

No. 20-1800

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**In the Supreme Court of the United States**

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HAROLD SHURTLEFF AND CAMP CONSTITUTION,

*Petitioners,*

v.

CITY OF BOSTON AND ROBERT MELVIN, IN HIS  
CAPACITY AS COMMISSIONER OF THE CITY OF BOSTON  
PROPERTY MANAGEMENT DEPARTMENT,

*Respondents.*

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

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**BRIEF FOR NATIONAL COUNCIL OF THE  
CHURCHES OF CHRIST IN THE USA, ET AL.,  
AS *AMICI CURIAE* SUPPORTING  
RESPONDENTS**

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**BRIEF FOR NATIONAL COUNCIL OF THE  
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**INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici* are religious and civil rights organizations whose members include adherents to a wide array of faiths and beliefs, including those that have historically been subjected to religious discrimination and official disfavor. *Amici* are united in respecting the important but distinct roles played by religion and government in the life of our Nation. From the time of the founding, the First Amendment's Religion Clauses and the religious and philosophical ideals on which they are premised have protected religious freedom for all Americans by ensuring that government does not interfere in private matters of conscience.

*Amicus* National Council of the Churches of Christ in the USA (NCC) has a special interest in, and long history with the use of, the Christian or Protestant Flag, which provides special insight into the Flag's meaning, use, and misuse. NCC is the largest ecumenical body in the United States, with a membership of 37 Protestant and Orthodox denominations representing more than 100,000 local congregations and 40 million adherents. NCC's predecessor, the Federal Council of Churches, officially

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<sup>1</sup> Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket letters of consent to the filing of *amicus* briefs.

adopted the Christian Flag in 1942, and many of NCC's member denominations and their congregations routinely use the Flag in religious ceremonies and activities. NCC and the other *amici* strongly believe that an official governmental display of the Christian Flag in front of a city hall is exclusionary to the countless Americans not represented by that religious symbol. It places a heavy thumb on the scale in favor of one religion over other faiths and belief systems. And it elevates the sacred symbol of one faith in ways that many denominations and individuals who adhere to the favored religion also find intrusive on and corrosive of their beliefs and fundamental religious freedom.

*Amici* are:

- National Council of the Churches of Christ in the USA.
- Central Conference of American Rabbis.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of Jewish Women.
- New Hampshire Conference of the United Church of Christ.

- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.
- American Atheists.
- American Humanist Association.
- Americans United for Separation of Church and State.
- People For the American Way.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Petitioners demand to fly the Christian Flag—an avowedly religious emblem of a particular faith—on one of the three municipal flagpoles outside Boston’s City Hall. That would be a shocking departure from the City’s past practice. Boston usually flies its own city flag on that flagpole, occasionally flies flags submitted by private entities when the City embraces those flags’ messages, and insists that the flying of flags from the City Hall flagpoles constitutes its own government speech. In these circumstances, Boston is not constitutionally obligated to vary its practice so as to display divisive religious images that will graphically associate the city government with the beliefs of particular faiths, in a manner that will alienate many residents and inevitably generate feelings of exclusion and resentment. That outcome is just what the Framers sought to avoid when, in the Establishment Clause, they mandated that government not favor one religion over another.

A. The flying of flags on Boston’s municipal flagpoles qualifies as government speech—and Boston

therefore may use those flagpoles to speak, or to stand silent, as it wishes. Although the City has, on occasion, elected to fly flags submitted by private parties, that practice has the principal hallmarks identified by this Court as government speech: the flying of flags historically has served as an unmistakable form of government speech; flags flown by government generally are understood by viewers to *be* government speech; and Boston exercises control over the flying of flags on its City Hall flagpoles. Particularly where religious speech is concerned, it is crucial that the Court not take an excessively narrow view of the kinds of communications that qualify as government speech; as this case demonstrates, doing so would lead all too often to the association of government with religiously divisive displays.

B. Boston's refusal to fly the Christian Flag from a City Hall flagpole comports with basic Establishment Clause principles. A central goal of the Clause, grounded in the Framers' pre-Revolutionary experience, was to discourage government from fomenting division between faiths. The Clause therefore precludes government from preferring one religion over another. But unavoidably, flying the Christian Flag from a municipal flagpole that towers over City Hall—alongside other city flagpoles that fly the United States and Massachusetts flags—would have just that effect. The Christian Flag is an avowedly religious emblem of certain Christian faiths, and has as its central device the Latin cross, the most recognizable religious symbol in our society. Adherents of other faiths and nonbelievers could not help but feel alienated and excluded upon seeing such a display on the City's own flagpole at City Hall.

C. If the flying of flags on city flagpoles is indeed government speech, Boston has no obligation—rooted in the Free Exercise Clause or any other provision of the Constitution—to display the Christian Flag simply because the City has elected to fly secular flags associated with private groups. To be sure, the Court has indicated that government regulation generally must give equivalent treatment to secular and religiously affiliated entities. But that doctrine has no application to government speech. So long as its speech does not favor or disfavor a particular religion (or religion generally), and therefore accords with the Establishment Clause, a government may speak (or refuse to speak) as it chooses. A contrary approach, which would require government to embrace religion whenever it endorses some secular value, would be nonsensical; in effect, it would *mandate* Establishment Clause violations by requiring government endorsement of particular religions. That is not the law.

## ARGUMENT

### **I. The display of flags on Boston’s flagpole is government speech.**

At the outset, as the City explains, the central and decisive question in this case is whether the display of a flag on the flagpoles in front of City Hall is properly characterized as government speech. It is essential to the values of religious inclusion embraced by *amici* that such displays are understood to be government speech. If the flying of religious flags on City Hall flagpoles is instead thought to be mandated by public forum doctrine, as petitioners and the United States contend, there is a grave danger that displays associated with particular faiths will be

attributed in the public's mind to the government, with divisive and exclusionary effects. *Amici* therefore fully embrace the City's arguments on government speech, and here touch on those points that, in *amici's* view, should be dispositive.

This Court has recognized three principal factors in determining whether an act or expression constitutes government speech: (1) the historic use of that medium by the government; (2) whether the speech is "often closely identified in the public mind with the State"; and (3) whether the government "effectively controlled" the message or messages at issue by exercising "'final approval authority' over their selection." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209-13 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 473 (2009) (alteration omitted)). Here, all three factors show that the City of Boston speaks when it flies nongovernmental flags over its City Hall.

**A. Flags have historically served as government speech.**

Perhaps most obviously, flags are likely the form of communication that is most ubiquitous and immediately recognizable as government speech, and the one with the longest pedigree. In the United States, flags fly outside courthouses, state and federal office buildings, city halls, and post offices. Governments fly their own flags as important symbols of their sovereignty and national, state, or local pride. "The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, 'the one visible manifestation of two hundred years of nationhood.'" *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (quoting *Smith v. Goguen*, 415 U.S. 566, 603 (1974)

(Rehnquist, J., dissenting)). The importance with which the federal government treats our national flag, and the manner in which the government understands the flag to express national values, can be seen in the codification of the “Flag Code.” 4 U.S.C. § 8.

“The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind,” making flags a notably powerful form of speech by the government entity flying the flag. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Some of the most arresting images throughout more than two centuries of our national history involve the government raising or flying the U.S. flag as a way to make a statement on the government’s behalf: the flying of the flag above Fort McHenry amidst bombardment during the War of 1812; the raising of the flag over Iwo Jima by U.S. Marines during the Second World War; the placement of the flag on the Moon in 1969; the raising of the flag over Ground Zero by New York City firefighters; the flying of flags at half-staff at times of national mourning. In all of these moments, the flag conveyed profound national feelings.

But government does not communicate only with its own flag. The POW/MIA flag that Boston displays on one of its flagpoles—which was designed by the National League of POW/MIA families, a nonprofit organization—provides a prime example. For over 20 years, Congress has required that this flag be flown outside certain federal buildings and at government properties on specified days. Pub. L. No. 105-85 § 1082, 111 Stat. 1629, 1917-18 (1997). Beginning in 2019, Congress extended this requirement, so that

the flag must be flown on “all days on which the flag of the United States is displayed.” 36 U.S.C. § 902(c) (2021). This flag is “designated as the symbol of our Nation’s concern and commitment to resolving as fully as possible the fates of Americans still prisoner, missing, and unaccounted for in Southeast Asia.” *Id.* § 902(a).

And—as in Boston—governments have a long tradition of using flags and flag-like displays to convey more transient messages. Just as Boston has displayed foreign flags to offer a message of inclusion for certain communities and welcome for visiting foreign dignitaries, it is a “time-honored custom” for the United States to welcome foreign heads of state to Washington, D.C., by hanging the flags of their nations from the front of the Eisenhower Executive Office Building. Jack Eisen, *Red Stars Fly Over D.C.*, Wash. Post (Jan. 11, 1984). These have included, among others, the flags of allies (like Canada, Australia, and France) and those of rivals (like the Soviet Union and the People’s Republic of China).<sup>2</sup> Similarly—in a parallel to Boston’s display of the LGBTQ “pride flag”—the President directed that the colors of the pride flag be projected on the front of the White House on the night of this Court’s decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). See *Justice Like a*

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<sup>2</sup> See UPI, *Workers prepare to hang a large Soviet flag to welcome Gorbachev* (May 30, 1990), <https://bit.ly/3EcCRl6>; The White House, *An Inside Look at the First State Visit of the Trump Presidency* (Apr. 23, 2018), <https://bit.ly/33TtaM5>; Julian Borger, *Flags, troops and banquets: how to throw a state visit*, The Guardian (Mar. 9, 2016), <https://bit.ly/3soFNJ3>; Darlene Superville, *Associated Press, Rose Garden setting for Trump’s second state dinner* (Sept. 19, 2019), <https://abcn.ws/3EjBDnW>.

*Thunderbolt*, Obama Foundation, <https://www.obama.org/june-26-2015>.

**B. Flags flown by the government are widely understood to be government speech.**

It is beyond dispute that a flag flown from a government flagpole is “often closely identified in the public mind with the State.” *Walker*, 576 U.S. at 212 (quoting *Summun*, 555 U.S. at 472) (alteration omitted). In fact, it can be assumed that a flag will be associated by viewers with the entity or individual that is flying it. This is, in part, because someone typically would not use their property or person to fly a flag “convey[ing] a message with which they do not wish to be associated.” *Summun*, 555 U.S. at 471. One would not expect a Boston-resident Red Sox fan, as a favor to their New York cousin, to wave a Yankees flag at Fenway Park; or, in a famous real-life example, although the first Black cheerleader at the University of Mississippi “said he would sing ‘Dixie,’ the school song, or dress up as Colonel Rebel, the school mascot, \* \* \* he would not carry the Confederate battle flag.” Wendell Rawls Jr., *Black Cheerleader Balks at Waving the ‘Rebel’ Flag*, N.Y. Times (Sept. 4, 1982).

And the usual association of the person or entity displaying a flag with the flag’s message is greatly strengthened by the historical use of flags by governments to convey their own messages. That history would lead a reasonable viewer to conclude that any flag flown by a government, on a government flagpole that generally is used (as in Boston) to display that government’s own emblem, is making a statement with which the government wishes to be asso-

ciated. Indeed, the flags flown on Boston’s third flagpole would have been particularly linked in viewers’ minds with the city government. As the court below recognized, the “third-party flag is part of a broader display” including the national, state, and POW/MIA flags. Pet. App. 18a. In this context, it is difficult to see how any reasonable observer would conclude that a flag flown on the third flagpole was anything other than government speech.

In arguing to the contrary, the United States maintains that Boston’s raising of third-party flags was almost always done in conjunction with privately sponsored events on the plaza below. U.S. Br. 18. But there is a critical difference—and observers reasonably would distinguish—between (1) events occurring at ground-level in a public space and (2) the flying of a flag on a government flagpole that can be accessed only with the permission and assistance of the government, and that is used almost all the time for the flying of the government’s own flag. “Public p[lazas] have been used time out of mind, ... for purposes of assembly, communicating thoughts between citizens, and discussing public questions, but one would be hard pressed to find a long tradition of” using government flagpoles in front of government buildings as public forums for private speech. *Summum*, 555 U.S. at 478-79; internal citations and quotation marks omitted). Even if the flag-flying and related events in the plaza below occur at the same time, therefore, the flag-raising looks like government endorsement of the flag display.

**C. The City of Boston exercised control over its flagpole.**

Finally, Boston unquestionably exercised control over its flagpole. An individual or group must apply to have the City fly their flag at City Hall. Pet. Br. 5. And although Boston did not have a written flag-raising policy at the time Shurtleff filed his application, petitioners acknowledge that the subsequently promulgated written policy merely “committed [the City’s] past policy and practice” to paper. *Id.* at 18. The first of seven flag rules prohibits, among other things, the “display [of] flags \* \* \* supporting \* \* \* religious movements.” *Id.* at 19 (internal quotation marks omitted). Under that policy, any flag associated with any faith would have been excluded. Therefore, the Commissioner of Property Management had the power to control what messages the City endorsed through flag raising. Petitioners place great weight on the Commissioner’s discretion in exercising that control (*ibid.*), but retention of discretion over messaging is the *essence* of government speech. See *Walker*, 576 U.S. at 213.

Petitioners emphasize how many flags Boston has flown in the past. See Pet. Br. 8. But as the City explains in detail, Boston flew only approximately 50 unique flags at City Hall between June 2005 and June 2017. The vast majority of those were national flags; otherwise, in addition to the pride flag, the remainder were raised in connection with municipal, state, or national holidays or days of commemoration. Resp. Br. 8-9. And since denying Shurtleff’s request, Boston has denied a request to raise the “Straight Pride” flag. Pet. App. 46a. That is, again, in keeping with the exercise of government speech. Bos-

ton may choose to promote LGBTQ pride but not “straight” pride, just as Texas may choose to promote its schools (but not the derision of schooling), its grapefruit (but not Florida’s), and the fight against terrorism (but not al Qaeda). *Walker*, 576 U.S. at 213.

The United States’ contrary argument relies principally on the assertion that Boston does not exercise meaningful control over the display of flags on its flagpole because it does not “dream up” the flags displayed, had no input into the design or choice of flags that citizens proposed for display, and approved every flag application prior to Shurtleff’s. U.S. Br. 15-17. Although the First Circuit explained this history by noting the self-selection that went into past flag applications—which is to say, *all* prior applicants proposed to raise flags that were wholly consistent with Boston’s *own* messages—the United States still finds it damning that Boston approved every flag but a religious one. *Id.* at 16.

But this argument focuses only on the raw number of approvals and disregards *what* was being approved. As Boston explains, in a description that accords with the United States’ account of Boston’s program, all the approved flags fell into a narrow category of displays that comport with Boston’s inclusive and welcoming values. There is no reason to doubt that, had Boston received requests to fly flags that it regarded as divisive or otherwise inconsistent with those values, it would have rejected them—as it in fact did when it declined to fly the “straight pride” flag. One could just as well observe that the United States has, without exception, displayed at the Eisenhower Executive Office Building the flag of every

nation whose head of state has met with the President in Washington, and that (just like Boston) the United States did not “dream up” or design those flags; but the United States surely would agree that this practice has not converted the front face of the Eisenhower Building into a public forum.

## **II. Establishment Clause principles support Boston’s refusal to display a religious flag.**

As respondents demonstrate—and, for that matter, as the United States seems to recognize (U.S. Br. 11-13)—a determination that Boston’s flying of flags on its flagpole is government speech should be the end of this case. The Court has explained repeatedly that governments generally may say, or not say, whatever they wish. *Walker*, 576 U.S. at 208; *Summum*, 555 U.S. at 468. In particular, the First Amendment’s Free Speech Clause, the only provision of the Constitution invoked here by petitioners, does not limit government speech at all. *Summum*, 555 U.S. at 467; see *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech \* \* \* is exempt from First Amendment scrutiny.”). Boston “is entitled to say what it wishes” (*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)), and it chooses not to speak through the display of flags that tend to divide rather than unite the City’s residents, including the flags of particular religious groups.

Two additional points that support Boston’s practice of declining to display religious emblems also bear emphasis here. First, although the Free Speech Clause does not limit government speech, the First Amendment’s Establishment Clause *does*. See *Summum*, 555 U.S. at 468. Here, Establishment

Clause principles strongly supported Boston's decision not to associate the municipal government with religious speech. And second, if the flag display at City Hall is indeed Boston's own speech, nothing in the Religion Clauses obligates the City to embrace a private party's religious speech as the City's own simply because the City endorses and amplifies *other* categories of private speech. For these reasons as well, the decision below should be affirmed.

If, as Boston submits, the display of flags on the City's flagpoles is government speech, Boston had good reason to be sensitive to the danger that flying the flag of a particular religion at the request of private parties would intrude on the religious freedom of all the City's residents and infringe constitutional values. There is a strong argument that Boston's display of religious imagery at municipal facilities would violate the Establishment Clause, and "the interest of the State in avoiding an Establishment Clause violation may be a compelling one." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotation marks omitted). And in any event, even if the application of the Establishment Clause in this context were thought to be unclear or merely debatable, "[t]he decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult, and \* \* \* [government] cannot be expected to resolve so precisely the inevitable tensions between the [Religious Clauses]," "at the peril of legal liability." *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) (Newman, J.). Here, given the governing constitutional context, Boston's approach in declining to fly a religious flag was eminently reasonable.

**A. The Framers of the Constitution were committed to religious pluralism.**

The Framers understood that religion was central to the social and cultural life of the new republic, but they also firmly believed that religion should be a force to unite, not divide, the Nation and its citizenry. They recognized that religious pluralism was the hallmark of the new United States, and were well aware of the corrosive effect that religious disputes and preferences had produced both in Europe and in their home colonies. They also understood, as this Court subsequently explained, that “sectarianism” is “often the flashpoint for religious animosity.” *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

Accordingly, in determining the propriety of religious displays associated with the government, one principle is paramount: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982); accord, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (government must remain “neutral[] between religion and religion, and between religion and nonreligion” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))). The Framers intended not only to protect “the freedom of the individual to worship in his own way,” but also to guard against the “anguish, hardship and bitter strife that could come when zealous religious groups struggle[] with one another to obtain the Government’s stamp of approval.” *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

1. Although the United States was more homogeneous in 1789 than it is today, the new nation was religiously diverse. In New England, Con-

gregationalism dominated, though Baptists and Quakers were numerous; in the southern states, the Anglican/Episcopalian church remained strong but was losing ground to Baptists, Presbyterians, Moravians, and Quakers. In the mid-Atlantic, no denomination was dominant: there were Presbyterians, Quakers, Lutherans, Moravians, and German Pietists. New York was home to numerous faiths: Dutch Reformed, Presbyterian, Anglican/Episcopalian, Quaker, and Lutheran. Methodism would become a force during the latter part of the Founding period and emerged as the Nation's largest denomination in a few decades. Finally, a growing number of Catholics resided in New York and Maryland, while substantial Jewish communities existed in Newport, Rhode Island; Charleston, South Carolina; and Savannah, Georgia. In their own religious affiliations, the delegates and members of Congress reflected this religious pluralism, a situation that was unmatched in any other nation at that time.<sup>3</sup>

The Framers knew that “[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947). Many had witnessed or experienced in their home colonies how religious preferences had excluded dissenters from enjoying the benefits of citizenship. In this respect,

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<sup>3</sup> See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422 (1990); Roger Finke & Rodney Stark, *The Churching of America, 1776-1990* (1992).

the Framers appreciated that religious pluralism represented not only a great national strength, but also a profound danger should the mistakes of the past be repeated.<sup>4</sup>

Against this backdrop, the Framers believed that any religious preferences would divide the nation and that religious faction was a chief source of destructive political strife. In the *Federalist*, James Madison referred repeatedly to the dangers to the new republic posed by religious division. “A zeal for different opinions concerning religion \* \* \* [has] divided mankind into parties, inflamed them with mutual animosity, and rendered them more to vex and oppress each other than to co-operate[] for the common good.” The *Federalist* No. 10 (James Madison); see The *Federalist* Nos. 51, 52, 57 (James Madison). And in his *Memorial and Remonstrance*, Madison denounced denominational preferences: “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), reprinted in *Everson*, 330 U.S. 1, 63-72 (appendix to dissent of Rutledge, J.). “A just government,” he declared, is “best supported by protecting every citizen in the enjoyment of his Religion \* \* \* by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” *Id.* ¶ 8.

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<sup>4</sup> Frank Lambert, *The Founding Fathers and the Place of Religion in America* 161-162 (2003).

It therefore is no surprise that both the Nation’s founding documents and the Framers’ practices demonstrate a firm rejection of governmental pronouncements and imagery that reflect the beliefs of particular faiths. Notably, the Declaration of Independence and Constitution both eschew references to the Christian religion. The Declaration’s immortal phrase, “they are endowed by their Creator, with certain unalienable rights,” rejects affiliation with any one religion. The Constitution goes even further, by entirely omitting any reference to a deity and then by prohibiting any religious test for federal office-holding, a clear affirmation of religious pluralism.<sup>5</sup>

At the state level, the documents crafted by Jefferson and Madison—whose views are central to an understanding of the Establishment Clause (see, e.g., *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 184 (2012))—evinced a similar sensitivity to religious inclusion and resistance to the use of language endorsing particular religious beliefs. Jefferson’s original draft of the Virginia Statute for Establishing Religious Freedom, the precursor to the federal Establishment Clause, declared in its Preamble that “Almighty God hath created the mind free” and that governmental penalties for religious beliefs “are a departure from the plan of the holy author of our religion.” A proposal to change the sentence to read “a departure from the plan of Jesus

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<sup>5</sup> The Framers made an affirmative choice to omit religious references from the Constitution, rejecting efforts to include such references that were advanced at the Convention by Luther Martin and a handful of others. See Luther Martin, *Genuine Information*, in *The Founders’ Constitution* (Philip K. Kurland & Ralph Lerner ed. 1987), vol. 4, document 18.

Christ, the holy author of our religion,” was rejected by the legislature.<sup>6</sup> Both Madison and Jefferson perceived a fundamental difference between the original language and the proposed amendment: the original language was universal, but the amendment was exclusionary, particularly of non-Christians. Madison believed that the phrase “Jesus Christ, the holy author of our religion” would “imply a restriction of the liberty defined in the Bill, to those professing his religion only.”<sup>7</sup> And Jefferson wrote that the legislature’s decision to omit that phrase from the final statute demonstrated an intent “to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.”<sup>8</sup>

2. More generally, and even outside of official documents, the Founders were careful to avoid aligning the new Nation with any religious faith. With the exception of John Adams, those who became President carefully chose their language so as to limit references to any particular religion, including Christianity in general. The Framers thus “strove to find a civil vocabulary that could encompass all people, regardless of their faith.”<sup>9</sup>

As President, George Washington was scrupulous in his use of only general religious language and

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<sup>6</sup> Thomas Jefferson, *Autobiography*, in *Founders’ Constitution*, vol. 5, document 45.

<sup>7</sup> Elizabeth Fleet, *Madison’s “Detached Memoranda”*, 3 *William and Mary Quarterly* 534, 554–60 (1946).

<sup>8</sup> Jefferson, *Autobiography*, *supra* n. 6.

<sup>9</sup> Michael I. Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 12 (2012).

studiously avoided all terms invoking individual beliefs, including distinct Christian references. His First Inaugural Address established a practice of government officials using only inclusive religious language, referring only in the most general terms to “that Almighty Being who rules over the Universe.”<sup>10</sup> When Washington issued his Thanksgiving Day proclamation on October 3, 1789, he again avoided denominational language, speaking of “the providence of Almighty God” and “the great Lord and Ruler of Nations.” He used an almost identical phrase in his proclamation on January 1, 1795, inviting people to “render their sincere and hearty thanks to the Great Ruler of Nations.”<sup>11</sup>

Jefferson and Madison continued Washington’s precedent by using religious language only in the most inclusive manner, with the former referring to “an overriding Providence” in his First Inaugural Address, and Madison mentioning “the guardianship and guidance of that Almighty Being” in his First Inaugural Address. Jefferson refused to issue any religious proclamations as president. During his tenure, Madison issued four proclamations for prayer and humiliation—all during the War of 1812—but again employed nondenominational language in each: “Almighty God,” “Sovereign of the Universe,” “Almighty Power,” “Great Parent,” “Holy and Omniscient Being,” “Great Disposer of Events,” and “Divine Author.” As Madison communicated in a letter upon

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<sup>10</sup> 1 *Compilation of the Messages and Papers of the Presidents* 44 (James D. Richardson, ed. 1897).

<sup>11</sup> 4 *Papers of George Washington, Presidential Series: Thanksgiving Proclamation, 3 October 1789* 131-32 (W.W. Abbott et al. eds.) (1993).

leaving office, “I was always careful to make the Proclamations absolutely indiscriminate.”<sup>12</sup> And later in life, Madison criticized presidential proclamations concerning religion as being religiously exclusive and inconsistent with the Nation’s respect for pluralism. “In a nation composed of various sects, some alienated widely from others, and where no agreement could take place through the [practice of Christian proclamations], the interposition of the [majority] is doubly wrong.”<sup>13</sup>

Among the Presidents of the founding generation, only John Adams deviated from this tradition, employing Christian-specific language in his Inaugural Address and in two presidential proclamations—and he came to regret having done so. In his first proclamation in 1798, Adams urged people to “acknowledge before God the[ir] manifold sins and transgressions \* \* \* beseeching him \* \* \* through the Redeemer of the world, freely to remit all of our offenses.”<sup>14</sup> (Without mentioning Adams by name, Madison later criticized this “deviation from the strict principle in the Executive Proclamations of fasts and festivals” for having “lost sight of the equality of all religious sects in the eye of the Constitution.”) After losing to Thomas Jefferson in the 1800 presidential election, Adams blamed his defeat on those religious proclamations, telling Benjamin Rush that “[t]he National Fast recommended by me turned

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<sup>12</sup> James Madison to Edward Livingston, July 10, 1822, in *Founders’ Constitution*, vol. 5, document 66.

<sup>13</sup> Fleet, *supra* n. 7, at 534-568.

<sup>14</sup> Proclamation for a National Fast, March 23, 1798, in 9 *Works of John Adams* 169-170 (Charles Francis Adams ed.) (1854).

me out of office.” Too late to salvage his political career, Adams concluded: “Nothing is more dreaded than the National Government meddling with Religion.”<sup>15</sup>

As this history demonstrates, the Establishment Clause reflects Madison’s and Jefferson’s “plan of preserving religious liberty to the fullest extent possible in a pluralistic society,” allowing religion to flourish while quelling the civil strife that pluralism may engender. *McCreary*, 545 U.S. at 882 (O’Connor, J., concurring). “[A]ssur[ing] the fullest possible scope of religious liberty and tolerance for all” was understood to be the only way “to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

**B. Flying the Christian Flag from a government flagpole would undermine Establishment Clause values.**

Especially when viewed in the context of this history, the display of the Christian Flag on a city flagpole usually occupied by Boston’s own flag, flying over City Hall and next to the U.S. and Massachusetts flags on adjacent city flagpoles, is especially jarring. Boston had good reason to fear that such a display, whether or not affirmatively violative of the

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<sup>15</sup> James Madison to Edward Livingston, *supra* n. 12; John Adams to Benjamin Rush, June 12, 1812, in *The Sacred Rights of Conscience* 518-519 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

Establishment Clause, would infringe fundamental constitutional values and cause just the sort of religiously based divisiveness that the Framers meant the Religion Clauses to forestall.

1. *The Latin cross is a profoundly religious symbol.*

The Latin cross, which is prominently featured on the Christian Flag, “is of course the preeminent symbol of Christianity” (*Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment)) and is likely the most recognizably sectarian religious symbol in our society. “From its earliest times, Christianity was distinguished as being *religio crucis*—the religion of the cross.”<sup>16</sup> The cross represents “a central object of Christian faith: the passion of Jesus, symbolized and epitomized by his death on the cross.”<sup>17</sup> As a result, no “symbol [is] more closely associated with a religion than the cross is with Christianity.”<sup>18</sup> Courts have uniformly, and properly, reached the unsurprising conclusion that the cross is a sacred Christian symbol with the greatest religious significance. It “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993). Or, as Pope Francis has explained:

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<sup>16</sup> Richard Viladesau, *The Beauty of the Cross: The Passion of Christ in Theology and the Arts, from the Catacombs to the Eve of the Renaissance* 7 (2006).

<sup>17</sup> *Ibid.*

<sup>18</sup> Douglas Keister, *Stories In Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004).

“The Christian Cross is not something to hang in the house ‘to tie the room together’ \* \* \* or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.”<sup>19</sup>

And the Latin cross is not simply a generic religious symbol; it is a symbol associated with particular branches of Christianity. Through the mid-nineteenth century in the United States, only Catholic churches were adorned with crosses, either crucifixes or Latin crosses. Over time, Protestant use of the Latin cross on and inside buildings became more common.<sup>20</sup> But even then, the Latin cross is particular to Western Christianity; Orthodox Christians of Eastern Rite denominations—Russian Orthodox, Ukrainian Orthodox, Greek Orthodox, and Serbian Orthodox—employ crosses with multiple crosslets.<sup>21</sup> The Latin cross therefore is not a universal religious symbol even within Christianity. For the millions of Americans who are neither Protestant nor Catholic—be they Orthodox, Unitarian Universalist, Jewish, Muslim, Hindu, Buddhist, Sikh, adherents of some other religion, or of no religion at all—the Latin cross is a symbol that excludes them.

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<sup>19</sup> *Pope Francis: the Cross is the gate of salvation*, Vatican Radio (Mar. 12, 2017), <https://bit.ly/399Rjwf>.

<sup>20</sup> Ryan K. Smith, *Gothic Arches, Latin Crosses: Anti-Catholicism and American Church Designs of the Nineteenth Century* 51-82 (2006).

<sup>21</sup> George Willard Benson, *The Cross: Its History and Symbolism* 11-16, 61 (1976); F. R. Webber, *Church Symbolism* 99-132 (1938) (detailing that there are approximately fifty varieties of the cross used throughout Christendom).

2. *The Christian Flag embodies religious values.*

The Christian Flag that petitioners seek to fly over Boston's City Hall purposely accentuates the divisive nature of that symbolism. Charles Overton created the Flag in 1897, inspired by a flag's ability to "awake[n] such enthusiasm and emotion." *The Christian Flag is a New Idea: A Symbolic Emblem*, Grand Rapids Press, Apr. 9, 1898, at 6. He observed that because "[a]n army without its colors is inconceivable, then why not equip the army of the Lord with a flag appropriate to its mission?" *Ibid.* The Christian Flag thus "stand[s] as an emblem around which all Christian nations and various denominations may rally in allegiance and devotion." *The Christian Flag*, 84 *The Christian Advocate* 1802 (Nov. 11, 1909). Overton's design for the Flag was pointedly symbolic: it features a white background representing peace, purity, and innocence; a blue canton in the upper corner representing an unclouded sky, a symbol of faith and trust; and the Latin cross in red, to symbolize Christ's blood. *The Christian Flag is a New Idea, supra*, at 6.

Early on, much of the Christian community embraced the Flag as a symbol of religious adherence, and innumerable churches and Sunday schools across the Nation displayed it. See, e.g., *2nd Mt. Olive Bapt. Church*, *Cleveland Call and Post*, Dec. 12, 1942. The Flag sparked creation of a plethora of hymns, songs, and pledges of allegiance, praising its message and serving as a religious rallying point. *Ibid.* See also, e.g., *Christian Endeavor*, *Philadelphia Tribune*, June 27, 1935, at 18 ("I pledge allegiance to the Christian Flag, and the Saviour for whose king-

dom it stands \* \* \* one brotherhood, uniting all mankind in service and love.”); James R. Pollack, *1997: One Hundred Years: Congratulations to the Christian Flag* 6 (1997) (“The Affirmations of Loyalty to the Christian Flag is a sacred commitment.”).

At the Flag’s inception, many Christian congregations displayed it during religious services. See, e.g., *New Haven Evening Register*, Apr. 18, 1898, at 10. In 1942, 45 years after the Flag’s creation, *amicus* NCC’s predecessor organization, the Federal Council of the Churches of Christ in America—which represented dozens of Christian communities (*History*, Nat’l Council of Churches, <https://bit.ly/2IfaWcy>)—officially adopted the Flag “as a symbol of the Kingdom of our Lord.” In addition to that formal approval, the Council created a flag code, setting out guidelines for the proper display of the Flag. *Ibid.* Noting that the place of highest honor is to the right, the code instructed churches to display the Flag either to the right of the congregation or to the right of the clergyman. *Ibid.*; see also Kenneth Dole, *Christian Banner Gets Post of Honor*, *The Washington Post and Times Herald*, June 24, 1957, at B1. Churches flew the Flag “to remind us of our Christian blessings,” and some flew the Flag on religious holidays and “memorable days of the faith,” including Ash Wednesday, Palm Sunday, Good Friday, Easter, and Christmas. E.g., Dan L. Thrapp, *Southland Parish*, *Los Angeles Times*, Aug. 27, 1974, at 19; see also, e.g., *Episcopal Church News: Present Flags, Colors at St. Simon’s Church*, *Philadelphia Tribune*, June 6, 1942, at 16. Even today, the Christian Flag is widely displayed in connection with religious processions, vacation Bible school class and parades, and confirmation classes. See, e.g., *National*

*Royal Rangers Guidelines for Formation & Ceremonies*, The National Office of Royal Rangers; see also Pollack, *supra*, at 6.

3. *Display of the Christian Flag on a City flagpole would associate Boston with a religious message.*

The display of the Christian Flag on a towering city-owned flagpole just outside City Hall would convey a City-associated religious message, threatening to generate the very sorts of religious divisions that the Framers feared. Shurtleff asks the Court to compel the City to fly a religious flag that represents a single religion's adherents and beliefs. The location of the proposed display—side-by-side with the flags of the United States and Massachusetts and high above the entrance to City Hall, itself a potent symbol of government—would communicate an especially powerful statement that Christianity holds a special place in the City. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (“where a government building and its immediate curtilage are involved,” placement of a private display may imply “official recognition and reinforcement, of its message”) (internal quotation marks omitted); *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) (placement of religious display at seat of government heightens establishment concerns).

Indeed, it appears that Shurtleff's *purpose* is to have the City broadcast that message; after all, he is able to fly the Christian Flag at Boston's City Hall Plaza without using the City's flagpoles. See *Walker*, 576 U.S. at 212–13 (explaining that drivers likely

prefer messages to be on license plates rather than bumper stickers because the former convey government approval); see also Mission: Camp Constitution Expansion, CampConstitution.net, <https://bit.ly/2BYTjLa> (petitioner Camp Constitution’s mission includes spreading the message that “America was founded as a Christian nation”).

Such an outcome would be deeply disturbing to many Bostonians, of many different faiths and beliefs. Individuals who saw the Christian Flag flying on the City’s flagpole would naturally assume that it conveys Boston’s own message; passers-by and casual viewers would have no way to know that the Flag was hoisted at the request of a private party. And that City-sponsored display would “send[] the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

And there is more. Boston is home to considerable religious diversity. See *Metro-Area Membership Report: Boston-Cambridge-Newton*, Ass’n of Religion Data Archives, <https://bit.ly/2X7sIC2> (listing over 100 different “religious bodies” represented in Boston metropolitan area as of 2010). Adherents of the many religions that do not employ the Latin cross would understandably be disturbed by seeing the Christian Flag flying over City Hall; some might well respond by

demanding that Boston fly flags symbolizing their faiths, even though such a demand would not previously have occurred to them. That is the very sort of religious tit-for-tat that the Framers sought to avoid: “nothing does a better job of roiling society” than “when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876.

Nor are nonadherents the only people who may be alienated if the City were to display the Christian Flag. *Amici*—including the *amicus* whose predecessor organization formally adopted the Christian Flag 80 years ago—can attest that many Christian individuals and denominational organizations would view such a display as official misappropriation of their sacred symbol—a gross intrusion on the ability of the faithful to define their own beliefs and a denigration of the cross. See also Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 Nev. L.J. 640, 645–46 (2012). And displaying the Flag at the seat of city government would, through the government’s power and “special status” in the marketplace of ideas (see *McCreary*, 545 U.S. at 883 (O’Connor, J., concurring)), interfere with the constitutional commitment to freedom of conscience by associating a religion and its adherents with the City and its policies, with which members of the putatively favored faith may strongly disagree. After all, “[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.” *Ibid.*

4. *Boston's embrace of secular speech does not obligate it also to embrace religious speakers*

Finally, if the flying of flags on City flagpoles is indeed government speech, Boston has no obligation—rooted in the Free Exercise Clause or any other provision of the Constitution—to display the Christian Flag simply because the City has elected to fly secular flags associated with private entities.

The Court has indicated that, when secular entities receive benefits from government programs or are exempted from government-imposed regulatory burdens, comparably situated religious entities generally must receive equivalent treatment. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 137 S. Ct. 2012, 2019-20 (2017). But government speech is of a wholly different character from regulatory or benefit programs of that sort. As a matter of definition, government speech is the government speaking for itself: “It is the very business of government to favor and disfavor points of view.” *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). Such speech, whatever it says and however it is expressed, therefore cannot be thought to treat “comparable secular activity more favorably than religious exercise” in the relevant sense. *Tandon*, 141 S. Ct. at 1296. The suggestion that, for example, a governor is constitutionally obligated to speak on religious subjects because he or she has chosen to speak on secular ones—or that, having made a secular speech, the governor is obligated to give equal speaking time at

the same location to a religious speaker—is nonsensical.

Nor does it matter that, like Boston at its flagpole, a government has spoken through private parties or endorsed private speech as its own: The government “is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005)); see *Sumnum*, 555 U.S. at 468 (government may continue to “regulate the content of what is or is not expressed \* \* \* when it enlists private entities to convey its own message.”) (internal quotation marks omitted). Surely, that the governor allows a secular speaker to join her on the podium does not mean that she also must invite a religious one—and, by the same token, that Boston embraces secular speech by allowing a nongovernmental organization to fly its flag at the City’s flagpole does not mean that the City must similarly associate Boston with religious speech.

Of course, private parties—whether religious or nonreligious—may object on Establishment Clause grounds when government speech is excessively favorable or hostile to religion in general, or favors or disfavors particular religions. In such circumstances, government may be required to terminate speech that infringes Establishment Clause guarantees. See, e.g., *McCreary*, 545 U.S. at 869 (Ten Commandments display violated Establishment Clause because it conveyed “unmistakably religious statement”); *Stone v. Graham*, 449 U.S. 39, 41–43 (1980) (Ten Commandments display in school classrooms violated Establishment Clause). But al-

lowing a religious speaker to appropriate the accoutrements of government speech, as demanded here by petitioners, would turn that principle on its head, encouraging the very religious strife and exclusion that the Framers sought to avoid. The Court should not embrace such a destructive result.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2021

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<sup>22</sup> The representation of *amici* by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.