No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, ET AL.,
Petitioners,

v.

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

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

BRIEF OF KENTUCKY, ARIZONA, ARKANSAS, GEORGIA, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*

This case raises important questions about the limits of the government-speech doctrine. As government bodies, the *amici* States have a significant interest in maintaining the freedom to speak—and not speak—on matters of public concern. The government-speech doctrine protects that freedom, and without it, "numerous Government programs [would be] constitutionally suspect." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

But part and parcel of that interest is ensuring those same governments do not use their freedom to speak as cover for undermining the First Amendment's protection of private speech. Blurring the line between government and private speech will necessarily erode the safeguards that the Free Speech Clause ensures. That is why this Court has recognized that the government-speech doctrine has the potential for abuse. *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). And so the *amici* States submit this brief to ensure that the boundaries of the government-speech doctrine remain firm.

SUMMARY OF THE ARGUMENT

The government-speech doctrine is both necessary and potentially dangerous. It's necessary because a government must be able to advocate for and support the ideas and policies that the people elected their officials to implement. But it's dangerous because expanding the doctrine too far risks creating an end-run

around the Free Speech Clause and the protections the clause provides for private speech—protections that apply even when that private speech occurs on government property. And so courts must carefully scrutinize claims of government speech to guard against abuse.

This case exemplifies that potential for abuse. The City of Boston opened up one of its flagpoles to the public so that anyone interested could temporarily raise a flag as part of a public demonstration. For over a decade, the City indiscriminately allowed hundreds of flag-raising events without preventing a single applicant from participating. In doing so, the City imposed no content restrictions or guidelines whatsoever. And the City's property commissioner did not even once ask to review the flag that would be raised—that is, not until the Petitioners appeared. At that point, the City's previously public forum transformed into a venue for government speech only. And because the City did not approve of the religious nature of the Petitioners' flag, it denied their application.

The government-speech doctrine requires courts to consider a host of factors, each of which weighs differently in any given case. But it cannot be that a government speaks on its own behalf when it fails to meaningfully control the content of the speech at issue. Once the government gives up control over the message, it surrenders its right to claim that the government has been speaking all along. That is what the

City of Boston did here, and its decision to open its flagpole to all comers for over a decade is dispositive.

Even still, the First Circuit's weighing of the various other factors that ordinarily go into a government-speech inquiry falls far short. The court effectively deemed it irrelevant that the City's own policies labeled the flagpole a public forum, instead suggesting that most observers would not be familiar with the rules put in place by the City. The court also held it against the Petitioners that the City rejected their application, explaining that the discrimination against the Petitioners was all the evidence the City needed to prove it controlled the flagpole. And the court failed to give due weight to the temporary nature of the flag-raising event.

What makes this case more troubling, though, is the growing hostility toward religion it exemplifies. Increasingly, religious Americans find themselves on the wrong end of government action. That much is reflected in this Court's recent docket. The Court has confronted governments prohibiting religious groups from participating in public-grant programs. It has pushed back against administrative tribunals subjecting sincerely held religious views to a kind of scrutiny that no secular worldview endures. And it has repeatedly admonished state and local governments for favoring secular interests over similarly positioned religious persons. Yet the trending animus toward religion only grows.

That makes this government-speech case particularly worrisome. No one doubts that the government must be permitted to speak freely for its constituents. But when speech becomes one more tool for the government to sideline and discriminate against religious observers, the Court should pay careful attention to the government that is purportedly doing the speaking.

ARGUMENT

This is a case about religious discrimination masquerading as government speech.

The question for the Court is whether the City of Boston can categorically exclude the religious from accessing a designated public forum by declaring the forum a place reserved for government speech. The Court can resolve that question by doing nothing more than applying its government-speech precedent to the particular facts of this case. And under that precedent, it is clear that the City violated the Petitioners' free-speech rights by denying their flag-raising application.

The reason for that is simple. This Court has never recognized a form of government speech where the government exercises no meaningful control over the speaker's message. And that makes sense. A government could hardly contend that it is speaking on its own behalf when it effectively abandons control over the ideas expressed. But that is precisely what hap-

pened here. Because the City of Boston failed to control the content of the flag-raising events at the City's public square, it cannot now use the government-speech doctrine to justify its discriminatory conduct.

Yet that narrow view of this case would miss much of the problem. Over the past few years, this Court's docket has been filled with suits spawned by religious discrimination. Governments excluding religious groups from accessing public benefits. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020). Governments carving out loopholes for favored interests but not religious ones. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69–70 (2020) (Gorsuch, J., concurring). Governments subjecting religious individuals to invidious double standards. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1734–36 (2018) (Gorsuch, J., concurring). "In far too many places, for far too long, our first freedom has fallen on deaf ears." *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring).

Here, the religious discrimination hides behind the banner of government speech. And so this case raises different questions than those before it. But the root problem is the same. The Court should reverse the decision below.

I. The Court should not extend the government-speech doctrine to cover speech over which the government has exercised no meaningful control.

The City of Boston's claim that the flag-raising events at its public square are government-speech stretches the government-speech doctrine beyond recognition. Given that the doctrine poses such a significant danger for abuse, this Court should deny the City's invitation to extend the doctrine's reach to include speech that the government has never meaningfully controlled.

A. The Court must carefully scrutinize claims of government speech to prevent abuse.

Governments must be able to speak freely. The *amici* States know that all too well. Citizens elect their government representatives in large part because of the political preferences and ideologies they support. And people elect those officials to pursue and promote those ideologies above others. *See Rust*, 500 U.S. at 192–93. So it is untenable to impose the same neutrality requirements on government speech that the First Amendment requires for private speech. Doing so would undermine the ability of a government to do what its officials were elected to do. Indeed, "'it is not easy to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech." *Matal*, 137 at 1757

(quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009)).

And so the Free Speech Clause "does not regulate government speech." *Summum*, 555 U.S. at 467. The government can say, and not say, whatever it wants without violating that clause. *Matal*, 137 S. Ct. at 1757. Of course, "[c]onstitutional and statutory provisions outside of the Free Speech Clause may limit government speech." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). But the Free Speech Clause simply does no work when the government "takes a particular viewpoint and rejects others." *Matal*, 137 S. Ct. at 1757.

Yet it is precisely because the government-speech doctrine is so robust that courts must be careful when deciding on the front end whether the government is, in fact, speaking. "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.* at 1758. And so "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *Id.*

It is not hard to imagine how. Suppose, for example, that a city required pre-approval before putting up a residential yard sign—an obvious form of private speech that is protected by the First Amendment. *See City of Ladue v. Gilleo*, 512 U.S. 43, 48, 54–58 (1994). Could the city use its approval process to declare residential yard signs government speech and restrict

what messages may be displayed? Of course not. No one would argue that the government could bypass the First Amendment by asserting ownership over such patently private speech. *See Matal*, 137 S. Ct. at 1760.

But not all potential abuses of the government-speech doctrine are so easy to discern. That's because the Free Speech Clause is not limited to the government regulating private speech on private property. *See Perry v. Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). It also prohibits the government from regulating private speech on some kinds of government-owned property. That includes property traditionally open to the public, like parks and sidewalks. *Summum*, 555 U.S. at 469. And it also includes government property that has "*not* traditionally been regarded as a public forum" if the government has "intentionally opened [it] up for that purpose." *Id.* at 469 (emphasis added). So even when speech occurs on public property that the government has historically reserved for itself, the government must abide by the Free Speech Clause once it decides to open that property to the public.

What good would that rule do if the government could skip over the First Amendment by claiming ownership of the speech at a designated public forum as soon as an unwelcome speaker appears? That kind of after-the-fact rule change for a designated public forum could be difficult to untangle. After all, it involves the government claiming ownership over speech on the kind of property that the government would have

traditionally reserved for itself. But if successful, such an end-run around the Free Speech Clause would "take[] a large and painful bite out of the First Amendment." *See Walker*, 576 U.S. at 222 (Alito, J., dissenting).

That is why this Court has urged "caution before extending [its] government-speech precedents" any further. *Matal*, 137 S. Ct. at 1758. The danger of misappropriating private speech to the government threatens the protections over public discourse that make this Nation what it is.

B. The City of Boston's lack of control over the flag-raising events dooms any claim that it was engaged in government speech.

"[M]any factors" go into deciding whether something is government speech. *Id.* at 1759. Chief among them is whether the government has exercised control over the message conveyed and, in doing so, endorsed it as its own. In fact, this Court has never found a case of government speech in which the government did not maintain ultimate control over the content expressed. And so while several factors can contribute to the analysis, a lack of meaningful control over the speech should all but foreclose any claim that it belongs to the government.

1. The Court's government-speech doctrine has been shaped primarily by a trio of cases. Each involved a different kind of government speech. And so each raised varying issues—some of which helped and some

of which hurt the government's case. But in all three, one consistent factor emerged: the government actually exercised control over the content of the speech at issue.

First, in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Court held that certain advertisements promoting the sale of beef were government speech and thus not subject to the Free Speech Clause. *Id.* at 553, 560. The ads at issue were created in response to a federal statute, the government provided content guidelines, government officials attended development meetings for the ads, and a government official had "final approval authority over every word used" in the ads. *Id.* at 561. Given all this, the Court (perhaps easily) concluded that the "message set out in the beef promotions [was] from beginning to end the message established by the Federal Government." *Id.* at 560.

The Court refined the analysis a bit more in *Summum*. That case raised a new question: whether a government can claim ownership over the messages conveyed by privately donated monuments displayed in a traditional public forum (a city park). *Summum*, 555 U.S. at 464, 472. A religious organization sued the city after the city denied its request to erect a monument alongside the others already in place. *Id.* at 466. The organization saw this as a free-speech problem because the city had opened its park to almost a dozen other privately donated monuments. *Id.* at 464. But the Court rejected that claim. It held that "although a

park is a traditional public forum for speeches and other transitory expressive acts, . . . the placement of a permanent monument in a public park is best viewed as a form of government speech." *Id.*

Summum made clear that the government-speech question does not reduce to a rigid formula. The Court weighed a variety of factors to reach its conclusion that the monuments amounted to government speech. *Id.* at 470–78. It considered, for example, the fact that governments have long used monuments to speak to the public. *Id.* at 470. It also recognized that governments have historically "exercised selectivity" in accepting donated monuments, *id.* at 471, and that the public usually associates a park with the government that owns the land, *id.* at 472.

But like the advertisements in *Johanns*, the Court relied heavily on the city's control over the monuments by maintaining "'final approval authority' over their selection," taking ownership of the monuments, and issuing selection criteria. *Id.* at 473 (quoting *Johanns*, 544 U.S. at 560–61). Even though the monuments were created and donated by private parties, the city decided which ones to accept and display in its park.

More recently, the Court in *Walker* again considered the circumstances in which the government can claim ownership over privately created speech. *Walker* dealt with speech displayed on specialty license plates. 576 U.S. at 203. Texas allowed private citizens to propose their own plate designs, and—if approved—Texas would create the plate and allow anyone to use

it. *Id.* The Court held that this was government speech. *Id.* at 204.

In doing so, the Court focused on three of the factors identified in *Summum*. First, it found that the history of license plates showed that they have long been used to convey a State's messages. *Id.* at 211. Second, the Court noted that the Texas plates "are often closely identified in the public mind with the [State]." *Id.* at 212 (alteration in original) (quoting *Summum*, 555 U.S. at 472). And third, the Court observed that Texas had "direct control over the messages conveyed on its specialty plates." *Id.* at 213.

On this final point, the Court looked at both the State's law and practice to determine whether Texas actually maintained such control. Texas law provided that the State had sole design control and a state board had to approve a specialty plate design. *Id.* Moreover, the board "actively exercised" that authority by rejecting "at least a dozen proposed designs." *Id.* So even though Texas had accepted hundreds of privately submitted specialty plates, Texas never gave up control as a matter of law, *and* it exercised that control by taking ownership of the plate design and rejecting messages it did not approve of. "This final approval authority allow[ed] Texas to choose how to present itself and its constituency." *Id.*

Walker marks the "outer bounds" of the government-speech doctrine. *Matal*, 137 S. Ct. at 1760. That's because the government can open up its prop-

erty for private speech only so far before it must submit to the First Amendment. Texas prevailed in large part because it never gave up control over the messages on its specialty plates. Even though it approved hundreds of different proposals, the State retained exclusive control over what messages would appear and even how they would be designed. *Walker*, 576 U.S. at 213 ("Texas law provides that the State has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." (cleaned up)). Once the government relinquishes that kind of control, it is hard to see how it could continue "speaking on its own behalf." *See Summum*, 555 U.S. at 470.

2. The City of Boston failed to exercise any kind of meaningful control over its flag-raising events until the Petitioners appeared. That fact alone should make it all but impossible for the City to claim that it was "speaking on its own behalf" during all those years. *See id.*

Start with the application process for raising a flag during a public event. The application was designed to "accommodate *all* applicants" and make everyone feel welcome. Pet.App.137a, 143a (emphasis added). Consistent with that mission, the City had no written guidelines explaining that certain kinds of speech or viewpoints were acceptable. Instead, the City described the flagpole as a "public forum[]," and the City commissioner explained that the City "[f]or the most part" would "allow any event." *Id.* at 137a, 149a. If the City intended to exercise control over the message

communicated during a flag-raising event, it failed to state that anywhere—and in fact, suggested the opposite.

Nor did the City's practice look any different. For 12 years—up until the moment the Petitioners submitted their application—the City approved 284 different flag-raising requests. It disapproved *zero*. And that's not because the City just happened to approve and endorse each message conveyed by the prior 284 requests. The City commissioner explained that he had never requested to review a flag design before the Petitioners' application. Pet.App.159a. That should not be surprising. It is perfectly consistent with the City's prior position that the flagpole was a public forum and open to anyone. But it is *not* consistent with the City's litigation position that the messages expressed during these events were actually government speech that the City approved of.

Given this lack of control or approval, it is "farfetched to suggest that the content of [a flag-raising event] is government speech." *See Matal*, 137 S. Ct. at 1758.

The First Circuit's contrary conclusion turns the idea of control on its head. The court rested its conclusion on two main points: The fact that the City required interested groups to submit an application and obtain the commissioner's approval, and the fact that the City exercised its discretion to deny the Petitioners' application. Pet.App.22a, 24a. Neither of those facts matter much here.

First, governments frequently use an application process to ensure availability of a public forum or compliance with neutral time, place, and manner restrictions. That is a routine—and ministerial—part of maintaining any kind of public space. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) ("To allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech." (cleaned up)). And this Court's public-forum precedent allows exactly those kinds of requirements for regulating private speech in public spaces. *Id.* at 322–23.

The City's application process here was no different. According to the City, the application allowed the City to do things like recommend a different location if someone else had already applied for the space on that same date. Pet.App.133a. The City might also deny an application if, for example, it determined that the applicant had damaged property during a prior event. *Id.* at 134a. But at no point did the City ever use its application or approval process to "'effectively control[]' the messages" conveyed during a flag-raising event. *See Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61). So the mere existence of an approval process says nothing about whether the City in fact exercised control over the *content* of the speech conveyed during the flag-raising events.

Even the City downplays the suggestion that its application process evidences any kind of meaningful control over speech. The City "concedes that despite

its application process," it cannot "prevent groups of citizens from arriving unannounced at" its public fora, like the gathering space around the flagpoles. BIO 20. And so, the City explains, the "application process serves as a way to reserve a public space for an event ahead of time." *Id.* In other words, not even the City contends that its application is anything more than an administrative tool for crowd control. Yet the First Circuit likened it to a city deciding which monuments to permanently install in one of its parks. Pet.App.22a–23a.

Second, the First Circuit rejected the suggestion that the City's long history of only approving applications undermined the City's claim of control. *Id.* at 25a–27a. That should be expected, the First Circuit explained, because each of those 284 requests came from a "country, civic organization, or secular cause." *Id.* at 26a. And so the fact that the City rejected the Petitioners' application—the first rejection in 12 years—purportedly demonstrated precisely the kind of selectivity that is necessary under *Summum* and *Walker*. *Id.*

Set aside for a moment the troubling First Amendment implications of a City making an otherwise publicly accessible forum available only to secular causes. And set aside that one of the Petitioners (Camp Constitution) *is* a civic organization that promotes civic education but also happens to be religious. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001) ("[S]peech discussing otherwise permissible

subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.").

What's particularly troubling about the First Circuit's reasoning is that it relied on the City's rejection of the Petitioners' own application as proof—the *only* proof—that the City does in fact exercise the requisite control over speech. In other words, the First Circuit held that the City's discrimination against the Petitioners is all the proof it needs to be able to discriminate against the Petitioners. This cannot be right. It will always be the case that the government has exercised some control by rejecting the application of whoever the plaintiff might be. So if 12 years of uninterrupted approvals totaling almost 300 applications that ended only when the Petitioners submitted their request is not enough to show a lack of control, what is?

While it is true that "many factors" go into deciding whether a particular form of speech belongs to the government, *Matal*, 137 S. Ct. at 1759, those factors cannot overcome a government's failure to maintain even a hint of control over the content of speech that allegedly belongs to the government. The City of Boston did nothing to suggest it cared about the messages conveyed on its flagpole until the Petitioners appeared. That lack of control wholly undermines the City's current claim that the flag-raising events were government speech all along.

C. Any other relevant factors in the government-speech analysis fail to tip the scale for the City.

Even if this Court turns to the other potentially relevant factors, nothing should change the outcome.

1. Consider first how a reasonable person would view the speech. On this point, it is relevant that the City held the flagpole out as a public forum and made it available to "all applicants." Pet.App.136a–140a. Reasonable perceptions of the public weigh on whether to classify speech as government-owned. *See Walker*, 576 U.S. at 212. And those perceptions include a "fully informed" understanding of whether the government controls or restricts the messages displayed in a particular forum. *See Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment); *see also Walker*, 576 U.S. at 212 (relying on information beyond what someone would know from simply observing a specialty plate to determine whether the design was "closely identified in the public mind with the State" (cleaned up)). Given the City's express policy of opening the flagpole up to all comers—along with its consistent practice of doing so—no reasonable observer would believe that the City was endorsing each display.

Next, consider the duration of the speech. In *Summum*, this Court held that the permanence of the monuments weighed in favor of finding government speech. 555 U.S. at 464. The First Circuit dismissed any consideration of the duration of a flag-raising

event because *Walker* held this issue was not dispositive. Pet.App.22a. Yet *Walker* did not declare the issue irrelevant, and it matters here that the Petitioners only requested a display lasting an hour. Pet.App.131a. That kind of fleeting expression is precisely what public fora regularly accommodate. *See Summum*, 555 U.S. at 478 ("The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program.").

2. Perhaps the only factor weighing in favor of the City here is that flagpoles on government property have been historically used for expressing government speech. *See Walker*, 576 U.S. at 210–11. But that can only take the City so far. Otherwise, the government-speech doctrine could be used to bypass the content-neutral requirements that ordinarily apply to a designated public forum.

A designated public forum exists on property that has not "*traditionally* been regarded as a public forum" but "is intentionally opened up for that purpose." *Summum*, 555 U.S. at 469 (emphasis added). These spaces are subject to the same content-neutral requirements as a traditional public forum, even though—historically—the government did not allow private speech there. *Id.* And so when the government opens its own (otherwise restricted) property to the

public, the Free Speech Clause prohibits it from discriminating based on viewpoint.

Over-reliance on history as a means to identify government speech thus runs the risk of hollowing out the protections that apply to such a forum. *Every* designated public forum has—by definition—been used in the past by the government to express its own ideas.

This case presents the perfect illustration. No one doubts that governments have historically used flagpoles to convey messages—patriotism, respect for fallen heroes, or any number of other ideas. But that historical practice cannot trump the government's "policy and practice" of "opening a nontraditional forum for public discourse." *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Here, the City's policy expressly provided that the flagpoles were a "public[] forum" open to "all applicants." Pet.App.137a. And its practice had been to indiscriminately approve every request without even reviewing a proposed flag. Pet.App.150a. Under those facts, no amount of historical use can undo the City's decision to open its flagpole up to the public.

* * *

The government must be free to speak on its own behalf. But it cannot use that freedom to maneuver around the Free Speech Clause to suppress private speech. The City of Boston's convenient discovery of its own voice as soon as a disfavored speaker asked to use its flagpole must therefore be rejected.

II. The City of Boston's exclusion of religious groups from its flag-raising forum continues a worrying trend of hostility toward religion.

It would be a mistake to resolve the free-speech question presented here without a broader understanding of the root problem—a growing hostility toward religion across the Nation.

1. In recent years, the Court has confronted a rising number of government actions designed to exclude religious individuals from fully participating in public life. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2021; *Espinoza*, 140 S. Ct. at 2256. Those cases have not arisen in a vacuum. Governments have acted increasingly hostile toward religious Americans. *See Roman Cath. Diocese*, 141 S. Ct. at 69–70 (Gorsuch, J., concurring). They label sincerely held religious beliefs as bigoted. *See Masterpiece Cakeshop*, 138 S. Ct. at 1734–36 (Gorsuch, J., concurring). Or they threaten to shut down two centuries of church-provided social services if the faithful refuse to give up their faith. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–76 (2021). This hostility toward religion should be unfathomable. And yet it persists. *See id.* at 1930 (Gorsuch, J., concurring) (lamenting the "nine-year odyssey" of discrimination against a devoutly religious creator of custom wedding cakes).

The public-benefit cases are a prime example. What reason could a government have to prohibit a religious organization from obtaining a grant that would

allow it to build a safer playground surface out of recycled rubber? Religious groups are, after all, "member[s] of the community too." *See Trinity Lutheran*, 137 S. Ct. at 2022. And so they should not be prevented from accessing the same public benefits available to everyone else.

Yet the features that made religious discrimination improper in *Trinity Lutheran* appear here just the same. Like the public grant of money in *Trinity Lutheran*, the City of Boston wants to make its flagpole available to every civic organization so long as it has no religious affiliation. And so, like *Trinity Lutheran*, "[t]he express discrimination against religious exercise here" is "the refusal to allow the [Petitioners]—solely because [they are] a [religious organization]—to compete with secular organizations" in the marketplace of ideas. *See id.*

Surely neither *Trinity Lutheran* nor *Espinoza* would play out differently if the State had argued that its decision to make funds widely available to only secular organizations was really a form of government speech? But it is not hard to see that as the next step. The government in *Trinity Lutheran*, after all, made that precise argument at the certiorari stage. *See Trinity Lutheran*, No. 15-577, BIO 5–6 (citing *Walker*, 135 S. Ct. at 2245). And yet what an easy workaround of the Free Exercise Clause that would be.

2. Just as worrisome, the City claims that its no-religion-allowed policy grew "out of concern for the so-

called separation of church and state or the constitution's establishment clause." Pet.App.157a. Perhaps that should not be surprising. This is not the first government-speech case "litigated in the shadow of the First Amendment's *Establishment* Clause." *Summum*, 555 U.S. at 482 (Scalia, J., concurring). And that's because the Court's Establishment Clause jurisprudence has been understood by some to "thwart[], rather than promote[], equal treatment of religion," *Espinoza*, 140 S. Ct. at 2265–66 (Thomas, J., concurring). The effect is "repeated denigration of those who continue to adhere to traditional moral standards, as well as laws even remotely influenced by such standards, as outmoded at best and bigoted at worst." *Id.* at 2267 (Thomas, J., concurring).

Such warnings ring particularly true here. After the City denied the Petitioners' flag-raising application, it adopted—for the first time—written policies governing the use of its public forum. Remarkably, the City made express exactly the kind of "denigration" of religion that one might fear. Its new policy provides that "[a]t no time will the City of Boston display flags deemed to be inappropriate or offensive in nature *or those supporting discrimination, prejudice, or religious movements*." Pet.App.160a (emphasis added).

What should be made of the fact that the City has paired "religious movements" along with things like "discrimination" and "prejudice"? That kind of "bureaucratic judgment" runs counter to this Nation's commitment to "protect[ing] religious beliefs" of all

stripes. *See Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring) ("[N]o bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the First Amendment."). Yet the City seems to have adopted such a rule in the wake of this controversy as a means to protect itself from future liability. Whatever the Religion Clauses mean in any given case, it surely cannot be that one solution is to simply make religious discrimination even more overt.

* * *

Doctrinally, this case is about the Free Speech Clause. But it arises against the backdrop of a growing hostility toward religion that should only add to this Court's caution against extending the government-speech doctrine any further. *See Matal*, 137 S. Ct. at 1758.

CONCLUSION

The Court should reverse the First Circuit's judgment.

Respectfully submitted,

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