NO. 20-1800

IN THE
Supreme Court of the United States

HAROLD SHURTLEFF, *et al.*,
Petitioners,

v.

CITY OF BOSTON, *et al.*,
Respondents.

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

BRIEF OF BRONX HOUSEHOLD OF FAITH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Bronx Household of Faith is an evangelical Christian church formed in 1972 to serve University Heights, one of the lowest-income neighborhoods in the Bronx. When it applied to conduct Sunday services in public school facilities generally available for use by community group during non-school hours, the New York City Board of Education denied the requests, declaring its facilities closed to use for "worship." The Second Circuit rejected Bronx Household's claim that this blanket exclusion infringed on its First Amendment speech rights, reasoning that the Board had established only a limited public forum because it had not previously authorized the use of school facilities for religious services. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 213 (2d Cir. 1997); *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 97–98 (2d Cir. 2007); *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 36 (2d Cir. 2011). Accordingly, Bronx Household has a significant interest in the development of public-forum doctrine and policing the government's exclusion of religious speech from forums otherwise generally open to public speech.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief through blanket consent letters filed on the Court's docket.

SUMMARY OF THE ARGUMENT

This case does not require the Court to break new ground in its public-forum jurisprudence, nor does it require the Court to redefine or reimagine government speech. Rather, it provides a sound vehicle for the Court to repudiate the circular logic embraced by several lower courts to justify excluding religious speech from public forums.

There is no question that "religious worship and discussion" are types of speech protected by the First Amendment. But when governments open public property to an endless array of private speakers, they often prescribe a single exception: no religious speech. This Court has consistently rejected such policies, regarding them either as content-based restrictions failing strict scrutiny, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981), or as forbidden viewpoint discrimination, *e.g.*, *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001).

But some courts have approved a workaround to avoid that result. Instead of examining policy and practice to determine whether the government has established a public forum that cannot exclude religious speech, they hold that the exclusion of religious speech itself proves the limited nature of the forum. *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ.* ("*Bronx III*"), 650 F.3d 30 (2d Cir. 2011). This is a tautology: the government has created a limited public forum *because* it excludes religious speech from the forum, and it may therefore exclude religious speech from the forum because the forum is limited. Under this flawed approach, religious speech may always be excluded to serve the forum's anything-goes-but-religion "purpose." *See, e.g.*, *Bronx Household v. Cmty.*

Sch. Dist. No. 10 ("*Bronx I*"), 127 F.3d 207, 213 (2d Cir. 1997).

The court below adopted a variation on that approach. It reasoned that the City of Boston's exclusion of a religious flag from its otherwise wide-open flagpole program meant that the City had not created a public forum at all because it evidenced the City's "control" over use of the flagpole. *Shurtleff v. City of Boston*, 986 F.3d 78, 91 (2021). In this way, the court regarded the City's religious-speech bar as justification for exempting that bar from First Amendment scrutiny altogether. The problem with this circular logic is clear: it immunizes governments' discrimination against religion from First Amendment scrutiny. "Government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). But the court below, like others before, missed this point entirely. Its plain misapplication of the Court's precedents requires correction.

The Court should take this opportunity to reassert the analytical framework it has prescribed for evaluating claims that government has wrongfully excluded speech from a public forum in violation of the First Amendment. Specifically, the Court should clarify that courts must look at what is *allowed* in the forum—not what is excluded—to determine whether the government has established a public forum from which religious speech may not be excluded. The government's wholesale exclusion of religious speech cannot circularly justify itself because it does not establish that a forum is limited or that the government has established no forum at all.

ARGUMENT

I. The First Amendment Forbids Government from Excluding Religious Speech and Speakers from Forums It Creates

"[T]he government does not have a free hand to regulate private speech on government property." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). But the level of protection for free speech varies depending on the type of "forum" where the speech takes place.

The Court explained its modern forum doctrine in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). The first type of forum, the "traditional public forum," includes spaces that "have immemorially been held in trust for the use of the public and…have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," such as parks and sidewalks. *Id.* at 45 (citation omitted). The government may also open, or designate, public property "for use by the public as a place for expressive activity." *Id.* Even though the government "is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46. Or, in other words, "[o]nce a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

Restrictions on speech in a traditional or designated public forum must satisfy strict scrutiny. *Perry*, 460 U.S. at 46. The government, in turn, has greater license to restrict speech in spaces that it maintains

for particular purposes, which are regarded for First Amendment purposes as limited public forums or nonpublic forums. *Id.* And, of course, in some instance that government does not open a forum at all but instead "speak[s] on its own behalf." *Summum*, 555 U.S. at 470.

To determine whether the government has established a forum and, if so, what type, a court must consider the "policy and practice" of the government, the nature of the property, its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activities. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–83 (1985). This inquiry turns on what speech the government has deigned *to allow* in a given place or context; only after determining what kind of forum the government has so established does a court then address whether the challenged speech-exclusion passes First Amendment muster. *See*, *e.g.*, *id.* at 805–06 (allowed speech to accomplish the government's business as an employer); *Rosenberger v. Rector & the Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995) (allowed speech "related to the educational purpose of the University").

Applying this approach, the Court's decisions reject government policies that exclude religious speech from otherwise open forums, even limited ones. *See, e.g.*, *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Rosenberger*, 515 U.S. at 845; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari) ("bann[ing] religion as a subject" runs afoul of the

First Amendment). And the Court has also recognized that such an exclusion is, in almost all cases, impermissible viewpoint discrimination. *See, e.g.*, *Good News Club*, 533 U.S. at 111–12.

II. Several Courts—Including the Court Below—Mistakenly Allow the Government To Evade This Constitutional Protection by Banning All Religious Speech from Its Forums

Despite this Court's simple framework for how courts should assess speech restrictions in asserted public forums, some courts have adopted a backward approach, analyzing the speech-restriction to set the forum, at least where bans on religious speech are concerned. In other words, these courts allow the government to define the forum based on the speech-restriction, ensuring the restriction will always justify itself. The result is to exempt the wholesale exclusion of religious speech from heightened scrutiny.

A. Three Circuits Allow the Government To Use Restrictions on Religious Speech to Avoid Creating a Designated Public Forum

The Second Circuit in *Bronx III*, 650 F.3d at 30, rubber-stamped a government policy excluding religious speech. The court decided that the restriction proved that the school had created a limited forum. In that case, the Board of Education of the City of New York allowed groups hosting events "pertaining to the welfare of the community" to rent empty school buildings when school was not in session. *Id.* at 33. But the school barred groups from renting the school for "religious worship services." *Id.* at 36. Bronx Household of

Faith, a local church, applied to rent an otherwise empty public school building for a "Christian worship service," its regular Sunday morning meeting. The school denied the application, citing its policy, and the Second Circuit upheld this denial. *Id.* at 35, 51.

The Second Circuit declared that the public school was "a limited public forum." *Id.* at 36 (citing *Bronx I*, 127 F.3d at 211–14). But it justified this holding because the school had only allowed "certain speakers" to rent the school in the past. *Bronx I*, 127 F.3d at 213. The Court found it "important to note that the parties ha[d] agreed that [the school] never has rented school property for [worship or religious instruction]." *Id.* So even though the school had opened its doors to hundreds of groups and events "pertaining to the welfare of the community," the fact that it had consistently barred religious groups meant that the restriction itself transformed the forum from an open public forum to a limited public forum.

The Ninth Circuit applied this same flawed approach in *Faith Center Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006), *opinion amended and superseded on other grounds on denial of reh'g.*, 480 F.3d 891 (2007). There, a non-profit religious corporation reserved several library meeting rooms for "Prayer, Praise, and Worship Open to the Public." *Id.* at 1199. After the group held one meeting, the library cancelled the group's subsequent reservation for violating a curiously named "Religious Use" policy that actually prohibited the use of meeting rooms for "religious purposes." *Id.* at 1199–200.

The court noted that the government's "purpose was to invite the community at large to participate in use of the meeting room for expressive activities,"

including renting meeting rooms to community groups ranging from the Sierra Club, to Narcotics Anonymous, to the East Contra Costa Democratic Club. *Id.* at 1204. Despite this wide-open invitation, the court held that the "[l]ibrary meeting room is a limited public forum," because the government "did not intend for the…meeting room to be open for indiscriminate use." *Id.* at 1206, 1205 (citing *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 331 F.3d 342, 346 (2d Cir. 2003). Relying on the Second Circuit's circular logic, the court said the government's "policy and practices make clear that the [government] did not intend[] for the…meeting room to be [a designated public forum]," because its "policy excludes…organizations who wish to engage in religious services." *Id.* at 1205. Thus, the exclusion was exempt from heightened scrutiny, and the court held the exclusion to justify itself under the rational basis standard.

Finally, the same error controlled the outcome in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018). At issue was a transit authority's prohibition on advertisements that "promote or oppose any religion, religious practice, or belief." *Id.* at 320. The Catholic Church sought to place an advertisement during December depicting a starry night, the silhouettes of three shepherds, a star in the sky, and the words "Find the Perfect Gift." *Id.* The advertisement included a link to a website about "Christmas Mass" and "joining in public service…during the liturgical season of Advent." *Id.* The government rejected the ad, despite regularly accepting ads from businesses advertising Christmas sales.

Once again, the court determined that the government's decision to "close [its] advertising space to certain subjects…converted that space into a non-public forum." *Id.* at 323. So the government was able to dodge any heightened scrutiny over its regulation because the regulation itself limited the forum. And the "exclusion of religion as a subject matter" did not impinge the archdiocese's First Amendment rights because it was the "implementation of a policy…permissible in a non-public forum." *Id.* at 327.[2]

B. The First Circuit Similarly Allowed the Government's Speech Restriction To Transform a Public Forum into Government Speech

The court below adopted essentially the same circular logic. It relied on the City of Boston's exclusion of the Petitioners' "Christian Flag" to prove that the City had not created a forum at all, but rather was engaged in government speech. Only in that way was it able to escape the inevitable conclusion that the City's exclusion of religious speech from an otherwise wide-open forum is viewpoint discrimination and therefore per se unconstitutional. *See Good News Club*, 533 U.S. at 111–12; *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 384.

1. This case is not the first time that there has been confusion about whether a given situation involves public-forum analysis or government speech. Indeed, this Court anticipated the problem and has

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[2] This Court denied certiorari only because "the full Court is unable to hear this case"; otherwise, "intervention and reversal would be warranted." 140 S. Ct. at 1199 (Gorsuch, J., statement regarding denial of certiorari).

specifically cautioned against using the government speech doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473.

When the Court has determined that a case involved government speech, not a forum for private speech, it defined the government speech by what the arena at issue *allows* to be included, not what it excludes. Thus, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015), held license plates to be government speech because they served "the governmental purposes of vehicle registration and identification." The Government could therefore determine which messages would impede its purpose of an effective government identifier.

Likewise, in *Rust v. Sullivan*, 500 U.S. 173, 178 (1991), the funding at issue was for "acceptable and effective family planning methods and services," and the government had the power to determine what it would define as "acceptable and effective" methods. Once that boundary of what the government *wanted* to say was established, its exclusion of opposing viewpoints was consistent with the court's protection of the government's ability to choose its own message.

And in *Summum*, the city allowed monuments to be erected in the park that were "directly relate[d] to the history" of the city, or "donated by groups with longstanding ties" to the community. 555 U.S. at 465. Once the government had established what it intended to speak about, it could then selectively establish a limited number of monuments in support of that message.

2. Here, by contrast, the City of Boston had nothing to say for itself. Indeed, the City could not

have been clearer about its intentions: it sought "to accommodate all applicants seeking to take advantage of" its "public forums," and included flag-raising events at a third flagpole in front of City Hall. Pet.App.137a. Having "opened" its property for "expressive activity," any restrictions on that activity are subject to "the same limitations as that governing a traditional public forum." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

But instead of following the plain language of the government's policy and application, the court below ignored this Court's admonition to exercise "great caution before extending…government-speech precedents," *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Rather, the court determined that "the City engages in government speech when it raises a third-party flag," *Shurtleff*, 986 F.3d at 94, because, while the City has let many groups raise a wide variety of flags (at over 280 flag raisings), *id.* at 83–84, the court believed these flags have fit in a "narrow set of acceptable secular designs," for "countries, civic organizations, or secular causes," *id.* at 91–92. But calling this subset of flags "narrow" is a misnomer. It is hard to imagine what type of flag would fall outside of flags for "a country, civic organization, or secular cause" other than a religious flag. Therefore, the "policy and practice," *Cornelius*, 473 U.S. at 802, of the City of Boston was to approve all flag-raising requests *except* for requests from religious organizations. Indeed, Petitioners' flag was the very first the City ever excluded.

Instead of examining the restrictions themselves in light of the First Amendment, the First Circuit determined that the "restrictions demonstrate an intent antithetic to the designation of a public forum, and

those restrictions adequately show that the City's flagpole is not a public forum." *Shurtleff*, 986 F.3d at 93–94. This is the same type of circular reasoning seen in *Bronx Household*, *Faith Center*, and *Archdiocese of Washington*. As in those cases, the plaintiffs' claims in this case "rise or fall on the classification of the challenged speech." *Shurtleff*, 986 F.3d at 87. And, like *Bronx Household*, *Faith Center*, and *Archdiocese of Washington*, the court allowed the government's religious-speech ban to define the type of forum that existed. The First Circuit extended this erroneous reasoning further by determining that *no forum existed at all*.

C. Other Circuits Have Correctly Applied This Court's Precedents to Protect Religious Speech in a Public Forum

To be clear, this kind of circular logic is entertained by only several of the circuits, and the others have generally followed the approach to forum assessment prescribed by this Court's cases. Some have expressly rejected the premise that a speech exclusion can justify itself. For example, in *Gregoire v. Centennial School District,* 907 F.2d 1366 (3d Cir. 1990), the Third Circuit refused to accept a tautological justification of speech bans. At issue was a policy authorizing the rental of unused school facilities to community groups so long as they were not religious. *Id.* at 1373. The government argued that the exclusion "evince[d] a clear intention to maintain a closed forum." *Id.* But the court understood that allowing "statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of [F]irst [A]mendment rights would be determined by the government

rather than by the constitution." *Id.* at 1374. Once the government "has, in reality, opened its doors" to a wide range of groups, it cannot "gerrymander[]" religious groups out of the forum "solely on the basis of the religious content" of their speech. *Id.* at 1375.

Similarly, the Fifth Circuit has recognized forum analysis must begin with whom the government *allows* to use the forum, not whom it excludes. *See Concerned Women for America v. Lafayette Cnty.*, 883 F.2d 32, 33–34 (5th Cir. 1989) ("[B]y allowing these various groups to hold their meetings in a library auditorium, the library has created a public forum, and therefore must now allow access to other groups whose meetings have…religious content.").

As noted, these kinds of decisions are the norm, and they should be, because they follow this Court's jurisprudence. What is unacceptable, and requires correction, is that Americans within the footprints of the circuits that go the other way are denied full exercise of their First Amendment rights, particularly where religious speech is concerned.

III. The Court Should Reaffirm that Excluding Only Religious Speech Does Not Transform a Public Forum Into a Limited Forum or Government Speech

Under the illogic of the decision below, if the government wants to exclude religious speech from an otherwise wide-open forum, it has carte blanche to do so. The exclusion itself means that the government has either opened a space only for secular causes or has chosen to speak for itself only on secular issues. Either way, the government gets to dodge First Amendment scrutiny. But this is inconsistent with

this Court's free-speech jurisprudence, which rejects this very reasoning.

In *Widmar*, a university claimed that its purpose was to "provid[e] a 'secular education' to its students." 454 U.S. at 268. So, it was reasonable to exclude a religious club from campus because that club was, by definition, not secular. *Id.* But the Court said that this "secular" goal did not "exempt [the university's] actions from constitutional scrutiny," and that any such restriction must still satisfy strict scrutiny. *Id.* at 270; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (a law is content based and subject to strict scrutiny if it "draws distinctions based on the message a speaker conveys," or if it "applies to particular speech because of the topic discussed or the idea or message expressed"); *Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 486–87 (5th Cir. 2000), *granted, vacated, and remanded in light of Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that the government had created a limited forum where its policy "prohibit[ed] several types of uses," like political, for-profit fundraising, and religious activities).

This Court has also rejected overly broad takes on the government speech doctrine. It warned in *Matal*, for example, that courts should not reflexively designate speech as "government speech" because "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." 137 S. Ct. at 1758.

The Court should take this opportunity to reenforce three key points from its precedents on public forums and government speech.

First, when examining whether the government has "by policy or by practice" opened a designated or limited forum, *Perry*, 460 U.S. at 47, courts should define the policy and practice by what the forum *includes*, not what it excludes. Courts should not give the government authority to discriminate against religious uses merely by defining a forum by the very exclusion at issue. In *Perry*, the Court reasoned that the school had limited access to its mail system because permission had not "been granted as a matter of course to all who seek to distribute material." *Id.* Even though the school allowed "some outside organizations…to use the facilities," that "selective access" did not create a public forum. *Id.* The Court looked at what was *allowed* in the forum (a limited number and type of speakers), not what was *excluded*, to determine that the policy or practice of the government had, at most, created a limited public forum. *See also Widmar*, 454 U.S. at 268 (government "created a forum generally open for use by student groups" because it had a policy "of accommodating their meetings"). The forum analysis hinges on the speech or narrow purpose for which the government has opened the forum.

Second, religious-speech restrictions trigger heightened scrutiny. It is indisputable that "religious worship and discussion" are "forms of speech protected by the First Amendment," *Widmar*, 454 U.S. at 269 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Niemtko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948)), entitled to "special constitutional solicitude," *id.* at 277. And no matter what type of forum is at issue, viewpoint discrimination is an unconstitutional, "egregious form of content discrimination."

Rosenberger, 515 U.S. at 829. The First Amendment forbids barring speech when the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 830–31.

Even if courts conclude that the government has managed to appropriately exclude all topics that religion might pertain to in an arena, such a "content-based law…target[ing] speech based on its communicative content—[is] presumptively unconstitutional" and must be justified by the government proving it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citations omitted). This Court has consistently rejected "skating as far as possible from religious establishment concerns" as a compelling interest. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 (2017) (citing *Widmar*, 454 U.S. at 276); *accord Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020). If the government wants to exclude all public speech from a particular arena, it must either close the forum for a limited purpose, or it must exclude private speech from an arena so that it may speak only as the government.

Third, government speech requires more than just excluding religious speech. When the government claims that it is merely receiving "assistance from private sources for the purpose of delivering a government-controlled message," *Summum*, 555 U.S. at 468, the "general government practice" must be "one of selective receptivity," *id.* at 471. If the government instead allows all private parties to craft the "government's" message, but *only* excludes religious speech or speakers, the government's receptivity is no longer selective. A ban on religious speech does not demonstrate that the government intends only to speak for itself. *Accord Matal*, 137 S. Ct. at 1759–60 (ban on

"derogatory" marks did not transform trademarks into government speech).

* * *

None of this analysis suggests that the government "lacks a choice." *Archdiocese of Wash.*, 140 S. Ct. at 1150. If the City of Boston (or any government entity) wants to exclude religious speech from an area it has otherwise opened, it may close the forum. *Perry*, 460 U.S. at 46. For example, in Lexington, Virginia, the city had allowed a wide range of flags to be flown on city flagpoles. *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 226 (4th Cir. 2013). In 2011, the City passed an ordinance limiting the use of its flagpoles to three flags: the flag of the United States, the flag of the Commonwealth of Virginia, and the flag of the city itself. *Id.* at 227. Because the city had closed its previously designated forum "to all private speakers," it had "reserve[d] its equipment purely for government speech." *Id.* at 232.

In this case, if Boston finds the message expressed on Petitioner's flag to be intolerable—which would say a lot about the City's motivation here—it could limit the use of its flagpole to its own flags. What it cannot do is provide a space where any group may fly a flag subject to general time, place, and manner restrictions, and then exclude all religious messages. This Court has never upheld a regulation that singles out religious viewpoints for silencing. This case should not be the first.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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