

No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, ET AL.,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR MASSACHUSETTS, CONNECTICUT,
DELAWARE, THE DISTRICT OF COLUMBIA,
HAWAII, MAINE, MINNESOTA, NEW YORK,
OREGON, AND VIRGINIA AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

MAURA HEALEY
*Attorney General for the
Commonwealth of Massachusetts*
David C. Kravitz*
Deputy State Solicitor
Phoebe Fischer-Groban
Grace Gohlke
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
david.kravitz@mass.gov
(617) 963-2427

**Counsel of Record*

(Additional counsel listed on signature pages.)

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INTERESTS OF *AMICI CURIAE*

Amici Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Minnesota, New York, Oregon, and Virginia, like state and local governments around the country, embrace opportunities to communicate with our constituents on matters of public importance, to honor our constituents' accomplishments, to celebrate the diverse communities that coexist within our jurisdictions, and to observe causes and occasions recognized by federal, state, and local authorities. We do all of these things in myriad ways, according to local traditions and customs, and in close collaboration with the people we serve. These practices strengthen the bonds between state and local governments and our constituents, thereby strengthening our democracy.

Petitioners' argument that one such practice, the City of Boston's occasional flying of certain flags over Boston City Hall Plaza, created a "designated public forum," threatens to destabilize these laudable practices. As both the district court and the court of appeals correctly concluded after extensive discovery and factfinding, the City's flag-flying practice falls comfortably within the government speech doctrine. Therefore, it is not subject to the strictures of the First Amendment's Free Speech Clause, as this Court's cases have repeatedly recognized.

Amici States value and strive to protect our residents' free speech rights in public fora, but public forum analysis is inapposite here. To classify speech of the kind at issue here as purely private speech

within a public forum could force state and local governments to eliminate or drastically scale back programs designed to facilitate cooperative communication between public and private actors, thereby reducing speech, to the detriment of all concerned. *Amici* have a strong interest in avoiding that outcome so that we may continue communicating with and celebrating our constituents.

SUMMARY OF THE ARGUMENT

As this Court has repeatedly recognized, the government speech doctrine is essential for government to function. It is the very business of government to take positions and express viewpoints, and it would make no sense to require government to maintain viewpoint neutrality when it does so. And this remains true when government speaks in collaboration with private parties, whether to raise awareness of important issues or causes, to celebrate constituents' achievements, or otherwise.

This Court's government speech cases have emphasized the importance of how a reasonable observer would attribute the speech in question. Case law, news reports, and common sense show that reasonable observers would—and do—attribute flags flying over government property to the government. Throughout history, governments have flown flags as a uniquely powerful means of sending a message. And examples from around the country—including one from Boston that arose out of the very policy at issue in this case—show that, when a government flies a flag over its property, local residents routinely attribute the flag's message to the government.

The two types of flag-raising in which Boston has engaged are emblematic of common forms of government speech, shared by jurisdictions around the country. First, governmental entities at the federal, state, and local level routinely fly the flags of other nations, often to honor a local community or a visiting dignitary. Many have adopted policies expressly stating that their flying of flags is government speech and authorizing flying the flags of other nations as one form of such speech. Second, governments routinely speak in recognition of important civic occasions like legal holidays and other widely-celebrated observances, often including flag-raising in such speech. The record of such flag-raising in Boston shows the inextricable linkage of flag-raising to other forms of government speech such as speeches and proclamations.

If practices like Boston's, in which state and local governments collaborate with constituents in marking important occasions, amount to designating a public forum, then the inevitable result would be less speech. Because no government would tolerate the possibility of deeply offensive flags being flown on city-owned flagpoles over government property, a city found to have designated a public forum on its flagpoles would simply take steps to reduce expressive use of the flagpoles, perhaps by eliminating the flag-raising program or drastically scaling it back, thereby reducing speech. Instead, consistent with the careful review of the facts of this case by the courts below, this Court should confirm that flag-raising practices like Boston's constitute government speech, and should affirm the court of appeals' judgment.

ARGUMENT

I. A robust government speech doctrine is essential for government to function.

This Court has repeatedly recognized that allowing governments the latitude to speak on our own behalf “is important—indeed, essential.” *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). A governmental entity, this Court has explained, “has the right to speak for itself” and “is entitled to say what it wishes and to select the views that it wants to express.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (citations and internal quotation marks omitted). When a governmental entity does so, it is engaging in government speech, to which “the Free Speech Clause has no application.” *Id.* at 467.¹

“Were the Free Speech Clause interpreted otherwise, government would not work.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Governments are elected by their constituents in order to advance certain priorities—indeed, “[i]t is the very business of government to favor and disfavor points of view.” *Summum*, 555 U.S. at 468 (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment)). Thus, as this Court has recognized, “it is not easy to imagine how government could function if it lacked this

¹ Other aspects of the First Amendment do apply to government speech, in particular, the Establishment Clause. See *Summum*, 555 U.S. at 468. Petitioners brought an unsuccessful Establishment Clause claim in the lower courts, Pet. App. 31a-38a, but they have abandoned it in this Court, see Pet. ii-iii.

freedom.” *Summum*, 555 U.S. at 468. “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.” *Matal*, 137 S. Ct. at 1757.

Nor are constituents without a remedy if they are dissatisfied with their government’s choices as to what to say and what not to. “[I]t is the democratic electoral process that first and foremost provides a check on government speech.” *Walker*, 576 U.S. at 207. “[A] government entity is ultimately ‘accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Summum*, 555 U.S. at 468-49 (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)).

Of particular importance to this case, this Court has recognized that “[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum-provider.” *Walker*, 576 U.S. at 217. To the contrary, “[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.” *Summum*, 555 U.S. at 468. And governmental officials and entities do this all the time, issuing proclamations at the behest of constituents, making speeches to interest groups, recording public service

announcements, and otherwise cooperatively engaging in speech with individuals and organizations whose accomplishments or interests the governmental entity chooses to support. *See, e.g.*, Kentucky Governor Andy Beshear, *Proclamations and Acclamations*, [governor.ky.gov, https://bit.ly/3pVQCPS](https://bit.ly/3pVQCPS) (“Proclamations are provided by the Governor’s Office as a service to Kentucky residents with the goal of honoring and celebrating events or increasing awareness of noteworthy issues among citizens across Kentucky.”); Office of [Massachusetts] Governor Charlie Baker and Lt. Gov. Karyn Polito, *Request a Proclamation from Governor Baker*, [mass.gov, https://bit.ly/3ET1HYo](https://bit.ly/3ET1HYo) (“Governor Baker issues ceremonial proclamations to honor, celebrate, or raise public awareness about issues and causes that constituents of Massachusetts value.”).²

Amici States recognize that the government speech doctrine must not extend beyond those instances in which it truly is the government itself speaking, lest private speech be improperly stifled. *See, e.g., Matal*, 137 S. Ct. at 1758 (noting that, “[i]f 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”). But when governments do speak, it is important that their speech be recognized as theirs, lest private actors be improperly allowed to commandeer government property into a means of expressing their own private views. And, as this Court has observed, “[t]here may be situations in which it is

² All hyperlinks in this brief were last visited on December 21, 2021.

difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.” *Summum*, 555 U.S. at 470.

To make that determination in this case, the district court denied the City’s motion for judgment on the pleadings, Pet. App. 91a-95a, instead allowing the parties to engage in discovery. Upon careful review of the full record thereby developed, both the district court and the court of appeals held that the flying of flags over Boston’s City Hall Plaza falls comfortably on the government speech side of the line. Pet. App. 13a-31a, 48a-55a. As explained below, this conclusion is consistent with *amici* States’ understanding, practices, and experience.

II. A reasonable observer would normally attribute to the government the speech associated with a flag flying over government property.

A key portion of the government speech analysis is whether a reasonable observer would likely attribute the speech in question to the government. *See, e.g., Walker*, 576 U.S. at 212; *Summum*, 555 U.S. at 471. In this case, the court of appeals “found it likely” that “an observer would attribute the message of a third-party flag on the City’s third flagpole to the City.” Pet. App. 17a. Both the nature of flags flying on government property, and the manner in which local residents react to such displays, confirm that the court of appeals’ conclusion was correct.

A. Flags are a uniquely potent form of government speech.

The court of appeals correctly noted that “governments have used flags throughout history to communicate messages and ideas,” and described it as “indisputable” that “a government flies a flag as a ‘symbolic act’ and signal of a greater message to the public.” Pet. App. 17a. If anything, the court of appeals understated the centrality of flags to government speech throughout the years.

For example, on April 19, 1775, the American War for Independence began with the raising of the Colonial Militia’s flag on the North Bridge in Concord, Massachusetts, a flag-raising that “served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad.” *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting). Nearly a century later, in 1861, the “lowering of the American flag at Fort Sumter was viewed as the start of the [Civil War].” *Id.* at 423.

Throughout history, governments have raised flags at government buildings to communicate important messages to the public. On December 25, 1991, the lowering of the Soviet flag that flew atop the Kremlin and its replacement with the Russian flag powerfully communicated to Russian citizens and to the international community that the Soviet Union, and Communism in the region, were no longer. See Francis X. Clines, *End of the Soviet Union; Gorbachev, Last Soviet Leader, Resigns; U.S. Recognizes Republics’ Independence*, N.Y. Times (Dec. 26, 1991), <https://nyti.ms/3mKl0MD>. In the waning days of the

Soviet Union, “the huge red union flag atop the Kremlin’s domed Council of Ministers building had waved mainly as a symbol of [Mikhail] Gorbachev’s holdout resistance to the commonwealth.” *Id.* On December 25, 1991, following Mr. Gorbachev’s formal resignation and final address, Russians watched as the Soviet flag atop the Kremlin in Moscow was lowered and, minutes later, the Russian flag was raised, marking the beginning of the new Russia. See James F. Clarity, *End of the Soviet Union; On Moscow’s Streets, Worry and Regret*, N.Y. Times (Dec. 26, 1991), <https://nyti.ms/3qjcViC>. And more recently, the international community watched as the Taliban raised its flag over the Afghan presidential palace in Kabul, marking the “official start of the work of the [Taliban’s] new government.” Kathy Gannon, *Taliban flag rises over seat of power on fateful anniversary*, AP News (Sept. 11, 2021), <https://bit.ly/3m3AbQm>.

The precise manner in which a government displays a flag (or does not do so) can send messages as well. It is of course common practice for the American flag to “be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory.” 4 U.S.C. § 7(m). States, too, have adopted detailed protocols regarding the flying of American and state flags, including how and when they should be flown at half-staff. See, e.g., Executive Office of the Governor [of Florida], *Flag Protocol*, flgov.com (Sept. 26, 2012), <https://bit.ly/3pTbqI0>. Similarly, in the United Kingdom, the Sovereign’s Royal Standard is used to communicate precise messages to the public, including the location of the Sovereign. *Royal Standard*,

royal.uk, <https://bit.ly/3pVUIHK>. And in 1997, the royal family's refusal to fly the Royal Standard at half-staff at Buckingham Palace to honor Diana, Princess of Wales, after her death generated widespread controversy. See Margaret Lowrie, *Royal family hurt by criticism over Diana*, cnn.com (Sept. 4, 1997), <https://cnn.it/3IMkJ4X>.

These are but a few of the many examples of the unique role that flags play in government speech. As they demonstrate, governments routinely use flags to communicate messages of triumph, messages of defeat, and messages of solidarity to our citizens and to the world at large.

B. Flag displays on government property generate controversy precisely because local residents reasonably attribute them to the government.

Around the country, flags flying on government property have generated considerable controversy in recent years. They have done so precisely because the messages such flags represent are routinely attributed to the government itself.

Examples of this phenomenon have arisen out of the very policy at issue in this case. In late September of 2020, the City of Boston flew China's flag over City Hall Plaza, as it had done on at least eleven occasions in the late September/early October timeframe in years past.³ See Pet. App. 174a-187a. According to

³ These flag-raising appear to coincide with "National Day," a Chinese public holiday commemorating the establishment of

news reports, “[p]rotesters criticized Boston Mayor Martin Walsh ... for flying the Chinese flag in front of City Hall, saying *the city shouldn’t be honoring a country* with as many civil rights issues as China has.” Sean Philip Cotter, *Protesters slam Marty Walsh for flying Chinese flag at Boston City Hall*, Bos. Herald (Sept. 29, 2020), <https://bit.ly/3ERsQe1> (emphasis added). The article further reports that the protesters sought to hold the City’s Mayor himself accountable for the message they attributed to the flag, chanting, “Mayor Walsh, stand up for human rights.” *Id.* Similarly, about one year earlier, petitioner Camp Constitution apparently posted a video to its YouTube channel of a similar flag-raising, also at Boston City Hall Plaza, in which a protester can be seen holding a sign reading “Marty [Walsh] Honors Concentration Camps.” Camp Constitution, *Communist China Flag Raising at Boston’s City Hall Plaza*, youtube.com, at 1:26-1:30 (Sept. 29, 2019), <https://youtu.be/HDFIm8K60xM>.

It is thus unnecessary for lawyers to imagine how a hypothetical observer would interpret another country’s flag flying over Boston’s City Hall Plaza, *see*, e.g., Pet. Br. 56-57; U.S. Br. 18-19; ACLU Br. 14-15, because we know how *real* observers have reacted.⁴

the People’s Republic of China on October 1, 1949. *See* Editors of Encyclopaedia Britannica, *National Day (Chinese holiday)*, britannica.com (rev. Aug. 1, 2021), <https://bit.ly/3si1hao>.

⁴ In a similar case further discussed *infra* at 12-14, the court noted that passers-by saw a flag flying over city-owned property whose message they disliked, and they called the city to express their displeasure. As the court explained, “[t]hat actual observers called *the City* to complain about the flag, if true, would

These protesters interpreted the Chinese flag flying over City Hall Plaza as *the City of Boston* “honoring” China, took umbrage at the City’s doing so, and looked to then-Mayor Walsh to stop it. To these protesters, it was clear that the Chinese flag flying over City Hall Plaza was the City of Boston’s government speech, not the speech of some private party utilizing a public forum.⁵

A factually similar case from New York further supports the proposition that a reasonable observer would normally attribute flags flying over government property to the government. In *United Veterans Memorial and Patriotic Ass’n of the City of New Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468 (S.D.N.Y. 2014), *aff’d*, 615 Fed. App’x 693 (2d Cir. 2015) (per curiam), a veterans’ group had been

demonstrate that reasonable observers attributed the flag’s message to the government.” *United Veterans Mem’l & Patriotic Ass’n of the City of New Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 475 n.4 (S.D.N.Y. 2014) (emphasis in original), *aff’d*, 615 Fed. App’x 693 (2d Cir. 2015) (per curiam).

⁵ Relatedly, in 2010, it appears that petitioner Harold Shurtleff expressed in a letter to a local newspaper his indignation at seeing the Chinese flag flying over Boston’s City Hall Plaza. See Hal Shurtleff, Letter to the Editor, *Chinese flag raising ‘slap in the face to the city’*, wickedlocal.com (Sept. 30, 2010, 11:06 p.m.), <https://bit.ly/3Ee5f6d>. In his letter regarding the flag-raising that occurred on September 25, 2010, see *id.*; see also Pet. App. 182a, Shurtleff noted that a Boston City Councilor and a Massachusetts State Representative were present at the event, and stated that he “was ashamed of Boston,” declaring that “[w]hat was once the Cradle of Liberty is now a Cradle of Oppression.” *Id.* If Shurtleff had understood the flag-raising to be purely private speech taking place on a flagpole that was a designated public forum open to everyone, it is unclear why he would have been “ashamed of Boston.”

delegated control of city-owned flagpoles located on the grounds of a city-owned armory, and had “exercised responsibility for the flags for sixteen years without interference by the City.” *Id.* at 471, 476. However, when the group hoisted the so-called “Gadsden Flag,” city officials received numerous complaints about it and, following a vote of the city council, had it removed. *Id.* at 471-72.

Rejecting the group’s First Amendment claim, the district court gave several reasons—equally applicable here—why it was “not plausible that a reasonable observer would consider the Gadsden Flag flying at the Armory to be private speech, and it is obvious that the flag would be regarded as government speech.” *Id.* at 474. First, “flags, like monuments, are reasonably interpreted ‘as conveying [a] message on the property owner’s behalf,’” and, “[l]ike most public parks,” the Armory (like Boston’s City Hall Plaza) was “closely identified in the public mind with the government unit that owns the land[.]” *Id.* at 474-75 (quoting *Summum*, 555 U.S. at 471-72; other citations omitted).⁶ Second, the veterans’ group’s sixteen years of control over the flagpoles without the city’s involvement had little relevance, because “[t]hat the City never had occasion to speak up until now does not plausibly suggest indifference to the message sent on the flagpole; one can easily imagine the reaction if Plaintiffs had flown a pro-choice or anti-marriage-equality or other politically fraught banner.” *Id.* at

⁶ The Second Circuit’s summary affirmance noted in particular that “the flagpole was located in a public space used for park and recreation purposes, and a reasonable observer would think the flags were presenting a message from the City.” 615 Fed. App’x at 694.

476 n.8. Similarly, here, the fact that the City had not rejected a flag request until petitioners' simply reflects the fact that the previous requests fell into categories consistent with the City's own speech. *See infra* Part III; Pet. App. 29a ("That the City had not rejected prior requests is insufficient to conclude that the City accepts any and all flags because the record shows that the City had criteria for approval that limited flagpole access and that all flags flown satisfied those criteria.").

The *United Veterans* court's prediction about reactions to "politically fraught banner[s]," 72 F. Supp. 3d at 476 n.8, was prescient. In recent years, towns and cities across America have faced—and responded to—public criticism related to certain flags being flown (or not flown) on municipal property precisely because such flags are understood to represent the views and priorities of the government. In Heber City, Utah, for example, the city council heard from citizens expressing both support for and opposition to the display of Pride banners on city lampposts—a display requested and financed by a private citizen and approved by the city. *See* David Boyle, *Pride Banners on Heber City Main Street Draws Public Comment*, KPCW.org (June 5, 2019, 7:24 a.m.), <https://bit.ly/3ykigtP>. Despite their private origin, the lamppost banners became a topic of public controversy on which citizens expected their city council to act.

Similarly, in Solon, Ohio, the city removed from police department property one version of the "Thin Blue Line" flag due to the "divisive and unhealthy reaction within [the city's] community" to seeing it, and then, days later, replaced it with a predecessor

version of the same flag. Dave DeNatale, *Solon mayor: City will fly 'original' Thin Blue Line flag to support law enforcement*, WKYC.com (July 16, 2021, 5:44 p.m.), <https://bit.ly/3ylahwq>. In a lengthy statement, the city's mayor explained that the replacement flag better conveyed the city's "intent and message" of honoring law enforcement, while also "mitigating the "unfortunate negative connotation" associated with the flag's other version. City of Solon, Ohio Police Department, *Statement from Mayor Kraus on Raising Original Thin Blue Line Flag*, facebook.com (July 16, 2021, 11:28 a.m.), <https://bit.ly/3DPDrFi>. The mayor further noted that, as a result of the flag incident, he had spoken with local Black community leaders and "agree[d] we must be selective in the symbols we choose to convey important perspectives." *Id.*

Examples such as these show that when citizens see flag displays on government property, they routinely attribute to their government the messages sent by those flags. And whether or not such flags are the result of a private request, citizens look to their local government to hear and respond to their concerns, just as the protesters on Boston's City Hall Plaza did. When these "reasonable observers," whether from New Rochelle, Heber City, Solon, Boston, or elsewhere, see flags flying over their government's property, they understand the messages sent by those flags to be government speech.

III. Governments routinely engage in speech by flying flags over government property that represent other nations or mark occasions of civic importance.

Amici States, like other governments around the country and around the world, speak to, with, and on behalf of our constituents in a wide variety of ways. As detailed below, flag-raising above government property are a common form of such government speech, including flag-raising of the two types reflected in the record in this case: flying flags of other nations (often to honor local communities or visiting dignitaries), and flying flags associated with a holiday or other occasion recognized by federal, state, or local authorities. And, not surprisingly, such flag-raising are often annual events, occurring at or around the same time each year.

Boston's flag-raising match this general description. Indeed, the record indicates that because a given flag was often flown multiple times between 2005 and 2017 at around the same time each year, the 284 flag-raising emphasized by petitioners, *see* Pet. Br. *passim* (using the number 284 at least 13 times), represent a much smaller number of unique flags—approximately 50. Pet. App. 173a-187a; Resp. Br. 8. All but eight of those 50 flags were flags of other nations, many of which are represented by substantial communities in Boston, raised on days that are significant to those nations.⁷ The remaining eight

⁷ “Flags of other nations” includes multinational flags such as that of the United Nations (raised nine times between 2005 and 2017, *see* Pet. App. 173a-184a), and the Pan-African flag (raised

flags are associated with some sort of governmental recognition such as speeches, holiday celebrations, and official proclamations—precisely the sorts of government speech in which *amici* engage all the time.⁸

A. Flying the flag of another nation to honor a local community or for other civically-important reasons is a common form of government speech.

Governments large and small across this country routinely express themselves by flying flags of other nations above their property. Nothing about their doing so indicates an intention to designate a public forum. To the contrary, flying other nations' flags is a common form of government speech, often employed as part of an official celebration of a local community.

in 2017, *see* Pet. App. 174a, on the birthday of Marcus Garvey, who designed it, *see* *The Untold Story And Meaning Behind The RBG Flag*, panafricanalliance.org (Dec. 7, 2021), <https://bit.ly/3ILr6FA>). News reports indicate that at least one Boston City Councilor had some involvement in the raising of the Pan-African flag in a previous year at around the same time of year. *See, e.g.*, O’Ryan Johnson, *Councilor, City Hall caught up in flag flap*, Bos. Herald (Aug. 21, 2008), <https://bit.ly/3DLshBi> (reporting that former City Councilor Chuck Turner had “helped raise” the Pan-African flag “at City Hall”).

⁸ What the record emphatically *does not* show is a practice of raising any flag that any group wanting to make a statement might wish to fly. Indeed, for all the emphasis petitioners and their *amici* place on the 284 flag-raising and the City’s supposed “lack of editorial control” over them, ACLU Br. 18, they cannot point to a single instance of a flag-raising that neither features another nation’s flag nor is associated with another form of governmental recognition.

The City of San José, California, for example, has a flag policy stating that “[t]he City’s flagpoles are not intended to serve as a forum for free expression by the public,” and listing flags that may be flown “as an expression of the City’s official sentiments.” City of San José, *Exhibition of Federal, State, and City Flags from City Buildings—All Occasions*, sanjoseca.gov, at 3, ¶ C (rev. Oct. 17, 2006), <https://bit.ly/30tX0Fu>. The policy states that “[f]lags of the *governments recognized by the United States* may be displayed upon the request of [certain city officials].” *Id.* ¶ C.1 (emphasis added). Thus, San José expressly contemplates flying flags of other nations as part of its government speech. Other municipalities in California have adopted similar provisions emphasizing that flags flown on municipal property are government speech, and including flags of other nations in their list of approved flags. *See, e.g.*, City of Gilroy, *Policy for Flying Flags at City Facilities*, cityofgilroy.org, at 3, ¶¶ 1-2 (May 17, 2021), <https://bit.ly/3m6nKmT> (noting that “the City’s flag poles are not intended to serve as a forum for free expression by the public” and represent “an expression of the City’s official sentiments,” and authorizing the display of “Commemorative Flags,” to include “a flag that identifies with a specific ... nation ..., whereby the City honors or commemorates the ... nation ... by flying the flag”); City of Arroyo Grande, *Policy on Display of Flags*, arroyogrande.org, at 6, ¶ II.C.3 (May 25, 2021), <https://bit.ly/324GMDe> (describing display of “commemorative flags,” which may include “a flag that identifies with a specific ... nation ... that the City Council chos[es] [sic] to honor or commemorate,” as “expression of the City’s official government speech”).

For another example from across the country, the City of Barre, Vermont, also authorizes the flying of “flags of other countries” on city property. City of Barre, *Policy on Flag Displays*, barrecity.org, at 1-2, Policy & Procedure ¶ 3.a (rev. Nov. 24, 2020), <https://bit.ly/321LEZR>.⁹ Such flags may be flown only upon approval by the Barre City Council. *Id.* ¶ 3.¹⁰ Another city in Vermont, Montpelier, also requires City Council approval for any flag to fly on government property, and authorizes the flying of flags that, *inter alia*, “promote[] unity and community with another ... country.” City of Montpelier, *Flag Display*, montpelier-vt.org, at 1-2, ¶¶ 4.b.i, 4.b.i.2.e, <https://bit.ly/3GKLMMo>.

Governments also fly flags as a means of honoring Native American nations. On October 12, 2021, the City of National City, California raised the flag of the Kumeyaay Nation at City Hall “in honor and acknowledgement of #IndigenousPeoplesDay 2021.” City of National City (@CityOfNatlCity), twitter.com (Oct. 11, 2021, 11:29 am), <https://bit.ly/3oTjcC5>. The city’s public acknowledgment of what it was doing—“honor[ing]” the Kumeyaay Nation by flying its flag on the day federally recognized as Columbus Day, *see* 5 U.S.C. § 6103(a); 36 U.S.C. § 107, but known in recent

⁹ A voter-approved measure to change the city charter to allow the City to fly only the City, State, United States, and POW/MIA flags had not been ratified by the Vermont Legislature as of December 21, 2021. *See* H. 444 (introduced Apr. 7, 2021), legislature.vermont.gov, <https://bit.ly/3pZNxhF>.

¹⁰ News reports indicate that flags flying over City Hall Park are understood by community members as “the city ... show[ing] its support” for the cause that the flag represents. *See, e.g.*, Mike Dougherty, *Barre hoists Black Lives Matter flag, with ‘thin blue line’ on deck*, VTDigger.org (Dec. 1, 2020), <https://bit.ly/3dTH42u>.

years in California as Indigenous Peoples' Day, *see* Cal. Gov. Gavin Newsom, *Proclamation*, gov.ca.gov (Oct. 8, 2021), <https://bit.ly/3EXKfC6>—makes pellucid that the flying of that flag over City Hall was government speech.

The Village of Clayton, New York, recently took a step further than other jurisdictions in embracing *solely* the practice of flying other nations' flags. According to news reports, following an occasion on which the LGBTQ Pride flag was displayed on one of the village's flagpoles, the village adopted a new rule "stat[ing] that *only* the U.S. flag and other national flags ... may be flown from village flagpoles." Alex Gault, *Clayton moves to ban non-national flags from village flagpoles*, NNY360.com (Aug. 4, 2021), <https://bit.ly/31OvIdL> (emphasis added). The village's Mayor "said it's the view of the village board that any flags flown on village property represent the entire village," adding that "[t]he issue is (that) you're speaking for the whole community when you put one up on village flagpoles." *Id.*

At the federal level, the Department of Defense has adopted a policy approving the display of other nations' flags as government speech. A recent memorandum from then-Secretary of Defense Mark Esper explained that "[f]lags are powerful symbols, particularly in the military community for whom flags embody common mission, common histories, and the special, timeless bond of warriors." Secretary of Defense, *Memorandum for Chief Management Officer of the Department of Defense, et al.: Public Display or Depiction of Flags in the Department of Defense*, media.defense.gov, at 1 (Jul. 16, 2020),

<https://bit.ly/3oTvuuh>. Accordingly, in an effort to “promote unity and esprit de corps,” Secretary Esper ordered that the display of flags other than the American flag in “Department of Defense work places, common access areas, and public areas” be limited to a short list of flags, including “[f]lags of other countries, for which the United States is an ally or partner, or for official protocol purposes.” *Id.* at 2. The memorandum went on to specify, however, that flag displays other than those on the short list were permissible at locations “where the nature of the display or depiction cannot reasonably be viewed as endorsement of the flag by the Department of Defense,” *id.*—that is, in locations where a reasonable observer would not understand the flag’s display to be government speech.

Flags of other nations have even flown from the most American of locations: atop the White House. On July 28, 1918, President Woodrow Wilson ordered that the flag of Serbia fly next to the American flag above the White House, in recognition of “the solidarity of Americans with the Serbian people who suffered so tremendously during the First World War.” U.S. Embassy in Belgrade, *When the Serbian Flag Flew Over the White House*, rs.usembassy.gov (July 28, 2020), <https://bit.ly/3GHXF7b>. President Wilson did so “upon the advice of his good friend Mihajlo Pupin,” *id.*—but that obviously does not mean that President Wilson had created a designated public forum by taking his friend’s advice. To the contrary, the president’s decision to fly the Serbian flag from atop the White House was a uniquely powerful gesture of government speech, still remembered more than a century later.

The City of Boston’s flag-raising policy is fully in line with these other jurisdictions that treat raising other nations’ flags as government speech intended to send a message. The City’s policy states the message that it intends to send: “[o]ur goal is to foster diversity and build and strengthen connections among Boston’s many communities,” including by “commemorat[ing] flags from many countries and communities at Boston City Hall Plaza during the year,” and “rais[ing] awareness in Greater Boston and beyond about the many countries and cultures around the world.” Pet. App. 143a. Accordingly, as noted above, the vast majority of flag-raising in the record are flags of other nations, which further the City’s stated goal.¹¹

¹¹ Petitioners suggest that the City of Boston cannot have been engaging in government speech when it raised other countries’ flags over City Hall Plaza because, in their view, such flag-raising is a crime in Massachusetts. See Pet. Br. 53-54. This argument lacks merit. The Victorian-era statute in question, see 1895 Mass. Stat. ch. 115, purports to prohibit “the flag or emblem of a foreign country” from being “display[ed] ... upon the outside of a ... city or town building,” on pain of a twenty dollar fine. Mass. Gen. L. ch. 264, § 8. Even assuming that this statute could be constitutionally enforced in any circumstances, but cf. *Texas v. Johnson*, 491 U.S. 397 (1989), its plain language limits its application to instances where the flag is in physical contact with the building’s exterior—an interpretation confirmed by the fact that the statute applies to both flags and emblems. And any question as to whether the phrase “upon the outside of” might be ambiguous enough to reach a flag flying nearby, see Pet. Br. 53, would be resolved in the negative by the rule of lenity. See, e.g., *Commonwealth v. Dayton*, 75 N.E.3d 600, 602 (Mass. 2017) (“[W]hen the language of a criminal statute plausibly can be found ambiguous, the rule of lenity requires that the defendant receive the benefit of the ambiguity.”).

Boston's actual practice lines up with its policy and stated goal. For example, on October 5, 2018, the City of Boston hoisted the flag of Italy above City Hall Plaza, *see* Boston Arts & Culture Cable Office, *Italian Flag Raising*, cityofboston.gov (Oct. 5, 2018), <https://bit.ly/3m1858D> ("Italian Flag Video"), as it had also done in early October of 2016 and 2017, *see* Pet. App. 174a-175a. Video of the 2018 flag-raising shows the then-Mayor of Boston explaining that "Boston is certainly proud to honor Italian Heritage Month with all of you," Italian Flag Video at 8:06-8:11, and, after extolling the accomplishments of Boston's Italian-American community, reading a mayoral proclamation declaring October to be Italian Heritage Month in the City of Boston. *Id.* at 9:00-9:10. The Italian flag was hoisted about five minutes later, with the Mayor and other elected officials looking on. *See id.* at 14:45 *et seq.* As another example, the record shows that the flag of Lithuania has flown nine times between 2005 and 2017 over City Hall Plaza, always on or around February 16. Pet. App. 173a-187a. A similar flag-raising occurred on February 16, 2018, *see* C.A. App. 395, and shortly before that flag-raising, the Governor of Massachusetts issued a proclamation recognizing February 16 as Lithuanian Independence Day, noting that "[o]ur vibrant Lithuanian American community has made tremendous contributions to the Commonwealth's society and culture." Governor Charles D. Baker, *A Proclamation*, mass.gov (Feb. 1, 2018), <https://bit.ly/3pQdTTv>.¹² These flag-raising

¹² A virtually-identical proclamation from 2019 is available at <https://bit.ly/3IMFjSD>. Similar proclamations may well have been given in previous years, but gubernatorial proclamations issued before October of 2017 are not readily available on

were not simply private parties utilizing a designated public forum to speak by flying a flag, but rather an integral part of state and local government speech honoring local communities.¹³

B. Flying a flag to commemorate holidays and other occasions of civic importance is paradigmatic government speech.

Amici and other governmental entities also routinely speak in recognition of important civic occasions like legal holidays and other widely-celebrated observances. Whether by proclamation, speech, written statement, or flag-raising—or a combination of these—governmental recognition of such occasions is paradigmatic government speech.

Often, a flag-raising will be accompanied by another traditional form of government speech (such as a proclamation). For example, the city of Belvedere, California’s flag policy regarding “commemorative flags” (i.e., “any flag other than the United States Flag, the State of California Flag, or the City of Belvedere Flag”) states that “[t]he display of commemorative flags constitutes governmental speech,” and further provides that “[t]he City may display commemorative flags only if authorized by

Massachusetts’ official website. See Mass. Governor’s Office of Constituent Services, *Issued Proclamations*, mass.gov, <https://bit.ly/3IMXh7F>.

¹³ Petitioners say that, in the past, the City “never so much as look[ed] at a flag before approving it,” Pet. Br. 50, but it would be surprising indeed were the City to ask the nation of Lithuania or Italy (or any other) to alter the design of its flag before agreeing to fly it. See Pet. App. 150a.

City Council Resolution.” City of Belvedere, *Policy 20-6: Flag Policy*, cityofbelvedere.org, at 2, ¶ 20.6.4, <https://bit.ly/3pWuIMD>. The City of Spokane, Washington, allows for the flying of flags other than the United States, Washington, Spokane, and POW-MIA flags, but “only ... upon the issuance of a federal or state proclamation or resolution or a mayoral proclamation.” City of Spokane, *Use and Display of U.S. Flag, State Flag, and Other Flags*, mrsc.org, at 2, ¶ 5.4 (Dec. 2, 2018), <https://bit.ly/3yv1HeD>. These jurisdictions and others like them explicitly treat flag raisings as an integral part of government speech that furthers the government’s decision to express itself in an especially potent way. *See supra* Part II.A.

Boston’s practice is similar. As noted *supra* at 16-17, the record shows that, between 2005 and 2017, Boston flew a total of eight flags that are not associated with other nations (and it has flown several of those eight flags on multiple occasions). All eight of those flags are tied directly to federal, state, or local holidays, or to other occasions recognized by the Governor or Legislature of Massachusetts, the Mayor of Boston, or the Boston City Council. *See* Resp. Br. 9-11 (listing occasions). Thus, as respondents explain, “[a]part from national flags, the Flag Raising List relied on in the Joint Statement does not identify a single instance during the period from 2005-2017 in which the City lowered the Boston City Flag and raised another flag in its place that was not in connection with a publicly identified observance or celebration.” *Id.* at 11.

As an example, the then-Mayor of Boston’s comments at Boston’s 2017 Pride Week flag-raising

directly link raising the Pride flag with other forms of government speech. Mayor Walsh stated that “City Hall is proud to be the first municipality to properly fly the rainbow flag, and we will continue to fly it every single year.... We’re going to continue to fly this [rainbow] flag, and the transgender flag, with pride in our hearts.” Cable Office, Dep’t of Neighborhood Development, *LGBT Pride Flag Raising 2017*, cityofboston.gov (June 2, 2017), <https://bit.ly/3IKLBSW>, video at 7:15-7:25 & 9:18-9:23. Shortly thereafter, the Mayor read a proclamation celebrating Pride Week and then watched as the Pride flag was raised. *See id.*, video at 9:38-10:02 & 26:45 *et seq.*¹⁴

In sum, Boston’s flag-raising have consistently honored the City’s diverse communities and marked important civic occasions. That practice is consistent with the expressive activities of state and local governments across the country.

IV. Reversal in this case will inevitably lead to less speech.

As this Court recognized in *Summum*, “where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.” *Summum*, 555 U.S. at 480. That is precisely the case here. Because “City

¹⁴ The record appears unclear as to whether *every single one* of the 284 flag-raising referenced by the parties was accompanied by a proclamation or other official action. Should this Court conclude that the result in this case turns on that point, the proper course would be to vacate the decision below and remand for further discovery.

Hall Plaza, and several nearby City-owned properties, are public forums open to public events,” Resp. Br. 6, it requires little imagination to foresee that, if the City’s flagpole is a designated public forum, deeply offensive flags could soon be flying high above City Hall Plaza next to the flags of the United States and the Commonwealth of Massachusetts. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (noting that “as long as” a governmental entity “retain[s] the open character” of a designated public forum, the entity is “bound by the same standards as apply to a traditional public forum”). And, unfortunately, that someone might wish to fly, say, a Nazi flag on a public flagpole is not a mere hypothetical. *See, e.g., Maya Eliahou & Christina Zdanowicz, A Nazi flag was found flying at a public park in Wyoming*, *cnn.com* (Aug. 2, 2018), <https://cnn.it/3yppQmN> (reporting that someone replaced the American flag with a Nazi flag on a city-owned flagpole located in a public park in Laramie, Wyoming).

The city of Alpharetta, Georgia, recently faced a similar situation when a local group wished to march in a city-sponsored parade while displaying the Confederate battle flag. *See Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021). The Eleventh Circuit rejected the group’s First Amendment claim, concluding that the parade was government speech and noting that “the City’s view was that the Confederate battle flag symbolizes oppression and slavery, and its inclusion was inconsistent with its goal of uniting the community.” *Id.* at 1252. The court further observed that “absurd results would follow if the First Amendment protected the [group’s] right to

fly the Confederate battle flag in the City-organized Parade” and concluded that such a result “would lead almost inexorably to’ the end of government-sponsored parades, a medium of communication governments have used from time immemorial.” *Id.* (quoting *Summum*, 555 U.S. at 480; other citations and internal quotation marks omitted).

In any event, because the scenario of offensive flags flying on city-owned flagpoles over city property would obviously be unacceptable to any city, a city found to have designated a public forum on its flagpoles would simply take steps to reduce access to the flagpoles. Perhaps the city would eliminate the flag-raising program all together. *Cf. Ark. Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 681 (1998) (“Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”). Perhaps it would significantly reduce the types of flags allowed to be flown, as Clayton, New York, did. *See supra* at 20. At the very least, the city would almost certainly take steps to “un-designate” the public forum by rewriting its policy, being careful to spell out that it was not “intentionally opening a nontraditional forum for public discourse” on the flagpole. *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985).¹⁵ Indeed, Boston has indicated

¹⁵ Petitioners and some *amici* emphasize the inclusion of the words “public forum” in the City’s policy in arguing that the City created a designated public forum *on* its flagpole. *See, e.g.*, Pet. Br. i, 7, 23, 27; ACLU Br. 7. But, as the City points out, the area *at the base of* the flagpole is indeed a public forum. Resp. Br. 3. The City’s policy carefully specifies that the area “*at the City Hall*

that, should this Court reverse the judgment below, it intends to do just that. *See* Resp. Br. 46.

The First Amendment analysis should turn on the facts of what the City has *actually done* over the years, and how reasonable observers would (and did) perceive it. Those factors, as the courts below recognized, consistent with *amici* States' own experience, lead to the conclusion that the flags flying over Boston's City Hall Plaza are government speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Flag Poles" is a public forum, Pet. App. 133a (emphasis added); petitioners and their *amici* are not so precise, conflating the location "at" the base of the flagpoles with the location "on" the flagpole itself. *See, e.g.*, ACLU Br. 7 ("The policies explain that members of the public may hold events at certain properties near City Hall, including *on* 'the City Hall Flagpoles' themselves.") (quoting Pet. App. 133a, but omitting the policy's use of the word "at") (emphasis added).

Respectfully submitted,

MAURA HEALEY
*Attorney General for the
Commonwealth of
Massachusetts*
David C. Kravitz*
Deputy State Solicitor
Phoebe Fischer-Groban
Grace Gohlke
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
david.kravitz@mass.gov
(617) 963-2427
**Counsel of Record*

December 22, 2021

WILLIAM TONG
*Attorney General of
Connecticut*
165 Capitol Ave.
Hartford, CT 06106

KATHLEEN JENNINGS
*Attorney General of
Delaware*
820 North French St.
Wilmington, DE
19801

KARL A. RACINE
*Attorney General for
the District of
Columbia*
400 6th Street, NW,
Suite 8100
Washington, DC 20001

HOLLY T. SHIKADA
*Attorney General of
Hawaii*
425 Queen St.
Honolulu, HI 96813

AARON M. FREY
*Attorney General of
Maine*
6 State House Sta.
Augusta, ME 04333

ELLEN F. ROSENBLUM
*Attorney General of
Oregon*
1162 Court St. N.E.
Salem, OR 97301

KEITH ELLISON
*Attorney General of
Minnesota*
102 State Capitol
75 Rev. Dr. Martin
Luther King Jr. Blvd.
St. Paul, MN 55155

MARK R. HERRING
*Attorney General of
Virginia*
202 North 9th St.
Richmond, VA 23219

LETITIA JAMES
*Attorney General of
New York*
28 Liberty St.
New York, NY 10005