No. 20-1158

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HAROLD SHURTLEFF; CAMP CONSTITUTION, a public charitable trust,

Plaintiffs - Appellants

v.

CITY OF BOSTON; GREGORY T. ROONEY, in his official capacity as Commissioner of the City of Boston Property Management Department,

Defendants - Appellees

On Appeal from the United States District Court
for the District of Massachusetts
In Case No. 1:18-cv-11417-DJC before The Honorable Denise J. Casper

REPLY BRIEF OF PLAINTIFFS–APPELLANTS

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Appellant Camp Constitution states that it is a public charitable trust and that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

All of the City's arguments depend on a single premise—that the private flags raised on the City Hall Flag Poles, pursuant to the City's "all applicants"–"public forums" policy, are government speech because the Flag Pole forum is not compatible with private expression and the City must approve all flags before raising. The undisputed record facts, however, reveal the City's premise to be false. The City can fly its own local flag or state flag without creating a forum, but the City's express policies and actual practices prove the City intentionally designated one of its Flag Poles as a public forum for regular, temporary use by private organizations, and that the City's control over the private flags is minimal to nonexistent—for more than a decade before Camp Constitution's request the City approved every flag raising request it received. Thus, the undisputed record negates the City's government speech arguments, and Camp Constitution is entitled to summary judgment.

ARGUMENT

I. THE UNDISPUTED FACTS NEGATE THE CITY'S GOVERNMENT SPEECH ARGUMENTS BECAUSE THE CITY HALL FLAG POLES HAVE CONTINUALLY ACCOMMODATED PRIVATE EXPRESSION, WHICH THE CITY NEVER CENSORED UNTIL IT CENSORED PLAINTIFFS' SPEECH.

A. Boston's Opening of Its City Hall Flag Poles for the Private Expression of "All Applicants" for Over a Decade Conclusively Distinguishes *Pleasant Grove* and *Walker* and Renders Obsolete This Court's Prior Decision on an Incomplete Record.

1. The permanence of the monuments in *Pleasant Grove*'s government speech finding was more important than "historical principles regarding monuments."

The City's Brief ("City Brief") downplays the permanence of the monuments deemed government speech in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), arguing that the Supreme Court was instead concerned with "generally understood historical principles regarding monuments as a basis for its decision." (City Br. 12–15.) But in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), the Court confirmed that the permanence of the proposed monument was critically important: "in [*Pleasant Grove*] we emphasized that monuments were 'permanent,' and . . . observed that public parks can accommodate only a limited number of permanent monuments." 135 S. Ct. at 2249. While *Walker* observed that no one factor was dispositive, it nonetheless affirmed the importance

of the permanence of the monuments in the *Pleasant Grove* government speech analysis.

The undisputed record facts here show that the temporary nature of flag raisings allowed on the City Hall Flag Poles ensures that the Flag Poles are continually open for the City's own speech (*e.g.*, the usual City of Boston Flag), as well as the speech of a large number of other private organizations allowed to raise their flags pursuant to the City's "all applicants"–"public forums" policy, serving the City's express purposes of "foster[ing] diversity and build[ing] and strengthen[ing] connections among Boston's many communities." (JA582–583 ¶¶ 22–23, 27.) The *Pleasant Grove* Court provided several illustrations distinguishing such accommodations of private speech from permanent monuments constituting government speech:

> **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**. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. A public university's student activity fund can provide money for many campus activities. A public university's buildings may offer meeting space for hundreds of student groups. A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators.

> **By contrast, public parks can accommodate only a limited number of *permanent* monuments**.

555 U.S. at 478 (emphasis added) (citations omitted). The undisputed record facts show where the City Hall Flag Poles fit in the above illustrations from *Pleasant Grove*: the Flag Poles are "capable of accommodating a large number of public speakers without defeating the essential function of the [Flag Poles]," *id.*, because they have done so frequently and continually, for "all applicants" over twelve years. (Br. 10–11, 31–34; JA577–583, JA587–588.) Thus, the Flag Poles "over the years, can provide a [forum] for a very large number of [flags] . . . for all who want to speak . . . ." 555 U.S. at 479.[1] *Pleasant Grove*'s government speech analysis could only

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[1] This Court, on an incomplete record, supposed a similar contrast between the City Hall Flag Poles and Boston's other public forums:

> And unlike many other public spaces controlled by a permitting process, for access to which the City might grant thousands of applications a year, the flagpole at issue is only rarely occupied by a third-party flag. Appellant's complaint lists only fifteen instances, over a period of years, in which the City has granted a third party's flag-flying request. **That rarity highlights the City's tight control over the flagpole in question and that it engages in symbolic speech as to the replacement flags it allows**.

Shurtleff v. City of Boston, 928 F.3d 166, 174 (1st Cir. 2019) (emphasis added). Now that the record wipes away any notion of rarity in flag raising approvals, and reveals that the Flag Poles accommodate the expression of all who ask, the contrast is no longer valid.

apply to Camp Constitution if Camp Constitution had requested to permanently occupy space in City Hall Plaza by placing its own flagpole in the ground.

The City relies heavily on the notion that governments have a historical practice of using flags to communicate a message. (City Br. 12–15.) But this is irrelevant to a determination of whether **Boston** has intentionally opened a designated public forum on its Flag Poles to supplement their traditional use. Under binding precedent, the proper inquiry is whether the City has a policy and practice of opening a public forum on the City Hall Flag Poles, not whether *other governments* have refused to designate such a forum. *See, e.g.*, *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 (1st Cir. 2004) (noting whether government has opened public forum on government-owned property turns on government policy and practice, not historical practices of other governments). The City's policy and practice show Boston intentionally opened a designated public forum on the City Hall Flag Poles. (*Cf.* Br. 27–37.)

2. The "direct" and "effective" government control found in *Walker*, and by this Court on an incomplete record, does not exist in Boston.

The City claims its control and final approval authority over private flag raisings transforms the private organizations' flags into government speech. (Br. 19–22.) Putting aside the facial implausibility of this argument, the City has fallen far short of showing any degree of actual control coming close to the "direct" and

"effective" control found to create government speech in *Walker*, and supposed by this Court on the incomplete record in Camp Constitution's prior appeal, *Shurtleff v. City of Boston*, 928 F.3d 166 (1st Cir. 2019) [hereinafter *Shurtleff I*].

In *Walker*, the relevant government control over the specialty license plate messages was the state's "**direct control** over the messages conveyed," where the state "**actively exercised** this authority" and "**rejected** at least **a dozen** proposed designs." 135 S. Ct. at 2249 (emphasis added). Thus, the Court concluded, "Texas has effectively controlled the messages conveyed by **exercising** final approval authority over their selection." *Id.* (emphasis added) (internal quotation marks omitted). In this case, Boston does not actively exercise its authority to reject or even look at proposed flags for flag raisings, and there is no record of any denial prior to Camp Constitution's. (Br. 10–11, 31–34; JA577–583, JA587–588.) Thus, Boston cannot claim the "direct" or "effective" control present in *Walker*, which is fatal to the City's government speech position.

Just as the Supreme Court has held that the mere involvement of private parties in selecting a government message does not, in and of itself, make the message private expression, *see Walker*, 135 S. Ct. at 2247, 2251, the mere involvement of the government in providing a forum likewise does not constitute sufficient control to make the message government speech, *see Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34–35 (2d

Cir. 2018) ("[S]peech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some ways allows or facilitates it."). Indeed, countenancing the City's rationale would vastly expand and sanction dangerous aspects of the government-speech doctrine: "[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. **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**." *Matal*, 137 S. Ct. at 1758 (emphasis added).[2] Thus, the government cannot, merely by reserving to itself "approval" rights, convert to government speech the private speech it openly solicits and automatically allows in its designated forums.

Thus, where "all applicants" are approved without exception for twelve years, at an increasing rate to almost once a week, neither *Pleasant Grove* nor *Walker*, nor this Court in *Shurtleff I*, provides any support for a government speech finding. The slender reed of government control on which this Court rested its decision in

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[2] The City protests that *Matal* is trademark case. (City Br. 25–26.) But the quoted admonition from the Supreme Court's opinion **precedes** and transcends the Court's application of the doctrine to trademarks. *See Matal*, 137 S. Ct. at 1758.

Shurtleff I was broken by the weight of the developed record. (*See supra* note 1.) Nothing remains to hold up the City's government speech position.

3. *Pleasant Grove* and *Walker* expressly recognize forum analysis, rather than government speech analysis, applies to nontraditional forums intentionally designated by the government for private expression.

Even in *Pleasant Grove*, the Supreme Court recognized that "a government entity may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," and "may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." 555 U.S. at 469–70. However, the Court reasoned, "**Permanent** monuments displayed on public property typically represent government speech." *Id.* at 470 (emphasis added). In so doing, the Court provided several illustrations of such nontraditional forums that were compatible with and intentionally designated for private speech, and therefore subject to forum analysis, distinguishing them from the government speech accomplished through permanent monuments. *See* 555 U.S. at 478, 480. (*See also supra* Part I.A.1.)

Subsequently, in *Walker*, the Court highlighted some of the nonexclusive considerations deemed relevant to the government speech finding in *Pleasant Grove*, and in so doing clarified that *Pleasant Grove* did not provide a formulaic test for government speech that must be applied in all cases. *See Walker*, 135 S. Ct. at 2247

("In light of **these and a few other relevant considerations**, the Court concluded that the expression at issue was government speech." (emphasis added)), 2249 ("That is **not to say that every element** of our discussion in [*Pleasant Grove*] is relevant here." (emphasis added)).[3] The *Walker* Court also, as in *Pleasant Grove*, recognized that forum analysis applies to intentionally established government forums for private speech, such as a designated public forum or a limited public forum. *Walker*, 135 S. Ct. at 2250. Importantly, the *Walker* Court found no such intention on the part of Texas because "the State exercises final authority over each specialty license plate **design**," "**takes ownership** of each specialty plate **design**," and "license plates have traditionally been used for government speech, are primarily used as a form of government ID, and **bear the State's name**." *Id.* at 2251 (emphasis added).

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[3] *Cf. Shurtleff I*, 928 F.3d at 172 ("The *Summum*/*Walker* three-part test controls here . . . ."). The Court is not bound by its prior application of the law to the facts on the previously undeveloped record *See LeBeau v. Spirito*, 703 F.2d 639, 643 (1st Cir. 1983). Furthermore, this Court's review of the district court's grant and denial of summary judgment on cross motions is de novo, *see Stephanie C. v. Blue Cross Blue Shield of Massachusetts HMO Blue, Inc.*, 852 F.3d 105, 110 (1st Cir. 2017), which includes plenary review of the "mixed fact/law matters which implicate core First Amendment concerns," *AIDS Action Comm. of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 7 (1st Cir. 1994). (Br. 26.) Thus, on the developed record that was unavailable to the Court in *Shurtleff I*, the Court is not bound to apply *Pleasant Grove* and *Walker* with the same formulation or emphases as in *Shurtleff I*, but instead should be guided by all the "relevant considerations." *Walker*, 135 S. Ct. at 2247.

By contrast, Boston's flag raising policies include a critical component missing from *Pleasant Grove*'s permanent monument policy and *Walker*'s state license plate policy: an express, written intention to accommodate "all applicants" who want to use the City Hall Flag Poles as one of "Boston's public forums." (Br. 9; JA580.) This undisputed, express statement of intent, combined with an undisputed record of approving as many flag-raisers as apply, compel consideration—in the first instance—of whether Boston has intentionally designated the Flag Poles as a public forum for private expression. *See Ridley*, 390 F.3d at 76. "To determine that intent, courts must consider **both explicit expressions about intent and 'the policy and practice of the government** to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum'" and "'examine[] the nature of the property and its compatibility with expressive activity . . . .'" *Id.* (emphasis added) (first modification in original) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). According to this Court in *Ridley*, the relationship between express intent and practice is important: "a statement of intent contradicted by consistent actual policy and practice would not be enough to support the [government's] argument" that its forum matches the statement of intent. 390 F.3d at 77. *A fortiori*, where Boston's "statement of intent" is reinforced by its "consistent actual policy and practice," the City's argument that the forum is different from its statement of intent

has no force whatsoever. As shown *supra* in part I.A.1, the City's policy, practice, and explicit expression of intent, as well as the continually demonstrated compatibility of the Flag Poles with private expressive activity, all point to an intentionally designated public forum for private speech.

The City's policy designating the Flag Poles as a "public forum" for "all applicants," and its twelve year history of never censoring flags of private speakers, is far different from the permanent monument in *Pleasant Grove*, and the tightly controlled, state-owned, state-designed, and state-accepted license plate in *Walker*. Indeed, the stark factual differences between *Pleasant Grove* and *Walker* and this case counsel against any formulaic application of "the recently minted government speech doctrine." *Pleasant Grove*, 555 U.S. at 481 (Stevens, J., concurring); *see also Matal*, 137 S. Ct. at 1760 (cautioning *Walker* "marks the outer bounds of the government speech doctrine.").

B. The City's Record of Universal Flag Raising Approvals Confirms It Intended to Designate the City Hall Flag Poles a Public Forum *for* Flag Raisings, *on* the Flag Poles.

Despite the unquestionable legal import of the City's explicit written designation of the City Hall Flag Poles as one of "Boston's public forums," the City urges this Court to look the other way due to a feigned difference between "the ***location at*** *the* City Hall Flag Poles," and the Flag Poles—***as flag poles.*** (City Br.

28–30.) This distinction is wrong as a matter of law, and as a matter of undisputed fact.

The undisputed record shows that the feigned distinction between "the location" of the City Hall Flag Poles and the Flag Poles themselves, *qua* flag poles, is wrong as a matter of fact. The City Hall Flag Poles are located at City Hall Plaza, and the City's written policies and application forms designate City Hall Plaza and the City Hall Flag Poles as two separate "public forums." (JA577–580, JA582.) It would have been entirely superfluous to name the City Hall Flag Poles as one of "Boston's public forums" if the City's intent was merely to identify some patch of the Plaza grounds at the Flag Poles, because those grounds already would have been covered by the designation of City Hall Plaza as one of the "public forums."

Furthermore, the 284 flag raisings the City allowed before Camp Constitution's request (JA583)—**on and at** the City Hall Flag Poles—were initiated by applications received and processed by the City according to the same procedures as all other events at "Boston's public forums," and pursuant to the same open invitation to "all applicants." (JA581 ¶ 16 ("The City processes all applications for public events on City properties, including flag raisings, in the same way.") (citing, *inter alia*, Rooney Dep., JA194:2–JA200:12 ("Yes, this is every request regardless of the type."), JA258:11–JA263:4 ("Yes, it's for any event request.")).) Thus, the City's argument that it operates a "separate and distinct flag-raising program" (City

Br. 29) which is not subject to the City's invitation to "all applicants" to use the City Hall Flag Poles as one of "Boston's public forums," is directly contradicted by the City's written policies and procedures for, and records of, processing flag raising event applications.

In sum, the City's position that the City Hall Flag Poles are a public forum for purposes of a private organization's flag raising event (**at** the Flag Poles), but the Flag Poles are not a public forum for purposes of the private organization's flag itself (**on** the Flag Poles)—even though the private organization owns the flag, provides the flag, flies the flag only during its flag raising event, and retains ownership of the flag after the event—is untenable. It cannot be true that the private organization's flag is government speech while every other aspect of the flag raising event is private speech.[4] The Court should reject the City's false, litigation-born distinctions, *see McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 871–72 (2005) (rejecting county's post-suit policy justification as mere "litigating position"), and hold that the City Hall Flag Poles are a public forum when designated by the City for use by a private

[4] The City deems significant the fact that groups raising flags must obtain a hand crank from the City (City Br. 30), but providing the hand crank is no different, constitutionally, from providing a key to a City facility made available to a private group for a meeting—neither reasonably communicates endorsement of the private group's message.

organization for the organization's flag raising event, and that the raising of the private organization's flag during its event is its own (private) speech.

C. The City's Practice of Inviting and Allowing Private Organizations' Flag Raisings on the City Hall Flag Poles Is Not Incompatible With the Purposes of the Flag Poles.

The City also contends that it has not created a designated public forum on the City Hall Flag Poles for flag raisings because observing its historical practice of universal access to flag raising applicants would somehow be incompatible with the Flag Poles. (City Br. 32–36.) Specifically, the City contends that it should not be "force[d] . . . to associate itself with positions that are offensive to residents and visitors alike." (City Br. 36.) Even this Court, on an undeveloped record, supposed the City was engaging in "symbolic speech," endorsing the messages of the substitute flags it permits on the City Hall Flag Poles. *Shurtleff I*, 928 F.3d at 174. But the undisputed material facts and the City's own Brief reveal the fallacy of this reasoning.

The City's Brief concedes that the City does not celebrate or endorse the regimes in control of Turkey, Cuba, or China, when it allows organizations to fly the flags of those countries on the Flag Poles. (City Br. 22–23.) Rather, allowing access to the Flag Poles for those flags (on the same terms as all others) demonstrates the City's inclusion of the communities and heritages represented by the flags, even when they "do not share our political values." (*Id.*) But the City nonetheless claims

that it cannot allow the raising of a Christian flag (on the same terms as all others) without promoting Christianity, as opposed to celebrating the inclusion of the community represented by the flag as the City claims to do for the communities represented by the flags of Turkey, Cuba, and China. (City Br. 23.) The City cannot have it both ways. By its own reasoning, the City would not endorse or promote Christianity by allowing Camp Constitution to raise its flag on the same terms as have been extended to "all applicants" to use "Boston's public forums."

Moreover, contrary to the City's argument (City Br. 35–36), maintaining a designated public forum for flag raising events on its Flag Poles, as has been its consistent policy and practice, does not deprive Boston of its right to engage in actual government speech on the Flag Poles at all times in between the approved flag raisings of private organizations—which is the vast majority of the time. (*E.g.*, Camp Constitution's event was to last only an hour. (JA15).) Thus, the City can fly a Boston Bruins flag on the City Hall Flag Poles whenever it wants, without affecting the City's designated flag public forum for flag raisings. Furthermore, the City is free to limit its designated Flag Poles forum to, *e.g.*, flags of local organizations, *see The Nationalist Movement v. City of York*, 481 F.3d 178, 183 n.4 (3d Cir. 2007) (upholding residency requirement against Equal Protection claim), or flags commemorating various communities' civic contributions to Boston, which is congruent with the current stated purposes of the forum. (JA583 ¶ 27 ("'Our goal is

to foster diversity and build and strengthen connections among Boston's many communities.'").)[5]

D. 284 Flag Raisings with No Denials Demonstrate Private Flag Raisings are Compatible With the Flag Poles' Purpose and the City's Claim of Control Over Flag Raising Messages Is Illusory.

The City tries to downplay the critical fact that it approved 284 flag raisings in the years preceding Camp Constitution's request (City Br. 23–24), including 39 in the immediate year before—which averages to more than three per month, or almost once per week. But this frequency is important because it displaces the "rarity" supposition of this Court in *Shurtleff I*, upon which the Court based its "control" conclusion. 928 F.3d at 174. (*See supra* note 1.) Moreover, the record of 284 flag raising approvals with no record of a denial, and an admission by Rooney that he has never denied a flag raising request, demonstrate—conclusively—that the City's claim of "control" is illusory. (Br. 10–11, 31–34; JA577–583, JA587–588.) To be sure, the City **says** it must review and approve flag raising requests (JA587 ¶ 36 (quoting Rooney Aff., JA300 ¶ 17)), but the City's bare "statement of intent [is]

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[5] Such a forum would not require acceptance of a St. Louis Blues flag raising or a "Straight Pride" flag raising (*see infra* note 6), as speculated by the City (City Br. 35–36), absent some plausible, identifiable civic contributions to Boston by the represented communities, nor would such a limitation necessarily reduce the amount of speech occurring on the Flag Poles under current policies and practices. (*Cf.* Br. 53–54 (explaining why City's exclusion of Camp Constitution's flag also does not satisfy alternative limited public forum analysis).)

contradicted by consistent actual policy and practice" of never so much as looking at a flag before approving it. *Ridley*, 390 F.3d at 77. Thus, the City's claim of "control" over flag raising messages is another pretextual litigation contrivance (*see supra* Part I.B), contradicted in full by the undisputed evidence of the City's actual practice.[6]

The City misleadingly attempts to distinguish between the "countries" and "civic organizations" featured in the 284 approved flag raisings. (City Br. 23–24.) But there is no record evidence that any "countries" applied to raise their flags on the Flag Poles, only private persons or organizations desiring to celebrate the heritages and contributions of various communities. The distinction is thus false and irrelevant.

The City also makes much of the percentage of time it calculated the City Hall Flag Poles are used for private flag raisings (15%), apparently arguing that the forum is less a forum because it is not used more. (City Br. 23.) But the math does not

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[6] The City has denied one flag raising request since denying Camp Constitution's— the request of Super Happy Fun America to raise a "Straight Pride" flag. (JA595 ¶ 67.) The only reason given was "the City's sole and complete discretion." (*Id.*) Without no other record evidence, this lone, *post hoc* denial does not alter the decisiveness of the City's uninterrupted streak of 284 approvals with no denials in the designated public forum analysis. Just as "[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum," *Ridley*, 390 F.3d at 78, a lone, aberrational departure from the City's otherwise perfect record of approving the raising of private flags does not defeat the City's intent to create a public forum.

support the argument. First, without a meaningful usage comparison from other public forums, the City's 15% estimate is meaningless. Second, no precedent holds a public forum is less a public forum because it is not being used to capacity. To be sure, Boston's expansive, open-air City Hall Plaza is undoubtedly one of "Boston's public forums," but, "'During the majority of the days of the year, it's kind of empty . . . or kind of underutilized and formless . . . .'" Nik DeCosta-Klipa, *Why is Boston City Hall the way it is?*, Boston.com (July 25, 2018), https://www.boston.com/news/history/2018/07/25/boston-city-hall-brutalism (D.65 at ECF 6). The City Hall Plaza is no less a public forum because it is empty most of the time. By contrast, the City Hall Flag Poles are used for private expression almost weekly. (JA583.) Given the City's documented "all applicants" policy and the absence of any record of a denial prior to Camp Constitution's, the estimated 15% utilization proves the Flag Poles can accommodate all the private speech that is requested, with plenty of room for more. This reality further differentiates the Flag Poles from the space-constrained public park in *Pleasant Grove*.

E. The City Misrepresents the Reasonable Observer as Ignorant and Misappropriates Self-Serving Inferences.

Citing this Court's record-starved preliminary injunction analysis, the City contends there is "little doubt" that an observer would attribute to the City the messages of all the flags temporarily flown by private organizations under the City's "all applicants"–"public forums" policy, based solely on the height of the Flag Poles.

(City Br. 17–18 (citing *Shurtleff I*, 928 F.3d at 174).) The City's argument depends, however, on an intentionally ignorant observer who is unknown to constitutional law.

Whether speech on government property is attributable to the government or merely obliged by the government must be determined from the "perception of an **informed** and **objectively reasonable** observer." *Wells v. City and Cnty. of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001) (emphasis added); *see also Pleasant Grove*, 555 U.S. at 487 (Souter, J., concurring) ("[T]he best approach that occurs to me is to ask whether a **reasonable and fully informed** observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige . . . ." (emphasis added)); *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 338 n. 16 (1st Cir. 2009) (Torruella, J., concurring in part, dissenting in part) (same); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1103 (9th Cir. 2018) (explaining that in *Pleasant Grove*, under government speech doctrine, "the focus was on whether a reasonable observer would view the statement made by the monument to be a statement by the government"); *A.N.S.W.E.R. Coalition v. Jewell*, 153 F. Supp. 3d 395, 413 (D.D.C. 2016) (same); *United Veterans Memorial v. City of New Rochelle*, 72 F. Supp. 3d 468, 474 (S.D.N.Y. 2014) (teaching *Pleasant Grove* "placed considerable emphasis on

whether, **based on all the circumstances**, a reasonable observer would have concluded that the government was the speaker").

Here, a reasonable and informed observer would know: (1) the City openly "seeks to accommodate all applications" for flag raisings on the Flag Poles so applicants can "take advantage of the City of Boston's public forums" (JA580–581 ¶ 14); (2) the City allows flag raisings by private organizations in which they temporarily "substitute" their own flags for the government's flag (JA582 ¶¶ 23–24), (3) the City had allowed at least **284 flag raisings** at and on the City Hall Flag Poles during the twelve years prior to Camp Constitution's request (JA583 ¶ 25); (4) the City granted flag raisings at the rate of **more than three per month** in the year immediately preceding Camp Constitution's request (JA583 ¶ 25); (5) Rooney had **never denied a flag raising** request (JA587 ¶ 35), and there is **no record evidence of any other denial**, prior to Camp Constitution's request; (6) the City essentially allows any event to take place on City Hall Plaza (JA587 ¶ 35); and (7) the City **does not review** the content of the substitute flags it allows to be raised on the City Hall Flag Poles by private organizations (JA588 ¶ 38). Any reasonable observer aware of half of these undisputed facts could not come to the conclusion that Boston itself is speaking through others' flags.

The visibility argument is invalid for another reason: The City does not care what observers see on the private flags raised on the Flag Poles. As shown in Camp

Constitution's Brief, Rooney would have approved Camp Constitution's "red cross on a blue field on a white flag," just as he approved the Bunker Hill flag's "red cross on a white field on a blue flag," if Camp Constitution had not **called** its flag "Christian." (Br. 19–20; JA592.) Thus, any argument that the City cares what observers see on a flag is disingenuous.[7]

Moreover, there is no record evidence to support the *ipse dixit* that private flags flown on the Flag Poles are "visible far beyond the immediate area of City Hall Plaza" where the associated flag raising events occur. (City Br. 18.) There is no record evidence of the extent, if any, to which hypothetical observers not near a flag raising event can see the Flag Poles but not an associated event on City Hall Plaza.[8]

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[7] To the extent the City's visibility argument is based on a distant observer's seeing a flag **and knowing** what the flag is called, then the City concedes the relevant observer must be fully informed, which concession is fatal to the City's government speech position.

[8] The following photo depicts the three City Hall Flag Poles in relation to the massive, **taller**, brutalist City Hall, situated on the expansive City Hall Plaza:

(Gannam Decl. JA598–600.) There is no obvious vantage point from which to see the Flag Poles without seeing an associated flag raising event at their base on the Plaza.

Furthermore, the Commissioner has no knowledge, and the City put forth no evidence, of any observer's ever perceiving that the City endorsed or adopted the message of a private organization's flag. (JA588.) Inferring wide, uninformed visibility from the Flag Poles' height alone is pure speculation, and an inference to which Boston is not entitled as summary judgment movant.[9] *See LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1993) (holding court "obliged to review the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor.")

Finally, the City contends "it can be inferred from the circumstances" that Camp Constitution sought "the powerful image of City approval" rather than free speech in the City's "public forums" on the same terms as "all applicants." (City Br. 18–19.) But the undisputed record shows Camp Constitution desired to conduct its own event, "sponsored by Camp Constitution," "to commemorate the civic and social contributions of the Christian community to the City . . . by raising a Christian flag on one of Boston's City Hall Flag Poles." (JA575–576.) The self-serving inference the City seeks—that Camp Constitution sough the City's sponsorship of

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[9] Also purely speculative was this Court's narration, "If the observer arrived in time, she could well see a City employee lower the Boston flag and replace it with a third party's flag." *Shurtleff I*, 928 F.3d at 173–74. Rooney could not say whether City employees ever raise the private flags themselves. (Rooney Dep. at JA226:23–JA228:15.)

its message—is contradicted by the undisputed facts (and is unavailable to the city in any event, *see LeBlanc*, 6 F.3d at 841).[10]

II. BECAUSE THE CITY OPENED A PUBLIC FORUM ON CITY HALL FLAG POLES, THE CITY'S DISCRIMINATORY TREATMENT OF RELIGIOUS SPEECH VIOLATES THE ESTABLISHMENT CLAUSE.

A. The City's Policy and Actions Impermissibly Demonstrate Legal Hostility Towards Camp Constitution's Religious Speech.

The City's discriminatory exclusion of Camp Constitution's religious speech violates the Establishment Clause. "The touchstone for our analysis is the principle that 'the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.'" *McCreary Cnty.*, 545 U.S. at 860 (2005). Indeed, "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington, Twp., Pa. v. Schempp*, 374

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[10] Under Massachusetts law, it is a crime to "display[] the flag or emblem of a foreign country upon the outside of a . . . city . . . building" except under certain circumstances approved by the Governor. Mass. Gen. Laws ch. 264, § 8. Though a minor crime, and perhaps never prosecuted, it is a crime nonetheless. No reasonable observer of the regular and frequent occurrence of foreign nations' flags on the Flag Poles would conclude Boston—the Capital City of the Commonwealth—is intentionally violating the Commonwealth's criminal law, as opposed to merely accommodating the private speech of the organizations assembling for the flag raising events.

U.S. 203, 305 (1963) (Goldberg, J., concurring); *see also Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (Breyer, J., concurring) (same). As the record demonstrates, the City has impermissibly discriminated between religion and non-religion, and also between religion and religion.

The undisputed material facts demonstrate the City's denial of Camp Constitution's request for access to the City Hall Flag Poles Forum was based solely on rejection of Camp Constitution's religious viewpoint. Indeed, the City's reason for denying Camp Constitution's request to fly a Christian flag was precisely because it was called "Christian." (JA588, JA590–592.) There can be no dispute that the City's treatment of Camp Constitution's religious speech discriminated between religious flags and non-religious flags.

The City also concedes that its "thorough inquiry" into Camp Constitution's flag raising application was a first-time occurrence. (*Compare* City Br. 20 (admitting "[i]n this particular case, Rooney, **for the first time**, evaluated a request to raise a flag" (emphasis added)), *with* JA588 ¶ 38 ("It is Rooney's usual practice not to see a proposed flag before approving a flag raising event, and Rooney has never requested to review a flag . . . .").) Such *sui generis* treatment of Camp Constitution's request demonstrates pretextual and post-hoc justification of religious discrimination.

And the undisputed facts also show the City has treated Camp Constitution's religious speech and flag differently than other flags containing religious imagery. (JA584 ¶ 28 ("The City has raised flags on the City Hall Flag Poles that contain religious language and symbols.").) The City of Boston flag regularly flown by the City, along with the private Turkish flag (raised at least thirteen times between 2005 and 2019), Bunker Hill Association Flag (raised at least three times between 2016 and 2019), and Portuguese flag all contain overtly religious language or imagery and are all allowed on the City's Flag Poles. (JA584–587.) The City has even permitted the Vatican Flag to be raised on a City-owned flagpole, which the Commissioner recognized is the exclusive flag of the Catholic Church. (JA592–593.)

Despite these many flag raisings containing religious symbols and imagery, and the City's allowing the official flag of the Catholic Church, Camp Constitution's proposed flag raising was denied because it was "religious." (JA598–592.) There can be no dispute that the City's denial impermissibly discriminated between religion and non-religion, and also discriminated between different religious traditions. Both violate the Establishment Clause.

B. The City Cannot Use the Establishment Clause to Justify Its Religious Discrimination.

The City admits that its decision to reject Camp Constitution's request to raise the Christian flag was based on its (ill-informed) belief that allowing the flag risked violating the Establishment Clause. (City Br. 37; JA593 ¶ 58.) Because the city has

opened a designated public forum on the Flag Poles, however, the City cannot violate the Establishment Clause by granting equal access to religious speech. It simply "does not violate the Establishment Clause for [the City] to grant access to its facilities on a religion-neutral basis to a wide spectrum of private speakers." *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995). Indeed, "**no reasonable observer would think a neutral program . . . carries with it the imprimatur of government endorsement**." *Zellman v. Simmons-Harris*, 536 U.S. 636, 655 (2002) (emphasis added); *see also Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) ("The message [of equal access] is one of **neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion**." (emphasis added)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (holding granting equal access to religious speech in public forum poses no danger that public "would misperceive the endorsement of religion"). Thus, the City's assertion that its denial was necessary to avoid an Establishment Clause violation is wholly without merit.

III. THE CITY HAS WAIVED ANY ARGUMENT IN OPPOSITION TO SUMMARY JUDGMENT ON CAMP CONSTITUTION'S PRIOR RESTRAINT AND EQUAL PROTECTION CLAIMS.

The City did not make any argument below in opposition to summary judgment on Camp Constitution's prior restraint and Equal Protection claims

(*compare* Dist. Ct. Doc. 61 at 29–36, *with* Dist. Ct. Doc. 64), and therefore abandoned any such argument there. *See Montany v. Univ. of New England*, 858 F.3d 34, 41 (1st Cir. 2017); *Latin Am. Music Co., Inc. v. Cardenas Fernandez & Assocs., Inc.*, 60 F. App'x 843, 848 (1st Cir. 2003). Thus, the Court should disregard the arguments in opposition to those claims in the City's Brief. (City Br. 41–43.)

CONCLUSION

For all the foregoing reasons and those in Camp Constitution's initial Brief, the district court's order should be reversed.

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DATED this August 14, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this August 14, 2020 I caused the foregoing to be filed electronically with this Court. Service will be effectuated on the following via the Court's ECF/electronic notification system:

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