No. 20-1800

IN THE

Supreme Court of the United States

HAROLD SHURTLEFF, ET AL.,
Petitioners,

v.

CITY OF BOSTON, MASSACHUSETTS, ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICAN CORNERSTONE INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The American Cornerstone Institute is a nonpartisan, not-for-profit organization founded by pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute's mission is to educate the public on the importance of Faith, Liberty, Community, and Life to the continued success of the United States of America. The protection of religious liberty is a central tenet of the American Cornerstone Institute.

In furtherance of this mission, the American Cornerstone Institute submits this brief in support of the Petitioners.

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than *amicus*, *amicus*'s members, or *amicus*'s counsel made a monetary contribution to fund its preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

A sad fact about the Court's docket over the past decade and a half is the number of cases that exhibit a clear government hostility to religion. The hostility comes from executive, legislative, and judicial action at the national, state, and local level. The hostility can be express and overt, such as in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). But usually it manifests itself more as government singling out the faithful for disfavored treatment in one way or another. Of all the organizations in the country, the government chose to vigorously enforce the Obamacare contraception mandate against an order of nuns who had taken a vow of chastity. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The federal government also sought to severely circumscribe the ability of churches to organize their own internal affairs as they see fit, when it argued that an individual who taught religion in a church's religious school, at times led the congregation in prayer, and was referred to as a minister by the church, was nevertheless not a minister for purposes of the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). And the past several months have seen any number of COVID-related laws that singled out the faithful.

In times past, these conflicts between civil law and religious calling likely would have been met with some sort of quiet settlement—political, legal, or both—that recognized religious exercise as a cornerstone of our society. But these are not those times. Instead, today many in government view it as their job to bend the

will of the faithful to the dictates of the civil authorities, ignoring the fact that the Constitution privileges the free exercise of religion. The importance of guarding against anti-religious hostility has never been greater.

While the nominal doctrine in each case can vary—from civil rights laws to the scope of the Religious Freedom Restoration Act to, as here, the concept of government speech—these cases are always, at bottom, about government seeking to further narrow the ability of the faithful to participate in civil society, and live their lives according to their faith.

This case is no different. Over the course of twelve years, the City of Boston allowed all manner of private groups to raise a flag on one of its flag poles; 284 times in fact. It hoisted the banners of foreign sovereigns, social justice causes, and everything in between—and it never denied a single application. This changed only when Camp Constitution, a Christian organization, asked for an opportunity to share its own message on the same terms as everyone else by flying a flag with a Christian Cross. The City denied Camp Constitution's request, making clear that it did so because of the organization's religious identity. This Court has never sanctioned this sort of blatant anti-religious animus by a government before, and it should use this case as an opportunity to remind all government employees that discrimination against the faithful will not stand.

The government-speech doctrine—which, as this Court has observed, is a potentially dangerous tool for suppressing disfavored speech—is a natural and convenient recourse for governments that wish to

discriminate against religious viewpoints. That is what happened here. The City's actions make plain that its refusal to display Camp Constitution's flag was driven by hostility to Christian beliefs. And the City's invocation of the government-speech doctrine should not excuse its discriminatory action.

The City's attempts to justify its behavior go nowhere, and indeed only illustrate the City's religious hostility. For example, the City argues that treating the flag pole as a public forum would lead to a "cacophony" of conflicting viewpoints. Opp. 25. But it never expressed any such concerns before when it displayed a bewildering array of flags representing a medley of controversial political and social causes, which shared nothing in common other than the lack of any Christian message. Only when a single Christian note was played did the melody begin to sound "cacophonous" to the City. That is animus, pure and simple.

If this type of discrimination is allowed to stand, other anti-religious governments will be ready to pounce. Cases from across the country suggest that the government-speech doctrine has already become a key weapon in the arsenal of bureaucrats seeking to exclude religious entities from civic life. And if the Court condones Boston's tactics in this case, that trend will only accelerate. To prevent that outcome, the Court should make clear that governments cannot suppress religious viewpoints by using the government-speech doctrine—or any other legal tool at hand—to mask their anti-religious animus. The First Amendment does not allow such a result.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY PROHIBITED GOVERNMENT HOSTILITY TO RELIGION.

As this Court knows all too well, "[g]overnments have not always been tolerant of religious activity," and "hostility toward religion [can] take[] many shapes and forms—economic, political, and sometimes harshly oppressive." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 673 (1970). For just that reason, safeguarding First Amendment rights requires the Court to "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* at 696 (Harlan, J., concurring). This responsibility is not limited to stamping out overt displays of hostility. This Court has also recognized the potential of government bodies "to discriminate invidiously" and to engage in the "covert suppression of particular religious beliefs." *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

This Court's seminal opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), offers a telling example of this dynamic. That case involved a series of municipal ordinances targeting the Santeria faith's tradition of animal sacrifice. Taking cues from equal protection jurisprudence, this Court carefully examined the record and discovered abundant evidence that the ordinances were "enacted '"because of," not merely "in spite of,"' their suppression of Santeria religious practice." *Id.* at 540. It noted, among other things, statements made during city council meetings that displayed "significant hostility exhibited by residents, members of the city council, and other city officials

toward the Santeria religion and its practice of animal sacrifice." *Id.* at 541. One councilman, for example, declared that devotees of Santeria were "in violation of everything this country stands for." *Id.* Another councilman noted, to audience applause, that adherents of Santeria had been jailed in pre-revolutionary Cuba. *Id.* Finding that this pattern "disclose[d] animosity to Santeria adherents and their religious practices," this Court held the ordinances unconstitutional. *Id.* at 542. In so doing, it put governments on notice that, under the First Amendment, they must treat religion even-handedly.

While the identity of the disfavored has changed, official animus toward certain faiths is alive and well.

Consider the Court's recent decision in *Masterpiece Cakeshop*. There, a Christian baker declined to bake a same-sex wedding cake and received a "cease and desist" order from the State's Civil Rights Commission. This Court set aside the Commission's directive in view of the "clear and impermissible hostility" it displayed during the proceedings. 138 S. Ct. at 1729. In one meeting, for example, the commissioners had expressed the view that religious beliefs "cannot legitimately be carried into the public sphere." *Id.* In another, they equated religion with bigotry, saying that "[f]reedom of religion … has been used to justify all kinds of discrimination throughout history," blaming it for "slavery" and "the holocaust," and calling freedom of religion "one of the most despicable pieces of rhetoric that people can use." *Id.* The Court explained that such hostility is wholly "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732.

Sadly, government efforts to target religion have only picked up steam since *Masterpiece Cakeshop*. As Justice Alito noted in a recent speech, "in certain quarters, religious liberty is fast becoming a disfavored right." *See* Hon. Samuel A. Alito, Associate Justice, Supreme Court of the United States, Keynote Address to the Federalist Society (Nov. 12, 2020), https://tinyurl.com/2e8ruum7. As just one example of this dynamic, he noted the "protracted campaign against the Little Sisters of the Poor." *Id.* Despite a distinguished record of charity and public service, the group of nuns has fallen under "unrelenting attack for the better part of a decade." *Id.* Due to their longstanding conscientious objection to providing insurance coverage for contraceptives and abortifacient drugs, they have been vilified as if they are somehow the aggressors in a culture war, when in fact they have been nothing more than civilian targets. While the Little Sisters recently found some measure of vindication in this Court, their years-long battle to vindicate their religious liberty has exacted a heavy toll. *See Little Sisters of the Poor*, 140 S. Ct. 2367.

In truth, Justice Alito could have just as easily picked any number of other examples of religious organizations facing open hostility from government entities for their convictions. Take *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1919 (2021). There, this Court unanimously invalidated Philadelphia's decision to preclude a Catholic charity from participating in the City's foster care program because of its unwillingness to personally certify same-sex couples as foster parents. Because this Court found a facial Free Exercise Clause violation, it did not have occasion to closely examine the record. But as Justice

Alito noted in his concurring opinion, fervent hostility to the Catholic faith lurked just beneath the surface. The City called the charity's religious beliefs "discrimination that occurs under the guise of religious freedom." *Id.* at 1919 (Alito, J., concurring in the judgment). The Mayor questioned an Archbishop's Christianity, and suggested that the Pope "kick some ass here." *Id.* at 1920. And the head of the City's Department of Human Services expressed the view that the teachings of the Charity were out of line with those of Pope Francis. *Id.*

Other cases display a similar government desire to subject religious decision-making to secular veto. Consider *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). There, the Court unanimously rejected a government agency's contention that a religious-school teacher who "led the students in prayer and devotional exercises" and who went by the title of "commissioned minister" somehow *did not qualify as a minister* for purposes of the First Amendment. *Id.* at 178–79. Reminding the agency that religious entities—not government bureaucrats—define the contours of spiritual practice, the Court safeguarded the freedom of the religious to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

Governments have attacked religious schools in other ways too. A case pending before the Court now provides a vivid example. *See Carson ex rel. O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 2883 (2021). In that case, Maine authorized tuition support for private schools, but only if they are not too religious. *Id.* at 25. That contradicts this

Court's recent teaching in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), which overturned a long history of government-sponsored discrimination against religion in holding that States cannot exclude religious schools from generally available tuition-support programs. *Id.* at 2261–62; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (rejecting an attempt to exclude a Church preschool from seeking a competitively-awarded grant for purchase of rubber playground surfaces). But despite that clear guidance, Maine persists in clutching at straws to single out religious institutions for mistreatment.

The COVID-19 pandemic has only amplified the difficulties faced by people of faith. Take as one example this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (per curiam), involving New York's draconian restrictions on in-person worship. *Id.* at 65. Like many other restrictions imposed around that time, it discriminated against religion on its face. It closed the doors of churches, mosques, and synagogues, while leaving open bike repair shops, liquor stores, and yoga studios. *Id.* at 69 (Gorsuch, J., concurring). And this facial inequality was driven by the same familiar animus. As Judge Park noted in his dissent from the Second Circuit's panel decision, New York's Governor stated publicly that if the "ultra-Orthodox [Jewish] community" would not agree to his rules he would "close the[ir] institutions down." *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting).

Several other COVID-era cases have featured similar discriminatory schemes against religious

activities. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (rejecting a California regulation that banned at-home religious gatherings but exempted many private secular gatherings); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (noting that Nevada's regulations sharply restricted attendance at houses of worship but imposed lenient rules on casinos). As the pandemic continues, there seems to be no end in sight to governmental efforts to use COVID-19 as a fig leaf for targeting religion. *See, e.g.*, *Does 1–3 v. Mills*, No. 21A90, 2021 WL 5027177, at *2 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (noting that the policy at issue allowed vaccine mandate exemptions based on secular but not religious reasons).

In short, like the City of Boston in this case, governments across the nation—local, state, and federal—have long proven themselves all too willing to treat people of faith as a disfavored class, in blatant disregard of this Court's teachings prohibiting such discrimination under the First Amendment. It therefore remains urgently necessary for this Court to protect religious liberty.

II. BOSTON'S ACTION IS A DISTINCT AND DANGEROUS WAY OF MASKING HOSTILITY TOWARD RELIGION.

As shown above, many governments are strongly motivated to find ways of discriminating against religion and religious viewpoints. One common tactic for such governments is to attempt to shield their anti-religious animus behind the cloak of the government-speech doctrine.

As this Court has recognized, that doctrine is "susceptible to dangerous misuse" of precisely this sort. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). This is because, by recharacterizing private speech as government speech, governments can "silence or muffle the expression of disfavored viewpoints." *Id.* For that reason, this Court wisely exercises "great caution before extending [its] government-speech precedents." *Id.* This caution must be at an apex when it comes to restrictions on religious expression, which is often among the first targets for hostile governments. This case provides a startling example of this danger.

As discussed below, the facts of the case unmistakably demonstrate that the City's treatment of Camp Constitution was dictated by anti-religious animus. And the City's responses, if anything, further underscore that point. Nor is the City's approach unusual; many other governments have already adopted the stratagem of cloaking anti-religious prejudice in the garb of government speech. If the Court sanctions the tactic in this case, this disturbing practice is rapidly going to become even more widespread.

A. This Case Presents an Especially Clear Example of Abuse of the Government-Speech Doctrine.

This case illustrates the dangers of government-speech doctrine. At issue here is a City program that allows private groups to fly their flags on a flag pole in a public plaza outside City Hall. Pet. App. 141a. This program has existed for twelve years. *Id.* at 142a. And during that time, the City approved all 284 flag-

raising requests that it received. *Id.* at 142a–43a. These included the flags of foreign sovereigns: "Albania, Brazil, Cuba, Ethiopia, Italy, Mexico, Panama, the People's Republic of China, Peru, [and] Portugal." *Id.* at 63a. They also included flags for numerous social and political movements: "the flag of the Chinese Progressive Association, the LGBT rainbow flag, the transgender rights flag, the Juneteenth flag commemorating the end of slavery, and that of the Bunker Hill Association." *Id.*

Supposedly, a review process had to take place before each of these requests was granted. *Id.* at 149a. But the City had no written policies on how to conduct that review process, and in practice the City "never really had a lot of discussion" about "flag raisings in any way." *Id.* at 149a–50a. Over the span of the program's operation leading up to the filing of this case, there is no record that the City ever denied any group's request. *Id.* And indeed, the City's own materials proudly advertise the flag pole as one of "Boston's public forums," where the City would strive to accommodate "all applicants." *Id.* at 137a.

But that all changed when a Christian group, Camp Constitution, sought to participate in the City's program by flying a flag with the Christian Cross. The City squarely denied this request. *Id.* at 152a. And it freely admitted that this decision was based on Camp Constitution's expression of faith. *Id.* at 157a. Specifically, the City stated that it would not fly flags that "promot[e] a specific religion." *Id.* at 155a–56a. And it criticized Camp Constitution's application form for using the term "Christian flag." *Id.*

This is a textbook case of religious animus prohibited by the First Amendment. But for the City's open display of hostility toward religion, Camp Constitution's flag-raising ceremony would have gone off without a hitch.

B. The City's Makeweight Responses Only Highlight Its Hostility to Religion.

While the City has offered a welter of excuses for its behavior, none is plausible (and some only underscore the City's anti-religious bias). The facial implausibility of these excuses further highlights the fact that the city's true animating purpose was hostility toward petitioners' Christian faith.

1. First, the City has tried to walk back its own representation that the flag poles were one of "Boston's public forums." Pet. App. 137a. It is not surprising that the City tries to minimize that representation, which is devastating to its position. After all, a public forum exists where government property "is intentionally opened up for that purpose." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). And it is hard to imagine a clearer reflection of that intent than Boston's express pronouncement that the flag poles were a public forum.[2]

The City offers a tortured explanation for this language, arguing that the designation referred only

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[2] The existence of this direct statement of intent is only one of several key distinctions between this case and the fact pattern in *Walker*. For one thing, the City does not "takes ownership of each [flag] design." *Walker*, 576 U.S. at 216. Nor do these flags serve as a "form of government [identification], [or] bear the State's name." *Id.*

to the physical location where the flag poles were located, and did not encompass the actual use of the flag poles for their intended purpose. Opp. 19. But this argument makes little sense. After all, the flag poles stand *inside* City Hall Plaza, and the City's official forms treat both "City Hall Plaza" and the "City Hall Flag Poles" as two discrete public forums. Pet. App. 133a. It would have been redundant to list the flag poles as a "public forum" if, as the City contends, that phrase was intended merely to denote their location within a public forum. The only logical reason for listing them as such was to indicate that they would be used by the public *as* flag poles.

More fundamentally, this argument is inapt at this stage of the litigation. This case is at the summary-judgment stage, where the evidence must be viewed in the light most favorable to Petitioners. *See* Fed. R. Civ. P. 56. In light of the record, a factfinder could easily conclude that the City intended to make the flag poles a public forum based on its own statements saying so. The City cannot rely on its tendentious interpretation of the evidence—which is debatable at best—to preserve the grant of summary judgment in its favor. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

2. The City next argues that the flag pole could not possibly serve as a public forum because of availability issues. Specifically, it asserts that, unlike a public park, "a single flagpole occasionally and temporarily made available for use by the public could only accommodate a limited number of flag-raising requests," and therefore it "could not reasonably be maintained as an unregulated public forum without disruption to the access and operations of City Hall." Opp. 22. This argument does not withstand scrutiny.

To start, it does not fit the facts. After all, the City has made the flag pole available to all comers for over a decade. And yet the flag pole has been used by outside groups only about 15% of the time. Pet. App. 53a. Indeed, the City has never had to turn down anyone for reasons of availability. *Id.* at 25a. And of course, if conflicts were to arise, they could be managed in any number of viewpoint-neutral ways (including methods as simple as a waiting list or a lottery). Such neutral "time, place, or manner" restrictions would be permissible. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989). But here, it is plainly no coincidence that the flag pole was never "unavailable" for any message until the first time someone tried to submit a Christian flag for an hour-long display. Pet. App. 131a.

The City's argument also proves too much. After all, no public venue has infinite capacity. While parks and public plazas may offer more space than does the City's flag pole, conflicts can and do arise between competing proposed uses of those spaces. Only one parade can march down any street at any given time. Only one group can demonstrate in a park on a particular day. If the mere fact that multiple groups may seek to use a public forum were enough to disprove its existence, the concept would become meaningless.

3. The City further claims that having to fly a Christian flag would create a "cacophony" of competing perspectives. Opp. 25. But this argument only further demonstrates the City's hostility to religion.

The City never previously claimed that its flag program created a "cacophony," despite the fact that it granted 284 flag requests over the course of 12 years. *See* Pet. App. 142a. Those flags reflected a dizzying array of perspectives, including ten foreign sovereigns and a variety of social and political causes. *Id.* at 142a–43a. Indeed, at times these flags reflected perspectives that conflicted with each other. For example, the City has flown the gay pride flag, *id.* at 142a, but it has also flown the flag of Ethiopia, *id.* at 174a, a country where "homosexual act[s]" are punishable by mandatory "imprisonment for not less than one year." Crim. Code of Fed. Democratic Republic of Eth. arts. 629, 630. The City also displayed the Turkish flag, which depicts the star and crescent of the Islamic Ottoman Empire, Pet. App. 144a–45a—not a noted historical ally of the LGBTQ+ community. In short, the City's flag-raising program has shown itself to be eminently capable of accommodating a wide range of diverging messages.

It is telling, however, that the City perceived a disturbing cacophony as soon as a Christian organization wished to express its viewpoint. No great insight is needed to recognize that the "cacophony" concern is simply a smokescreen for the City's anti-religious sentiments. Indeed, as this Court has recognized, "verbal tumult[and] discord" are "necessary side effects of the broader enduring values which the process of open debate permits"—"[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 24–25 (1971).

The City cannot defend its discrimination under the guise of concerns about the Establishment Clause. That clause at most demands government *neutrality*

towards religion, not *hostility* towards it. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *see also infra* Part II.C. It therefore does not tolerate—much less *require*—government to subject religious organizations to worse treatment than their secular counterparts. And just as no reasonable observer could view flying the Mexican flag as proof that the City had been annexed by Mexico, no sensible citizen could conclude that displaying a flag with a simple cross constitutes an official establishment of the Christian faith.

4. The City further argues that it did not show hostility toward religion because it permitted Camp Constitution to hold a public event (albeit without being able to use the flag pole). Opp. 17. This is another argument that, in addition to being substantively misguided, actually reflects the City's anti-religion bias.

The City apparently believes that it has done Camp Constitution enough favors simply by allowing its members to congregate in a public space—even as it denied Camp Constitution the same flag-raising privileges it has offered every other group, solely based on the religious character of Camp Constitution's message. Thus, it is apparently the City's view that a government cannot demonstrate hostility to religion unless it tries to stamp out religious activities altogether; any accommodation at all is accommodation enough. That deeply misguided view—which the City would not likely apply to secular groups—is itself a product of the City's hostility to religion. Put simply, under the First Amendment, a half-loaf for a religious organization like Camp Constitution is not just as good as a full loaf for all

other groups. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 272 n.12 (1981) (religious speakers must be allowed to "use public forums on equal terms with others").

C. The Court Should Put a Stop to This Tactic Now, Lest It Become Even More Widespread.

This is hardly the first time that a government has invoked the doctrine of government speech in a bid to stifle religious expression. A predictable and concerning pattern has begun to emerge: First, a government takes a public space—a school, a park, or (as here) a flag pole—and appears to open it for public use. Second, a religious entity seeks to make use of that space in just the same manner and subject to just the same conditions as its secular counterparts. Third, the government refuses that request, invoking the doctrine of government speech. The government then justifies that refusal—as the City official did in this case, Pet App. 157a—with the purported concern that complying with the religious entity's request would risk violating the Establishment Clause.

A paradigmatic example of this pattern in action can be found in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). There, a local school board permitted the use of a public school building for "social, civic and recreational meetings" after hours, so long as those meetings were "non-exclusive" and "open to the general public." *Id*. at 386–87. A Church sought to take advantage of this opportunity to show an educational film, but the school board denied this request. *Id.* This Court held that denial unconstitutional. Despite occurring on

school grounds, the film's display would "not have been sponsored by the school," and there could be "no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Id.* at 395. Because the Church sought to engage in private speech, and not to compel government speech, the denial amounted to anti-religious discrimination. *Id.* And because the speech at issue was private, the Establishment Clause simply did not apply. *Id.* at 394–95; *accord Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 100 (2001).

"More than once," this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839. To the contrary, excluding religious messages from public forums that are open to other viewpoints is "a denial of the right of free speech" that smacks of "hostility to religion," which threatens to "undermine the very neutrality the Establishment Clause requires." *Id.* at 845–46.

Similar cases have arisen in public schools around the country. In *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514, 525 (3d Cir. 2004) (Alito, J.), a Christian after-school program received permission to use a public school classroom for an hour a week. *Id.* at 522. But when it sought to have permission slips and flyers distributed to the school's students, the superintendent refused "due to Establishment Clause concerns." *Id.* The Third Circuit rejected the school's position. *Id.* at 535–36. Although the flyers were handed out by teachers at the end of school, they were

still the private speech of the Christian after-school program, not school-sponsored government speech. *Id.* at 524–26. For that reason, the court found no basis for restricting the dissemination of the flyers. *Id.* Other cases fit a similar mold. *See, e.g.*, *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1050 (9th Cir. 2003) (distributing religious summer-camp brochure); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994) (allowing religious after-school program).

These conflicts are by no means limited to public schools; they routinely arise in other public forums as well. For example, in *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, 590 (7th Cir. 1995), a rabbi had been permitted for many years to display a menorah in the lobby of the local City-County Building. *Id.* at 582. The government had a longstanding practice of holding the lobby open to displays by various groups—out of more than 100 such applications, nearly all were granted. *Id.* at 582–83 One year, however, the government suddenly changed its mind and forbade the display of the menorah in the lobby. *Id.* The rabbi sued, and won. Finding the speech to be the rabbi's own, the Seventh Circuit rejected the government's prohibition of the menorah as an act of discrimination. *Id.* at 588–92; *accord Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (government rotundas); *Doe v. Small*, 964 F.2d 611, 612 (7th Cir. 1992) (en banc) (public parks).

Unfortunately, not all of these cases are resolved correctly. While lower courts understand that a government body's invocation of government-speech doctrine can be "animated by discriminatory animus toward" particular religious groups, *Am. Atheists, Inc.*

v. Port Auth. of N.Y. & N.J., 760 F.3d 227, 246 (2d Cir. 2014), some cases of exclusion have nevertheless survived judicial review, *see, e.g.*, *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 46 (2d Cir. 2011) (upholding an exclusion of religious groups from access to school during non-school hours); *id.* at 63 (Walker, J., dissenting) (identifying this as impermissible viewpoint discrimination).

The dynamic underlying these cases is apparent. As Justice O'Connor famously put it, there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., plurality). Thus, by recharacterizing private speech as government speech, a government entity can circumvent First Amendment scrutiny while gaining an Establishment Clause-based excuse for its hostility to religion.

This is yet another reason why it is crucial for this court to set and enforce clear boundaries for the government-speech doctrine. If the Court tolerates Boston's tactics in this case, other governments will become emboldened, and official hostility to people of faith will proliferate unchecked.

CONCLUSION

There is no small irony in the fact that Boston is using the site of a flag pole to restrict the right of religious believers to "[p]raise the power that hath made and preserv'd us a nation[.]" Francis Scott Key, *The Star-Spangled Banner* (1814). But the stakes of

this case stretch far beyond these specific facts. Boston's actions are just one manifestation of a broader anti-religious ideology, which is perpetually in search of convenient doctrinal vehicles for policies that disfavor religious groups. Thus, if Boston prevails, the government-speech exception will swallow the First Amendment rule, and religious liberty will be permanently constricted.

For the foregoing reasons, the Court should reverse.

November 22, 2021

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