritage, the City must contort the purpose of its forum by expressly carving out only one specific subset of speech for disfavored treatment. *See Tucker*, 97 F.3d at 1215 ("[I]t is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials."). Such a content–based distinction raises "the danger of censorship" and can be used "for invidious, thought-control purposes." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). Boston's restriction on non-secular flags also undermines the purpose of the forum as a place to celebrate the history and cultural heritage of the City. After all, the flagpole is intended to promote Boston's diverse heritage and culture and "grave damage is done if the government, in regulating access to public property, *even appears* to be discriminating in an unconstitutional fashion." *AIDS*

[4] https://www.boston.gov/departments/property-management/boston-city-hall-plaza-flag-raising-dates.

Action Comm. of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994) (emphasis added). And "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd.*, 515 U.S. at 760.

The City invokes the slippery slope, fearing that if it permits religious flags, then it would also be required to allow flags celebrating the Ku Klux Klan or Nazi Germany. Opp. Br. at 11. Those flags would be outside of the scope of the designated public forum because those groups are not part of the City's heritage and culture and could therefore be restricted. *See Widmar v. Vincent*, 454 U.S. 263, 267–68 & n.5 (1981) (university could exclude non-students from use of its designated public forums, but could not discriminate between different types of student speech). This fear is, in any event, wholly speculative. Excluding only flags concerning religion is an unreasonable solution since the City has allowed other controversial or politically charged flags such as gay pride or transgender flags. Allowing religious flags would not "creat[e] incentives for all-or-nothing access" and therefore would not "lead to unnecessary curtailment of speech." *Del Gallo v. Parent*, 557 F.3d 58, 75 (1st Cir. 2009). Boston simply cannot justify its actions based on fears of a slippery slope or other unsubstantiated concerns.[5]

[5] To justify its policy, the City must point to actual evidence that a restriction on religious imagery furthers the purpose of the forum. *Searcey v. Harris*, 888 F.2d 1314, 1322 (11th Cir. 1989). At the preliminary injunction stage, the City must at

IV

PERMITTING BOTH SECULAR AND NON-SECULAR FLAGS DOES NOT IMPLICATE THE ESTABLISHMENT CLAUSE

The City's primary argument in favor of its policy is that it is concerned that allowing a religious flag to fly would be seen as an endorsement of religion. But this concern is not reasonable in light of the City's willingness to allow a wide range of cultural and historical flags to be flown. Since the Christian flag would fly "on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups," there would be no Establishment Clause issues. *Capitol Square Review & Advisory Bd.*, 515 U.S. at 763. Indeed, it would be "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy." *Id.* at 763–64. (Scalia, J., plurality opinion). To the contrary, allowing "[a] neutral open-forum policy, providing equal access for religious as well as non-religious speech" advances both "free speech and religious tolerance." *Flamer v. City of White Plains, N.Y.*, 841 F. Supp. 1365, 1377 (S.D.N.Y. 1993). As the Supreme Court has explained, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose

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least *allege* that it has evidence that its restriction is needed to preserve the proper function and purpose of the forum. *See Sammartano*, 303 F.3d at 968.

ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839.

The City's actions with regard to other flags that it has displayed show that its purported fear that the display of the Christian flag on a city flagpole will appear to be government endorsement of Christianity is unfounded. The City understands that flying the Cuban or Chinese flags will not lead onlookers to believe that the City has adopted or endorsed communism or approves of the human rights violations perpetrated by those governments. JA 13. Instead, it expects that those who see the flag will understand that it represents a celebration of Boston's diverse cultural landscape. *See O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (allowing a religious event on the National Mall sends a message of "approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion"). Similarly, reasonable onlookers understand that the City allows the Christian flag to be flown not because it is endorsing or establishing Christianity as its religion, but because it is celebrating the City's residents' Christian heritage just as it celebrates the City's residents' Portuguese and Puerto Rican heritage. *See Tucker*, 97 F.3d at 1215 (state ban on providing religious information was "an unreasonable means of obviating" a concern that onlookers would perceive an Establishment). A reasonable onlooker would not assume that the City endorsed particular religions by allowing flags celebrating the City's residents' Jewish or

Islamic or Humanist heritage. To assuage any concerns, the City could issue a statement explaining no private display is endorsed by the City. It is not, however, justified in taking the drastic step of barring religious flags—and only religious flags—from display.

Nor can the City's desire for "skating as far as possible from religious establishment concerns" be credited as an interest favoring the ban. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). The Supreme Court has long emphasized "[o]ur Nation's tradition of allowing religious adherents to participate in evenhanded government programs." *Rosenberger*, 515 U.S. at 862 (Thomas, J., concurring). Barring religious participation in the administration of a neutral and evenhanded program for fear of the appearance of an Establishment of religion is not only unreasonable, *Capitol Square Review & Advisory Bd.*, 515 U.S. at 765 (plurality opinion) (explaining that the fact that some onlookers "*might* leap to the erroneous conclusion of state endorsement" did not create an Establishment Clause concern"), it is patently unconstitutional. *Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring))).

After all, a state's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2024. The Establishment Clause offers no support for the City's unconstitutional policy.

CONCLUSION

The decision below should be reversed.

DATED: February 6, 2019.

Respectfully submitted,

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