

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD SHURTLEFF, ET AL.,)
) Petitioners,)
) v.) No. 20-1800
CITY OF BOSTON, MASSACHUSETTS,)
ET AL.,)
) Respondents.)

Pages: 1 through 90
Place: Washington, D.C.
Date: January 18, 2022

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10
11 Washington, D.C.
12 Tuesday, January 18, 2022

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:00 a.m.

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1 APPEARANCES:
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3 the Petitioners.
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7 supporting reversal.
8 DOUGLAS HALLWARD-DRIEMEIER, ESQUIRE, Washington, D.C.;
9 on behalf of the Respondents.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely.

We'll hear argument first this morning in Case Number 20-1800, Shurtleff versus Boston, Massachusetts.

Mr. Staver.

ORAL ARGUMENT OF MATHEW STAVER
ON BEHALF OF THE PETITIONERS

MR. STAVER: Mr. Chief Justice, and may it please the Court:

After 12 years with 284 flag-raising approvals, no denials, and usually no review, one word caught the attention of a Boston official, the word "Christian" on the application. The flag itself was not the problem. Had it been called anything but Christian, the same flag would have flown for an hour without incident.

The policy does not limit the flagpoles to subject matters or speakers. All applicants are welcome, except religious viewpoints. The 2018 codification places religion in the same category as speech deemed

1 inappropriate, offensive, supporting prejudice
2 or discrimination.

3 To support its admitted viewpoint
4 discrimination, the City raises one defense,
5 that the public forum open for all applicants
6 is really government speech. This Court warned
7 in *Matal* that the government speech doctrine is
8 susceptible to dangerous misuse. This is such
9 a case.

10 The City's flag-raising forum is not
11 government speech under *Walker* and *Summun*. The
12 City, by an unbroken history and practice and
13 policy, expressly declared that the flagpoles
14 are one of its public forums open to all
15 applicants. In doing so, the City long ago
16 crossed the line from government speech to
17 private speech.

18 A reasonable observer would understand
19 this history and the policy. This observer
20 would also see a private event coinciding with
21 a temporary flag-raising event. The City
22 exercised no control over the message, the
23 design, and did not own the flags. The City
24 never requested flags or messages to be changed
25 and usually did not review them. The City's

1 application alone cannot transform private
2 speech into government speech.

3 In light of the practice and policy,
4 the decision below upholding viewpoint
5 discrimination under the guise of government
6 speech is dangerous and should be reversed.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Staver, you begin
9 your brief by arguing that this is a limited
10 public forum and -- or a designated public
11 forum. And do we have to agree with that in
12 order for you to win?

13 MR. STAVER: No, Your Honor. Chief --
14 Justice Thomas, this is viewpoint
15 discrimination under any one of the public
16 forum doctrine, even in a non-public forum. If
17 this is it, it's clearly viewpoint
18 discrimination.

19 So this Court does not need to address
20 the category or the kind of public forum at
21 issue. Viewpoint discrimination is
22 impermissible in every category.

23 CHIEF JUSTICE ROBERTS: Well, that
24 can't be right because, if it's -- if it's a --
25 a government forum and this is government

1 speech, they can certainly discriminate on the
2 basis of viewpoint, right?

3 MR. STAVER: That's correct, if it's
4 government speech.

5 CHIEF JUSTICE ROBERTS: Okay.

6 MR. STAVER: But this is not
7 government speech. It's nothing like Walker,
8 which is the outer bounds of the government
9 speech doctrine. It's nothing like Summun.
10 The City exercised no control. For 12 years,
11 the City ministerially approved all of these
12 applications with virtually no review.

13 CHIEF JUSTICE ROBERTS: The -- the
14 policy that they adopted in the middle of this,
15 I guess, saying that they won't fly flags
16 supporting discrimination, prejudice, or
17 religious movements, what if it just said
18 supporting discrimination or prejudice? Could
19 they do that?

20 MR. STAVER: I think that would still
21 be viewpoint discrimination. Offense, for
22 example, which that would be what it is, is, in
23 fact, viewpoint discrimination, as this Court
24 has already held in Matal.

25 CHIEF JUSTICE ROBERTS: Well, they

1 can't have an official view against
2 discrimination or against prejudice?

3 MR. STAVER: They have an -- a view in
4 terms of whether or not the public is allowed
5 to attend a particular event. But this
6 particular policy not only covers the
7 flagpoles, but it also covers the public forums
8 that are out there in front of City Hall, the
9 designated public forums that are clearly
10 admitted.

11 The City could not prohibit
12 discrimination or discriminatory speech within
13 those designated public fora. For 12 years,
14 you had a unified policy --

15 JUSTICE KAGAN: Mr. Staver, just --
16 just to follow up on -- on the Chief Justice's
17 question, and this is not this case, but it's
18 an important question because we have to set
19 lines and we're giving instruction to cities
20 about how they can create their -- their own
21 policies.

22 And suppose a city thinks two things.
23 It thinks we like this idea of -- of -- of
24 having our flagpole be a public forum and --
25 and -- and having a wide variety of

1 organizations use it to -- to identify
2 themselves and to express messages, so we sort
3 of like this sort of civic organization kind of
4 activity. But, at the same time, we think that
5 there are limits.

6 So -- so the city has a -- a -- a
7 policy of that kind, and then somebody comes to
8 it and says, we'd like to put up this swastika
9 on your pole. Does the city really have to say
10 yes at that point?

11 MR. STAVER: If it's a designated
12 public forum, I think the answer is yes. But,
13 on the other hand --

14 JUSTICE KAGAN: So, really, what
15 you're saying is that a city can't possibly
16 have a kind of open policy like this because no
17 city is going to want to put up a swastika or a
18 KKK flag or something like that. So, really,
19 what you're saying is that this is just a kind
20 of policy that a city can't have?

21 MR. STAVER: No, Justice Kagan. In
22 fact, the City could have a more limited
23 policy. It didn't choose to do that.

24 Now the City's brief tries to indicate
25 certain limitations on categories of subject

1 matters. But that's nowhere to be found in the
2 12-year or 13-year policy, and it's not in the
3 2018 codification of that policy anyway.

4 That is not limited to subject matters
5 or speaker identity. If the City wants to open
6 up a forum but limit it to certain kinds of
7 subject matters or speakers, certainly, the
8 City is capable of doing so.

9 JUSTICE KAVANAUGH: Can the City allow
10 patriotic flags or messages of support and not
11 those that are anti-American? For example, to
12 pick up on Justice Kagan's question, someone
13 wants to fly the al Qaeda flag at City Hall in
14 Boston. You're -- you're saying they would
15 have a right to do so?

16 MR. STAVER: The City, for example --
17 and the Solicitor General's brief goes into
18 that with regards to what the public parks do
19 and the federal public parks in terms of being
20 able to not only use those parks for a wide
21 variety of expressive activities but for their
22 own specific speech as well.

23 Certainly, the City could have a
24 limitation on the subject matters or speakers.
25 For example, the City could limit all the flags

1 to simply flags of other countries recognizing
2 the various constituencies of their
3 communities. But the City has chosen not to do
4 that.

5 JUSTICE BARRETT: Mr. Staver, what if
6 the City said kind of along the lines of what
7 Justice Kagan proposed? Said, you know, we
8 want to endorse certain messages. We like this
9 idea of civic expression at the flagpole. But
10 we want to exercise more control. And Boston
11 has said it's going to do that if it loses this
12 case.

13 Couldn't Boston -- or I guess I should
14 ask you, do you agree that Boston could
15 accomplish that by making the exact same run of
16 flags that it's had up to this point government
17 speech by exercising more control and maybe
18 putting a Boston official next to the flagpole
19 when it -- when it's raised up to show that
20 this is the City speaking?

21 Isn't that another way to do it other
22 than just designate it as a limited public
23 forum, you know, for these categories or
24 subject matters?

25 MR. STAVER: Justice Barrett, that

1 would be a closer call, but, in fact, if the
2 City just simply wanted to use government
3 speech as a guise for censorship, as I believe
4 happened in this particular case that we're
5 speaking --

6 JUSTICE BARRETT: Well, I'm not saying
7 this case. I'm saying, can't the government
8 choose what it wants to say? And if the
9 government makes it clear and it's not, you
10 know, just stamping government speech on it to
11 hide discrimination against private viewpoints,
12 but if the government truly exercises control,
13 wouldn't that be okay?

14 MR. STAVER: If the government truly
15 exercised control. And, in fact, the brief of
16 the local governments show that Boston is an
17 outlier by many respects. Other cities don't
18 open for third-party flags for obvious reasons.

19 Those that do can invite some
20 third-party participation as long as they
21 maintain very specific control of the subject
22 matters and messages and that it's very clear
23 that it is their speech.

24 JUSTICE BARRETT: I have a question
25 about the record. You mention in your reply

1 brief this Metro Credit Union flag.

2 MR. STAVER: Yes.

3 JUSTICE BARRETT: But that doesn't
4 appear on the list in the City's brief, and I
5 just wonder, is there some dispute about that?

6 MR. STAVER: No, there's no dispute.

7 The -- the list that's in the appendix
8 was the list from 2005 to 2017. The Metro
9 Credit Union is 2018. During that year, there
10 were 50 private third-party applications, and
11 Metro Credit Union was one of those. That
12 didn't celebrate any kind of historic event.
13 It wasn't national. It wasn't constituency- or
14 ethnicity-related. It was just simply a
15 private credit union that's, frankly, across
16 the street from where the City Hall is.

17 So, contrary to what the City says,
18 there's no evidence they say that anyone just
19 had a random day. That, in fact, is one of
20 those random days. It's not consistent with
21 the City's now-invented categories of national
22 flags and other community recognition.

23 JUSTICE BREYER: So what are we
24 supposed to do about that? I mean, you saw,
25 you know, in the brief, what is the brief of

1 various religious groups, one of Dark Greens.
2 So, really, look over that 12-year period we've
3 been getting our sample from, 2005 to 2017.
4 There weren't 284 different flags. There were
5 50 different flags and, moreover, because some
6 ran twice or three times --

7 MR. STAVER: Mm-hmm.

8 JUSTICE BREYER: -- I guess.

9 And it says of those 50 different
10 flags, 45 percent -- 90 percent of them, which
11 means 45, I guess, were, like, national flags
12 or regional flags. And then, of the remaining
13 five, we had one for Columbus Day, one for
14 Veterans Day, one for Bunker Hill Day, and the
15 other two might have been gray -- gay pride and
16 something like that.

17 And it says, of course, we didn't go
18 through all this control. There wasn't any
19 need to. I mean, sure, those flags are right.
20 That doesn't show they're going to have every
21 conceivable group, including the KKK and so
22 forth.

23 So what do we do about the record in
24 that? Because that isn't really in the record,
25 I don't think, what I just read you, is it?

1 Maybe it is.

2 And then the other question that I --
3 related that I would have is go to Boston, go
4 look at the city plaza. I mean, you see three
5 flagpoles and there are flags. And what do you
6 -- and they're right in front of the City Hall
7 and two of them, one the state, one the
8 national -- federal -- national flag. And the
9 third one, I mean, what are you going to think?
10 Of course, you think it has something to do
11 with the City, something.

12 MR. STAVER: Justice Breyer --

13 JUSTICE BREYER: And so -- so they're
14 saying, look, on the one hand, anybody --
15 anybody in his right mind would think it does
16 have something to do with the City. And,
17 number two, there isn't some huge diversity for
18 any group in sight. All there is is the flag
19 -- the flag of Paraguay and -- and a couple of
20 exceptions for groups that we support.

21 MR. STAVER: Justice Breyer, on your
22 last point, taking that first, in the Petition
23 Appendix on page 142 and then also on 145 to
24 146, there is a second flag, and that's why
25 they use the word flagpoles.

1 The one that was at issue here was the
2 flagpole near the other three in front of City
3 Hall. The second flagpole is part of their
4 public forum as well, and it's on Congress
5 Street parallel to the City. And, in fact,
6 it's the Bunker Hill flag, the picture in the
7 appendix, that's actually raised on that
8 Congress Street flagpole.

9 And if you --

10 JUSTICE BREYER: Well, that's just the
11 back of the City Hall, isn't it?

12 MR. STAVER: The background might be
13 the City Hall. It depends upon which way you
14 take the photograph. But it's not in front of
15 the City. And it's not near any other
16 government flags. It stands alone by itself.

17 And as it relates to whether or not
18 certain groups have historically taken
19 advantage of this forum, doesn't mean that the
20 forum was ever limited.

21 In fact, the 2018 policy had the
22 advantage of Matal, Walker, Sumnum, and our
23 litigation and nevertheless decided not to
24 close or limit the subject matters or speakers.
25 In fact --

1 JUSTICE KAGAN: I -- I guess, though,
2 that one of the points that Justice Breyer was
3 making is, if you're on the street in Boston
4 and looking over to City Hall and see these
5 three flagpoles, and now you say there's maybe
6 a fourth, but the three are sort of together,
7 you know, why -- why would you think that this
8 is anything other than government -- than the
9 government flying a flag?

10 MR. STAVER: I think, when you look at
11 that, Justice Kagan, you're going to see, one,
12 that's clearly government speech, as Justice
13 Barrett was referring to in terms of limiting.
14 You have the United States flag always up, and
15 underneath it is always the POW/MIA flag. It's
16 always there. That's clearly the government's
17 speech.

18 JUSTICE KAGAN: Right. And then
19 there's the Commonwealth flag. And then
20 there's this third flagpole. And -- and you've
21 been -- you've walked the street many times and
22 mostly you've seen the City of Boston's flag on
23 it, but occasionally you see another flag on
24 it. Why wouldn't you think that this is the
25 City of Boston deciding to put up a substitute

1 flag for its own purposes?

2 MR. STAVER: Because an informed
3 observer would understand the history, the
4 policy, and also see the --

5 JUSTICE KAGAN: Well, that is very,
6 very informed. I mean, that is not your
7 typical person who walks the street in Boston.
8 And, you know, all they know is, I've seen the
9 City of Boston flag here a thousand times, and
10 now I see another flag. It must be the City of
11 Boston decided to do something else today.

12 MR. STAVER: Well, the City -- the --
13 the observer would also see the private event
14 that's coinciding at the same time as the
15 private flag-raising because the private event
16 gathering down there by the base of the flag
17 would happen as in this case was designed to
18 do. Camp Constitution was going to gather
19 around the base while for one hour having an
20 event that would temporarily raise the flag and
21 bring it down.

22 The reason --

23 JUSTICE ALITO: Is it -- is it --

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE ALITO: -- is it true that one

1 of the flags that has been displayed on this
2 third flagpole is the flag of the People's
3 Republic of China?

4 MR. STAVER: Yes, Justice Alito. In
5 fact, that can't --

6 JUSTICE ALITO: And -- and Cuba was --
7 the Cuban flag was -- was displayed?

8 MR. STAVER: Correct.

9 JUSTICE ALITO: So, I mean, it might
10 be shocking to somebody walking down the street
11 if they didn't know the background to see some
12 of these national flags flying, wouldn't it?

13 MR. STAVER: Certainly. And then, if
14 you look, for example, at the two --

15 JUSTICE KAGAN: Is that a really
16 certainly? Because there are all the time
17 national flags flying on 16th Street. It just
18 signifies that somebody's come to town. So
19 it's like, you know, the Chinese premier is
20 here.

21 MR. STAVER: There's a second reason
22 why it would be that way, because all the time,
23 when you had the People's Republic of China by
24 a private organization, the Chinese Progressive
25 Association, flying roughly September/October

1 every year, you always have Mr. Chen, a private
2 individual, protesting that flag by raising the
3 Taiwanese flag supporting the pre-Mao rather
4 than the post-Mao revolution.

5 So, certainly, Boston has not one week
6 --

7 JUSTICE SOTOMAYOR: Counsel, I -- I
8 thought, and I may be mistaken, but in one of
9 the briefs, they suggested that your client,
10 the Petitioner, actually complained to the City
11 about flying the Chinese flag at one point.

12 MR. STAVER: That's not in the record,
13 but there was a YouTube video that he took of
14 the raising of the flag, and he put it up on
15 YouTube.

16 JUSTICE SOTOMAYOR: And it was a
17 complaint about the City doing this, correct?

18 MR. STAVER: No, not about the City
19 doing it. About the fact that it's the Chinese
20 Communist flag, not the City, because how
21 Shurtleff knew that the City --

22 JUSTICE SOTOMAYOR: I think we're
23 missing an essential point, I believe, that I
24 think Justice Kagan and Justice Breyer are
25 discussing, which is, to an ordinary observer

1 walking past City Hall, if you see a flag on
2 the pole, you think it's City Hall speaking.

3 You're asking us now to import a
4 fiction that this ordinary speaker is going to
5 also look at the event that's occurring and
6 understand that the flag is related only to the
7 event and not an event sponsored by the City.

8 Is that correct?

9 MR. STAVER: Not necessarily. I don't
10 think that the ordinary observer can just be
11 limited to a few seconds' or minutes' snapshot
12 and discount everything else that's gone on
13 before it or that actually is taking place at
14 the same time with the private event taking
15 place.

16 In this case, for example, whether you
17 have the Chinese Progressive Association
18 People's Republic flag or the other one, the
19 Taiwanese, the Republic of China flag -- I see
20 that I'm --

21 CHIEF JUSTICE ROBERTS: You can finish
22 your thought.

23 MR. STAVER: -- you're -- you're going
24 to have a private event that is happening at
25 the same time. That private event can notify

1 any observer, whether they're familiar or not
2 with the past or the policy, that a private
3 event of a flag-raising is taking place.

4 CHIEF JUSTICE ROBERTS: Thank -- thank
5 you, counsel. I have just one more question.
6 Your friends from the City say that even if
7 judgment should not have been entered in their
8 favor, it shouldn't be entered in your favor
9 either, that the case should be remanded
10 because there are factual issues, particularly
11 concerning whether or not this is a government
12 forum. They say, you know, the mayor was
13 there. Sometimes other government officials
14 participated. Do you dispute that?

15 MR. STAVER: Yes, Mr. Chief Justice,
16 because this has gone on for a number of years
17 of litigation. There was a stipulated set of
18 facts on page 132 of the Petition Appendix.
19 There's a stipulation that the flagpoles are
20 included in their designated properties.
21 There's also stipulation as to why they took it
22 down because of the "Christian" word on the
23 application, the Christian viewpoint.

24 There is no reason to send this back
25 for additional factors to be developed. The

1 City had all the -- plenty of opportunity to be
2 able to develop that record, and this is the
3 record that we have, simple -- simple --

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you, counsel.

6 MR. STAVER: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas, anything?

9 Justice Breyer?

10 JUSTICE BREYER: Yeah, I mean, oddly
11 enough, I'm sure this is a useless question,
12 but you would have thought after reading the
13 SG's brief, if they really want to have
14 government speech, it's not too hard for them
15 to arrange it. And they didn't pay too much
16 attention in the past, like, zero.

17 And can't it be settled? I mean, you
18 would have thought what's past is past. Let's
19 look to the future. See what Boston wants.
20 You might not disagree. I don't know.

21 MR. STAVER: Justice Breyer --

22 JUSTICE BREYER: But it just cried out
23 with an empty record sort of for --

24 MR. STAVER: Well, Justice Breyer, I
25 don't believe the record is empty, but could --

1 JUSTICE BREYER: No, no, but, I mean,
2 you see where I'm going.

3 MR. STAVER: -- could it be settled?

4 JUSTICE BREYER: Yeah.

5 MR. STAVER: We thought that this was,
6 in our view, a straightforward case from the
7 very beginning. The City drafted its own
8 policy, and the City used the word "public"
9 forums. The City said it's open to all
10 applicants. The City acted that way for 12
11 years -- in fact, 13 years -- codified the
12 policy and continued the practice up until
13 October 2021.

14 We thought it was straightforward,
15 but, obviously, the City, under the guise of
16 government speech condoned by the First
17 Circuit, has ultimately engaged in admitted
18 viewpoint discrimination justified by
19 government speech.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 Justice Sotomayor?

22 Justice Kagan?

23 JUSTICE KAGAN: If I could just say
24 one small thing, which is I had the same
25 reaction as Justice Breyer had, but you've

1 answered his question. I just want to say now
2 that Mr. Hallward-Driemeier should also think
3 about that question. Why hasn't this case been
4 settled? All right. That's all I have to say.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 Justice Kavanaugh?

8 Justice Barrett? No?

9 Thank you, counsel.

10 MR. STAVER: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Joshi.

12 ORAL ARGUMENT OF SOPAN JOSHI
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING REVERSAL

15 MR. JOSHI: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 Like any private property owner, the
18 government is entitled to use its own property
19 for whatever lawful purpose it likes, including
20 for expressive purposes, and when the
21 government expresses its own viewpoint, it is
22 never compelled to express competing or
23 alternative viewpoints. Government could not
24 function were that the rule.

25 And, of course, when the government

1 expresses its own viewpoint, it is free to
2 solicit input from and assistance from and even
3 other messages from third parties in helping
4 the government to shape its own message.

5 But this Court has said that, unlike a
6 private property owner or a private speaker,
7 when the government chooses to open up its own
8 property for use by third parties to express
9 their messages, the government cannot restrict
10 access based on viewpoint, including religious
11 viewpoints.

12 Now I admit and this Court has
13 recognized that it can be a really fine line
14 between the government soliciting messages from
15 third parties to help shape its own message on
16 the one hand and serving as a conduit for the
17 third parties to express their own messages on
18 the other.

19 But the record in this case, viewed in
20 the light most favorable to the Petitioners
21 here, suggests that what Boston did at least at
22 the time of the denial of Petitioners'
23 application was the latter and not the former.

24 JUSTICE GORSUCH: Counsel, what --
25 what's at stake in that line between public

1 forums and government speech? On the one hand,
2 you emphasize the government's right and
3 entitlement to edit speech of its own. But
4 what -- what happens when that doctrine goes
5 too far? Why does the government think that
6 this properly belongs on the other side of the
7 line?

8 MR. JOSHI: So, as I said, I think the
9 -- ultimately, the question is always going to
10 be who is speaking. And as this Court told us
11 in -- in *Matal* against *Tam*, the fear is that
12 the government could simply, by putting its
13 stamp of approval, as Justice Barrett mentioned
14 in her questioning, on private speech, it could
15 favor certain speakers over others, and the
16 First Amendment tells us that that's off limits
17 to the government.

18 But, that said, I think, in this
19 particular case, as in all cases, the question
20 is going to be highly fact-bound, and it's
21 going to depend on really the answer to the
22 question who is speaking. In this case, every
23 time one of those 284 flags went up the
24 flagpole, was that Boston speaking each of
25 those times, or was it the third party whose

1 flag it was?

2 JUSTICE GORSUCH: Why does the
3 government come down on that side of the line,
4 though? What are the factors you think that we
5 should be using to guide us in drawing that
6 very difficult line between these two
7 doctrines?

8 MR. JOSHI: I think, ultimately, the
9 -- the factor is what did -- or the -- the --
10 the ultimate question is, what did Boston do
11 when it created the flag-raising program? And,
12 here, we -- I think there are a number of facts
13 in the record that would tip the scales toward
14 believing that -- that Boston created a forum,
15 even if it's a non-public forum.

16 The 284 approvals in a row, of course.
17 The fact that Rooney would approve these in an
18 almost ministerial manner without ever looking
19 at the flags, without requiring that the actual
20 flag design be shown, is underscored by the
21 fact that Petitioners' flag apparently would
22 have passed muster but for its description as a
23 Christian flag in the accompanying e-mail. The
24 fact that flags raised in the flag-raising
25 ceremony were, generally speaking, at the

1 request of a third party and not initiated by
2 the City itself.

3 JUSTICE KAGAN: So, Mr. Joshi, suppose
4 you're right as to all of those things, that
5 there was essentially no control from the city
6 government here and -- and that pushes strongly
7 in the direction of, well, it's not government
8 speech if government doesn't control it.

9 But suppose, on the other hand, one
10 thinks that reasonable observers would think
11 that this was government speech. And there
12 might be some arguments about that, but I just
13 want to assume it for the moment.

14 Suppose one goes in one direction and
15 the other goes in the other direction. How do
16 we think about that?

17 MR. JOSHI: Well, I think, first, a
18 reasonable observer ought to be charged with
19 knowledge of the basic contours of the program
20 we're talking about. This Court's cases
21 dealing with forums going back to Widmar and --
22 and Rosenberger and Lamb's Chapel, some of the
23 others, Cornelius, have said that the -- the
24 right unit of analysis is the program to which
25 the plaintiff seeks access. It can't be at too

1 high a level of generality, so it's the
2 combined federal campaign, not the federal
3 workforce. In Lamb's Chapel, it's use of the
4 school rooms after school, not during the
5 school day.

6 And so I think, here, you would have
7 to assume that the reasonable observer is aware
8 that there is such a thing as a flag-raising
9 program.

10 JUSTICE KAGAN: Yeah. I mean --

11 MR. JOSHI: And one of the basic --

12 JUSTICE KAGAN: -- Justice Sotomayor
13 called that a fiction. And I think it -- you
14 know, that's an assumption that does verge on a
15 fiction, right? The person walking by City
16 Hall every day does not know about the contours
17 of the flag-raising program. It just knows, on
18 Monday through Thursday, I saw the City of
19 Boston flag and now I see another flag.
20 Surely, that's just the City of Boston deciding
21 to fly another flag instead of its own flag.

22 MR. JOSHI: So I -- I have two related
23 responses to it.

24 First, I -- I -- I think it's just as
25 likely that an observer might know that there

1 exists some kind of flag-raising program, and
2 when they call into Boston to complain about
3 the flag they see on the flagpole, they're not
4 necessarily complaining that Boston is
5 endorsing that flag, but, rather, they might be
6 complaining that Boston has opened up its
7 flagpole for a use that would permit such a
8 flag to be flown.

9 But, more broadly speaking, I -- I --
10 I think it would be a little bit problematic if
11 we allowed -- and realize I'm speaking on
12 behalf of the United States here -- but we take
13 this Court's cases to say that the First
14 Amendment should not allow a government to
15 evade the strictures of the First Amendment and
16 the prohibition on viewpoint discrimination
17 simply by being innovative in -- in its program
18 or by fooling the public or by having a secret
19 program on the side that only a few people know
20 about.

21 The fact is, once the government, or
22 the City of Boston here in particular, has
23 chosen to open up its flagpole for use by third
24 parties, the First Amendment imposes certain
25 restrictions on -- on how it can run that

1 program.

2 JUSTICE KAVANAUGH: You -- you listed
3 certain factors, I think three, the 284
4 approvals, they were approved in a ministerial
5 fashion, the flags were flown at the request of
6 a third party. Were there more you were going
7 to say there?

8 MR. JOSHI: Yes, Justice Kavanaugh.
9 Another one is that these flag-raising were
10 generally accompanied by a flag-raising
11 ceremony at the base and often by an associated
12 event in City Hall.

13 This Court in Krishna Consciousness,
14 one of the several Krishna Consciousness cases,
15 mentioned that separation from a -- a
16 traditional public forum could help make you
17 think that it's government speech as opposed to
18 a -- a forum itself.

19 It's the same application forum that
20 people use in -- I think this is at Pet. App.
21 148 -- Boston says that they process
22 applications the same.

23 If you go to the website today that
24 lists the new 2018 policy, it directs you to
25 exactly the same application you would fill out

1 if you wanted to host an event on a concededly
2 designated public forum.

3 And, of course, Boston's own desires
4 for the program itself, which is celebrate
5 diversity and foster connections among Boston's
6 many communities. They didn't pick the week --

7 JUSTICE KAVANAUGH: That makes the
8 doctrine, though, seem quite circular in the
9 sense that it is a public forum because of what
10 they've done and it'll be easy, presumably, and
11 why don't you tell me what you think Boston
12 would need to do to change this from a public
13 forum to something that's not a public forum
14 where they could permissibly exercise control.

15 MR. JOSHI: Yes. So it -- I do think,
16 to directly answer your question, it should be
17 rather easy for the government to change
18 things. This Court expressly recognized that
19 in Perry and in a line of cases --

20 JUSTICE KAVANAUGH: And -- and what --
21 what specifically do you think they'd need to
22 do?

23 MR. JOSHI: I -- as we suggest in --
24 in the back of our brief, they could do a
25 couple of things. Obviously, government

1 property can be used both for government speech
2 and to create a forum, even if it's a limited
3 or a non-public forum. And so Boston could
4 take a two-track approach like that.

5 Most of the time, it does use the
6 flagpole for its own flags. But, if it wanted
7 to preserve this kind of flag-raising program
8 in which third parties could raise their flags,
9 they could limit it, as we suggest and as Mr.
10 Staver pointed out, to flags of countries.

11 JUSTICE GORSUCH: Could it --

12 MR. JOSHI: Of course, if they --

13 JUSTICE GORSUCH: -- could it limit it
14 only with the purpose of discriminating against
15 religious viewpoints?

16 MR. JOSHI: I don't believe that would
17 be appropriate. This Court has said that even
18 in a non-public forum, viewpoint discrimination
19 is impermissible.

20 And we read *Rosenberger*, *Lamb's*
21 *Chapel*, and *Good News Club* to suggest that
22 prohibiting all religious viewpoints is
23 nonetheless viewpoint-based discrimination. So
24 I don't think that would be an available tool.

25 JUSTICE BARRETT: Mr. Joshi, I want to

1 follow up on Justice Kagan's questions about
2 what an informed observer might think about
3 seeing this flag because I agree with her, this
4 really is a fiction, and this goes to Justice
5 Souter's concurrence in Summum, trying to
6 figure out how much the -- the observer, the
7 informed observer, knows.

8 It seems to me that when you think
9 about the three factors from our case law,
10 control does almost all of the work because,
11 really, it's the informed observer knowing
12 about the degree of control that the government
13 exercises that, if we're creating this fiction,
14 makes the informed observer think or not think
15 that the speech is actually uttered on behalf
16 of the government.

17 Would you agree that control is the
18 most important factor?

19 MR. JOSHI: I think that's right.
20 Control is the most factor -- most important
21 factor, excuse me. And -- and that's because
22 all of the factors in Summum and Walker are
23 just that. They're factors to determine who is
24 speaking. And when you're asking the question
25 who is speaking, generally, the person speaking

1 has exercised some degree of control over the
2 message that's being conveyed.

3 JUSTICE ALITO: What if the -- what if
4 the City exercised complete control in this
5 sense? It has a policy that says anybody can
6 put up whatever message they like on a big
7 billboard that we have in front of City Hall,
8 except that we will review all of these
9 messages and we will exercise complete
10 discretion in deciding whether we will allow
11 the message to be put up, and in exercising
12 that discretion, the City disallows any message
13 with which it disagrees.

14 Now, there, there's complete control.
15 Do you think that's government speech?

16 MR. JOSHI: That's sort of difficult
17 to -- to answer, and I'll just give you a
18 couple of the things that -- that --

19 JUSTICE ALITO: How can it be possibly
20 difficult to answer? Suppose that it was a --
21 a -- a speaker's platform in a park and they
22 say you -- anybody can speak here, but you have
23 to give us your speech in advance, and we're
24 going to exercise complete control over what
25 you say. If we don't like your speech at all,

1 we're going to reject it. If it's got some
2 things we don't like, we're going to edit it.
3 Other than that, you can say anything you want
4 subject to our complete control.

5 That's government speech?

6 MR. JOSHI: That's obviously not
7 government speech and obviously forbidden, and,
8 in particular, you said a public park, where
9 that -- that is --

10 JUSTICE ALITO: Well, let's say it's
11 in front of City Hall. It's not --

12 JUSTICE SOTOMAYOR: But -- well, but
13 --

14 JUSTICE ALITO: -- a public park.
15 It's on public land in front of City Hall.
16 My -- my point is control can't be the be all
17 and end all because censorship involves
18 control. Censorship -- that's exactly what
19 censorship is.

20 MR. JOSHI: That -- you're -- you're
21 absolutely right. I'm not going to fight you
22 on that. But I guess what I'm saying is that
23 one can imagine the City, if it chooses to,
24 say, on its website post articles about Boston
25 and how great Boston is, they might not want to

1 write all of them. They might say submit your
2 essays, but this is on our website and it's
3 going to be from our viewpoint, and if we agree
4 with your viewpoint of why Boston is great,
5 we'll publish your article that you've
6 submitted to us on our website.

7 I think that looks a lot more like
8 soliciting third-party views to shape a
9 government message. And so, to the extent the
10 billboard example would be similar, that very
11 well might be government speech.

12 But I think, in most cases, if what
13 the city is doing or if what the governmental
14 body is doing is simply inviting a diversity of
15 viewpoints, then it's no longer government
16 speech, and then it really does look like
17 putting a stamp of approval.

18 I guess an analogy I would give you is
19 the difference between, say, hosting a
20 symposium in which you're sort of curating
21 who's going to speak, you might be inviting a
22 diversity of views but within a narrow band and
23 -- and you're exercising a lot of control
24 versus hosting an open mic night, where you're
25 just -- you have the mic available, you're

1 serving as a conduit, and third parties can
2 come and give their views.

3 And I think that's the key question in
4 this case, was Boston hosting a symposium of
5 flags in its communities, or was it more like
6 an open mic night?

7 JUSTICE BREYER: Well --

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE BREYER: -- if that's the key
10 question, then how do we answer it? Because I
11 don't find anything -- look, I look at the
12 record. You thought 173, 180-something, and,
13 hey, it says Lithuanian, Dominican, Tibet,
14 Ireland, United Nations, Vietnamese, Poland,
15 Haiti, dah, dah, dah, dah, dah.

16 As I look through that, it's certainly
17 90 percent national flags, and then they have a
18 few others, okay?

19 So -- and then that -- and then that
20 isn't even in the record, I don't think, any of
21 this stuff. I think this is somebody printed
22 it or something. And -- and so what am I
23 supposed to do? What I'd like to do is say,
24 send it back and find out what they actually
25 did. But that doesn't seem necessarily

1 possible. I don't know. That's why I'm asking
2 you. I really don't know.

3 MR. JOSHI: So --

4 JUSTICE BREYER: What do I do?

5 MR. JOSHI: -- so -- so I'll -- I'll
6 answer those in turn. First --

7 JUSTICE BREYER: Yeah.

8 MR. JOSHI: -- I -- I -- I do think
9 that list of flag-raising is in the record and
10 2018 --

11 JUSTICE BREYER: Oh, okay.

12 MR. JOSHI: -- that included the Metro
13 Credit Union, that's also in the record.

14 JUSTICE BREYER: Yeah. You have one,
15 Metro Credit Union, and you have 99 of -- of
16 their favored countries. I don't know if China
17 is their favored country up there or not,
18 but -- but -- but, nonetheless, they have
19 countries and regions --

20 MR. JOSHI: Yeah.

21 JUSTICE BREYER: -- 90 percent. So
22 what? We say 90 percent, there you have
23 10 percent that's other things, and, therefore,
24 you're not government speech? Or the opposite?
25 At 73 percent, that would have made a

1 difference.

2 Is that the kind of holding you want?

3 MR. JOSHI: I -- I -- I -- I don't
4 think that would be appropriate --

5 JUSTICE BREYER: No.

6 MR. JOSHI: -- or -- or even
7 relevant --

8 JUSTICE BREYER: Right, right.

9 MR. JOSHI: -- Justice Breyer. I
10 think the point is that even if -- even if you
11 accept that although it doesn't exactly match
12 their past practice and they haven't codified
13 it, but even if you accept that what the City
14 wanted to fly were flags of countries and flags
15 commemorating holidays, that doesn't
16 necessarily mean it's government speech.

17 It could still be a non-public forum
18 in which it invites Boston's communities to --
19 to raise the flags of their countries of
20 origin. It could still be a non-public forum
21 in which Boston -- you know, third parties are
22 invited to come and celebrate holidays.

23 And if that's what they were doing,
24 then they would have to be viewpoint-neutral.
25 So country flags, they'd have to fly the

1 Vatican. Celebratory day flags, they'd have to
2 fly a Columbus Day flag.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 One question. What about the issue
6 that your friends on the other side say is
7 really still open? They say that the record
8 will show when it's developed that the mayor
9 came to a lot of these things or some other
10 governmental representative, said that they're
11 often in connection with governmental
12 proclamations, you know, the -- the -- the
13 people of Italy or whatever and all that, and
14 it's the Italian flag. Does that change your
15 analysis about whether it's government speech
16 or not? In other words, it's in conjunction
17 with other governmental activities.

18 MR. JOSHI: Had that been in the
19 record, it -- it may well have because that
20 would suggest a degree of governmental control,
21 involvement, perhaps initiation. But, in -- in
22 this particular case, first of all, I don't
23 think that's in the current record on summary
24 judgment. And I'm -- I'm an appellate lawyer,
25 not a trial lawyer, but my understanding is you

1 usually can't reopen these things.

2 But, second, I will say that the City
3 itself seems to understand the difference
4 between when it wants to speak on the flagpole
5 and when third parties speak pursuant to the
6 flag-raising program. And I'll just give you a
7 couple of examples.

8 The district judge mentioned a couple
9 of times that the City had raised a pink
10 transgender flag. That's not in the list of
11 flags in the Petition Appendix that Boston
12 provided to Petitioners during the litigation
13 that starts at Pet. App. 173a.

14 Likewise, this is not in the record,
15 but it's common knowledge that I think in 2014
16 then-Mayor Walsh raised the flag of the
17 Montreal Canadiens, a hockey team that I think
18 had just defeated the Boston Bruins in a
19 playoff series. That flag is not --

20 CHIEF JUSTICE ROBERTS: Well, I can
21 understand why it wasn't put in the record.

22 (Laughter.)

23 MR. JOSHI: But -- but that flag's
24 not -- you know, not in the list of flags
25 either. And I think that just shows that

1 Respondents understand when they're using their
2 flagpole to speak and when flags are being
3 raised pursuant to this program.

4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas?

6 Justice Breyer?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Yes.

10 Counsel, in your response to the
11 question of deciding whether control is the
12 only factor, I think your answer to Justice
13 Alito has to be no because, in your response,
14 you started to focus in on forum a lot, because
15 your response was, in a park, they couldn't do
16 the kind of content or viewpoint discrimination
17 that they might be able to do at the flagpole.

18 Am I right about that?

19 MR. JOSHI: It's correct that a park
20 is a traditional public forum. So even --

21 JUSTICE SOTOMAYOR: So the nature of
22 the forum is important. So do you agree with
23 your -- with Petitioner that forum is
24 irrelevant in this case? And if you do, why is
25 it irrelevant in this case?

1 MR. JOSHI: I -- I don't think it's
2 irrelevant, but I do think that you have to
3 look at the program that Boston created. So
4 it's not flags in general, although that is
5 relevant, but I think you have to look at the
6 particular program that the City created, which
7 is a flag-raising program in which it seemed
8 to, from its actions, invite a diversity of
9 views.

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: So, Mr. Joshi, I don't
14 want to put words in your mouth, but if it's a
15 program that is attempting to invite a
16 diversity of views, that believes in civic
17 speech, civic organizations, essentially,
18 you're saying, once you have that kind of
19 program, the city loses all control over it,
20 even if the city wished to maintain control,
21 like, kind of the outer edges of the program --
22 and, again, I -- I don't want to talk about the
23 facts of this case; I want to talk about sort
24 of other cases -- like, a city couldn't do that
25 and keep out the KKK flag?

1 MR. JOSHI: I -- I disagree. I think
2 it could, and -- and I think, to a certain
3 degree, this case, at least below, was
4 litigated as a binary choice between government
5 speech on the one hand and a designated public
6 forum on the other. But I think that ignores
7 the fact that this Court has recognized there
8 are limited forums or non-public forums in
9 which content-based and even speaker-based
10 restrictions on the use of governmental
11 property for communicative purposes are
12 acceptable as long as they're reasonably
13 related to the purpose of the forum.

14 And so that's why in our brief we
15 suggest that the City could still have this
16 program while excluding things like the KKK
17 flag. If the program is reserved for flags of
18 countries from which Boston's community members
19 originate or -- or have, you know, ancestors --

20 JUSTICE KAGAN: Right. I --

21 MR. JOSHI: -- then they wouldn't have
22 to fly them.

23 JUSTICE KAGAN: -- I guess I was
24 suggesting that that's -- that's a much more
25 limited program than the one that I was

1 positing, which is a program that's meant to
2 say, you know, we want to hear from every --
3 all -- all different members of our community
4 on the things that they care about, you know,
5 not just, like, which country they're from, so
6 they can put up whatever flags they want to,
7 but we're -- we're going to draw some lines.
8 Essentially, you're saying they can't do that.

9 MR. JOSHI: I'm saying they can draw
10 the lines based on content and based on even
11 speaker status or identity. So, for example,
12 nonprofits only or -- I think, Justice
13 Kavanaugh, you mentioned al Qaeda -- a no
14 terrorist rule seems pretty reasonable to me.
15 So that would probably pass muster. But they
16 can't draw lines based on viewpoints.

17 So, if the program is such that, for
18 example, a group could raise a Black Lives
19 Matter flag, they probably would have to be
20 able to raise a Proud Boys flag. I mean,
21 that's just what the First Amendment demands,
22 even in a non-public forum.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 Justice Kavanaugh?

1 Justice Barrett?

2 JUSTICE BARRETT: I just want to
3 return to the control question in the colloquy
4 that you had with Justice Alito. So the -- the
5 factors from our case law are the history, the
6 way an informed observer would perceive it, and
7 the control. And it doesn't seem to me that
8 either history or how an informed observer
9 would perceive it necessarily suss out this
10 question of whether the government is using it
11 as a cover.

12 So you said, in figuring out if the
13 government is using this as a cover for
14 censorship, you know, we would be asking is
15 this more like a symposium, you know, where --
16 where a diversity of views on a particular
17 topic are solicited and welcome.

18 Is that a subset of the control
19 factor? I mean, none of our cases that I can
20 think of are really getting at that question of
21 sussing out government just trying to put a
22 stamp of approval on speech to weed out certain
23 disfavored speeches. At least not Sumnum,
24 Walker, and -- oh, what was the other one? The
25 license plate --

1 CHIEF JUSTICE ROBERTS: Tam.

2 JUSTICE BARRETT: Tam, oh, yeah, the
3 -- the trademark. So how do you suss it out,
4 you know?

5 MR. JOSHI: I think it's ultimately
6 going to be really fact-bound. I guess I would
7 point the Court to Forbes, the Arkansas
8 Educational --

9 JUSTICE BARRETT: Mm-hmm.

10 MR. JOSHI: -- Television Commission
11 against Forbes. There, the Court made clear
12 that a public broadcaster who's exercising
13 editorial control, a sort of curation of what
14 programs to air, that's government speech. And
15 -- and the Court said that expressly. Even
16 though the programs are created by third
17 parties, the -- the editorial control was
18 government speech, but a candidate debate in
19 particular was a non-public forum in which
20 viewpoint discrimination was prohibited.

21 And that's the kind of analysis --
22 unfortunately, it is fact-bound -- that has to
23 be brought to bear in every case, you know, but
24 -- but, again, you -- you have to look at the
25 particular program. Imagine Summum, for

1 example. Those three factors that you
2 discussed were discussed in Sumnum and pointed
3 toward government speech.

4 But imagine if the City of Pleasant
5 Grove also simultaneously reserved a corner of
6 that same park for a Monument of the Week
7 program. I think the Court might have had --
8 in which all comers could come and put their
9 monument up for a week as long as it satisfied
10 certain size criteria and then took it down and
11 it was returned to them.

12 I think the Court might have had a
13 different reaction to whether that piece of it
14 was government speech, and that would be sort
15 of regardless of whether a passerby would know
16 that that corner was for the Monument of the
17 Week or was for the permanent display.

18 JUSTICE BARRETT: So returning to
19 Justice Kagan's hypothetical about how such a
20 program might be structured, would Justice
21 Kagan's envisioned program work if, to
22 celebrate, you know, all of the commitments and
23 ideals of various civic organizations, the City
24 of Boston sits down, asks what's going to be
25 expressed, and says, yes, this is an idea that

1 Boston can get behind, and a government
2 official participates in the flag-raising,
3 participates in the ceremony, communicating
4 that, yes, Boston is happy to celebrate and
5 communicate pride in Juneteenth, but, no,
6 Boston is not going to participate in a
7 flag-raising for the Proud Boys? Is that a way
8 to structure Justice Kagan's program?

9 MR. JOSHI: Absolutely. I think that
10 would be government speech. With -- with that
11 level of control, that level of planning, and
12 that initiation, I think that would be
13 governmental speech.

14 JUSTICE BARRETT: So the difference is
15 the government involvement? Like, it would be
16 difficult to set up the parameters for, say, a
17 limited public forum, as Justice Kagan was
18 proposing, but if the government gets so
19 involved in it that it's standing outside
20 endorsing that speech, then it would be
21 government speech?

22 MR. JOSHI: I think that's right. The
23 difference between a symposium and an open mic
24 night.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Hallward-Driemeier.

3 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

4 ON BEHALF OF THE RESPONDENTS

5 MR. HALLWARD-DRIEMEIER: Mr. Chief
6 Justice, and may it please the Court:

7 The sole issue here is whether the
8 City's decision to lower Boston's flag from the
9 City Hall flagpole and raise another in its
10 place is the City's own speech. If so, then,
11 as Summun held, the City is free to select the
12 views it wants to express.

13 If, however, the flag-raising were
14 private speech and the flagpole had become a
15 public forum, then the City agrees that it
16 cannot exclude Petitioners' flag.

17 Thus, whether the flag-raising were
18 government or private speech is dispositive.
19 The facts here are at least as supportive of
20 the City as in Summun. And Petitioners'
21 counter-arguments rest upon a caricature of the
22 actual events.

23 First, Summun held that exercising
24 final approval authority constituted effective
25 control. Petitioners stipulated at Pet. App.

1 149a that before "final approval," any
2 flag-raising, Commissioner Rooney "must review
3 whether the City's decision to raise a flag is
4 consistent with the City's message." As in
5 Summum, there is no record of prior denials but
6 also no record of flag-raising inconsistent
7 with the City's message. And, unlike Walker,
8 there are no purely private messages.

9 Second, Summum looked to the general
10 practice of governments erecting monuments.
11 And, similarly here, governments speak from
12 government-owned flagpoles. That is what the
13 observer would expect. Whereas Pleasant Grove
14 made no express statement of its message, here,
15 the City has. It has a specific policy with
16 respect to foreign flag-raising, and it has
17 issued resolutions in connection with others.

18 Third, as in Summum, the -- it would
19 defeat the flagpole's essential function as the
20 City's bully pulpit to treat it as a public
21 forum. The City cannot effectively use its
22 flagpole to communicate its own message if it
23 must remain neutral and also carry the opposite
24 message.

25 Private parties are free to wave their

1 flags on City Hall Plaza or even raise a
2 temporary flagpole there, but they cannot
3 commandeer the City's flagpole to send a
4 message the City does not endorse.

5 I welcome the Court's questions. And
6 I'm happy to address some of the questions --

7 CHIEF JUSTICE ROBERTS: Well --

8 MR. HALLWARD-DRIEMEIER: -- that have
9 been raised.

10 CHIEF JUSTICE ROBERTS: -- do I
11 understand you to be saying that, to some
12 extent, the City approves of every flag that
13 flies?

14 MR. HALLWARD-DRIEMEIER: The -- it has
15 to confirm that raising a flag is consistent
16 with the City's message. That's the
17 stipulation.

18 CHIEF JUSTICE ROBERTS: All right.
19 Well, I -- I -- I don't know, there may be some
20 dispute about it, but does the mayor of Boston
21 really approve of the Montreal Canadiens?

22 MR. HALLWARD-DRIEMEIER: So the -- the
23 mayor of Boston made a bet with a fellow mayor
24 and lost the bet and agreed to raise the
25 Canadiens flag. The -- the Bruins flag would

1 have had to rise in -- in Montreal if the
2 Bruins had won.

3 The -- what's -- what's critical here
4 is that in, of course, 90 percent, as Justice
5 Breyer has mentioned, of the flags that are
6 raised are foreign national flags, and -- and
7 that -- it's not any individual flag that's the
8 City's message. The City's statement of its
9 goals is clear. It's the collective. It's the
10 diversity of those flags.

11 JUSTICE ALITO: You now say that your
12 policy is we'll put up the -- the national flag
13 of any group in the community that has roots in
14 that country, plus we'll put up flags for city
15 holidays, and then there are a few others that
16 don't seem to fall into either of those
17 categories. But was there any mention of this
18 policy as you set it out in your brief until
19 you filed your brief?

20 MR. HALLWARD-DRIEMEIER: Your Honor,
21 that is the -- the -- those are the buckets
22 that the flag-raising fall into.

23 JUSTICE ALITO: I mean, that's what
24 you've reverse-engineered. But, when you have
25 explained what your policy was, it was nothing

1 like that. There's nothing like that on the
2 application.

3 When you rejected the flag in question
4 here, if I remember correctly, all that Mr.
5 Rooney said was, we will put up non-secular
6 flags. When he got the -- and that was the
7 advice. That wasn't just something that he
8 himself dreamed up. That was the advice he got
9 from your Law Department.

10 And then your Rule Number 1 of your
11 seven rules -- and I haven't been able to find
12 the other rules -- is basically that we will
13 put up flags that are -- we will -- we will not
14 put up flags that are inappropriate or
15 discriminatory or religious flags from which
16 one can infer we'll allow anything else.

17 MR. HALLWARD-DRIEMEIER: So, Your
18 Honor, to be clear, the -- the City policy,
19 which appears at Joint Appendix 569, states
20 that the City, through its Commissioner, may
21 allow raising of flags to commemorate an event
22 or occasion. And that's -- that's one bucket
23 that we've described, these holidays or other
24 similar events or occasions.

25 Also, on the City's website, there is

1 a statement of the goals of the flag-raising
2 program, and it says, we commemorate, we, the
3 City, commemorate flags of many countries. We
4 want to create an environment in which everyone
5 feels included. We also want to raise
6 awareness in Boston and beyond about the many
7 countries and cultures of the world. Our goal
8 is to foster diversity by celebrating the
9 communities within Boston.

10 So -- so the foreign nation
11 flag-raising is described in the goals. It's
12 on the City's website. The -- the policy
13 states we do this in commemoration of events or
14 occasions. And so the categories we've given
15 are explicit there.

16 And, moreover, the rules are actually
17 a subcategory. The policy incorporates the
18 rules. And then, under the rule -- under the
19 policy, the first rule is that we, the City,
20 will not put up a flag that is discriminatory,
21 offensive, or that supports religion.

22 It's -- the -- the City is going to
23 stay silent, neutral, with respect to religion.
24 We're not going to support a religion. Neither
25 will we offer something that is derogatory of

1 religion. And that's consistent with the
2 principles of the Establishment Clause.

3 JUSTICE ALITO: Well, is that -- is it
4 consistent with the principles of the Free
5 Speech Clause if you say anybody can speak,
6 except we are going to monitor what is said and
7 we're not going to allow religious speech? I
8 mean, the Court has said you can't do that in
9 *Rosenberger* and other cases.

10 Plus, we're not going to allow speech
11 that is offensive, and we've said that that's
12 viewpoint discrimination in -- in our two most
13 recent cases that have a bearing on this.

14 MR. HALLWARD-DRIEMEIER: And -- and --
15 and the -- the parties' stipulation makes clear
16 that religious events are allowed in the public
17 forum in the City Hall plaza around the
18 flagpoles. Religious events are allowed.

19 The City's own speech will not support
20 a religion. So the First Amendment doesn't --

21 JUSTICE ALITO: Well, I -- I
22 understand that. But, when you say anybody can
23 speak by putting up a flag, with these few
24 exceptions, are you not creating a forum for
25 private speech rather than speaking on --

1 speaking your own mind?

2 MR. HALLWARD-DRIEMEIER: No, Your
3 Honor, I -- I do believe that the fact that
4 we're talking about the government's own
5 flagpole in front of the government's seat of
6 power, where governments have historically
7 spoken, it's the government's bully pulpit,
8 everyone would think that is the government
9 speaking.

10 We're not taking anything from the
11 public when the government says we will speak
12 here in certain ways. One of the ways we, the
13 City, speak there is to allow the flag-raising
14 of -- of foreign national flags to celebrate
15 the diversity of the communities in Boston.

16 It's not those governments. It's the
17 communities in Boston.

18 JUSTICE ALITO: But do you think the
19 fact that it is a flagpole in front of City
20 Hall is dispositive?

21 MR. HALLWARD-DRIEMEIER: I think it is
22 almost dispositive, Your Honor, because I do
23 think that all observers would understand that
24 that is the City speaking.

25 Again, 90 percent of the time, the

1 City of Boston flag there or more flies there
2 next to the flags of the United States and the
3 Commonwealth. The fact that occasionally --
4 and, again, physically, the City must lower its
5 own flag and provide the crank to allow another
6 to go up in its place.

7 The City maintains physical as well as
8 regulatory control over the flagpole.

9 JUSTICE ALITO: But what is the
10 difference between that and a program that
11 allows people to speak in front of City Hall
12 and say whatever they want but not certain
13 things that the City is going to rule out?

14 MR. HALLWARD-DRIEMEIER: I -- I think
15 --

16 JUSTICE ALITO: That's government
17 speech?

18 MR. HALLWARD-DRIEMEIER: No, Your
19 Honor, it's not, because that's a traditional
20 public forum. And I think that --

21 JUSTICE ALITO: Well, only on your
22 property on -- right in front of City Hall.

23 MR. HALLWARD-DRIEMEIER: Well, most
24 public forums --

25 JUSTICE ALITO: Let's say you had --

1 MR. HALLWARD-DRIEMEIER: -- aren't
2 government property.

3 JUSTICE ALITO: -- you've designated
4 it as a public forum, but let's say it -- it's
5 not, but you allow it for that one purpose.

6 MR. HALLWARD-DRIEMEIER: I -- I think
7 most public properties, including in front of
8 City Hall, would be a public forum because that
9 is where the -- the -- the citizens can protest
10 their government. That is their right.

11 And so, in Summun, what the Court
12 insisted on in terms of permanence, et cetera,
13 was something was being removed from the
14 public, taken from the public. Otherwise, this
15 park is public forum. Something's being taken
16 away. Nothing's being taken away from the
17 public when the City of Boston says, we and
18 only we will decide what we say from our
19 flagpole because --

20 JUSTICE SOTOMAYOR: Counsel, could I
21 just ask a question? Because I've wondered
22 about this from the beginning of the case. I
23 thought we were ruling on whether the First
24 Circuit on the basis of the summary judgment
25 motion and the evidence before it, whether that

1 policy was constitutional or not.

2 But you've been arguing not the old
3 policy but the new one that changed during this
4 litigation. What are we ruling on?

5 MR. HALLWARD-DRIEMEIER: Well, Your
6 Honor, the parties stipulated that the written
7 policy, which was written down in October of
8 2018, was the same as Boston understood the
9 policy to be at the time of the --

10 JUSTICE SOTOMAYOR: Yeah, but what you
11 understand and what you did are two different
12 things, and assuming that I think there's a
13 difference between the two, what am I ruling
14 on?

15 MR. HALLWARD-DRIEMEIER: Well, Your
16 Honor, I -- I -- I -- I think -- the parties
17 have stipulated that it's the same policy. We
18 believe it was the same policy.

19 The -- the -- the fact that Mr. Rooney
20 cited the Establishment Clause, I think, is
21 further evidence that he thought it was the
22 city speaking because the Establishment Clause
23 would only limit the city speaking. And so
24 I -- I think --

25 JUSTICE SOTOMAYOR: Well, he can speak

1 for himself on this point, but you're believing
2 that we're ruling on the policy as it's written
3 today, not the policy that we understand the
4 summary judgment history related to, correct?

5 MR. HALLWARD-DRIEMEIER: Well, the --
6 because the parties stipulated that the two
7 were the same, I think that there's no
8 difference between them, Your Honor.

9 JUSTICE KAVANAUGH: On the
10 Establishment Clause point, it seems to me that
11 maybe the root cause of this, as some of the
12 amicus briefs suggest, is actually a mistaken
13 view about the Establishment Clause, that when
14 you have government property that's opened for
15 a forum for speech or for use, that there is a
16 mistaken understanding that has existed that if
17 you allow a bunch of secular groups and then
18 allow a religious group to use it, that you've
19 violated the Establishment Clause by doing
20 that. It seems like we've had case after case
21 after case that has tried to correct that
22 misimpression of the Establishment Clause, and
23 that seems to me what the root cause is here.

24 I think the Becket Fund amicus brief
25 is pretty helpful on that. I'd be curious of

1 your thoughts about that.

2 MR. HALLWARD-DRIEMEIER: I -- Your
3 Honor, I think that the Establishment Clause
4 was cited by the City because the -- the City
5 did not want to be accused of having endorsed a
6 religion. The -- the proposal was --

7 JUSTICE KAVANAUGH: Exactly. And --
8 and the --

9 MR. HALLWARD-DRIEMEIER: -- to fly the
10 Christian flag, but then the City thought that
11 it was the City's own speech. And if the City,
12 speaking for itself, was to say, we are flying
13 the Christian flag, we, the City, are flying
14 the Christian flag, not one that's been -- had
15 its religious intentions removed through the
16 force of history but one that is right out
17 there, we are flying it as the Christian flag,
18 that that might raise Establishment Clause
19 concerns, I think, was legitimate.

20 JUSTICE KAVANAUGH: But isn't the
21 answer to that what we've said repeatedly,
22 which is equal treatment of religious groups
23 vis-à-vis secular groups, religious speech,
24 religious organizations? Someone -- there's an
25 open gym policy and a religious group wants to

1 use it, and they're excluded because they're
2 religious. We've had cases like that. Isn't
3 the answer to that to say equal treatment of
4 religious groups or religious speech is not an
5 Establishment Clause violation --

6 MR. HALLWARD-DRIEMEIER: It --

7 JUSTICE KAVANAUGH: -- to reiterate
8 that?

9 MR. HALLWARD-DRIEMEIER: -- is
10 absolutely clear that if this is a -- a -- a
11 public forum of any type, of any type, limited
12 or -- or general designated, the City does not
13 maintain that it has a basis to exclude
14 religious speech. And it's also clear that the
15 City does not exclude religious groups from
16 proposing to raise a flag.

17 In fact, in connection with
18 Constitution Day, the City said it was willing
19 to raise a flag of Camp Constitution in -- in
20 -- in celebration and recognition of -- of
21 Constitution Day, notwithstanding --

22 JUSTICE KAGAN: But you're saying,
23 Mr. Hallward-Driemeier, that we should
24 recognize as government speech a program that
25 basically now says and -- and -- and,

1 previously, we welcome all comers, except for
2 the most reprehensible discriminatory speech
3 and religious speech. That's what this program
4 is.

5 And why should we understand that to
6 be government speech, to say everything's good,
7 except religion?

8 MR. HALLWARD-DRIEMEIER: I -- Your --
9 Your Honor, the suggestion that the policy ever
10 said that flag-raising were open to all comers
11 is a mischaracterization of the documents.
12 There -- there -- there are documents that
13 relate to seeking a permit to use the space at
14 the flagpoles. That is a designated public
15 forum. It is open to all comers. But that --

16 JUSTICE GORSUCH: So -- so, counsel,
17 if I understand your response, and I don't mean
18 to interrupt, but -- but your -- your argument
19 to Justice Kagan seems to hinge on a factual
20 premise. Is this flagpole, in fact, open to
21 all comers more or less? Is it a public forum?

22 But, once you, say, lose now on that
23 point, is your answer to Justice Kagan, you're
24 right, we can't discriminate against religious
25 movements and treat them as other offensive and

1 -- offensive viewpoints?

2 MR. HALLWARD-DRIEMEIER: If the
3 flagpoles had become a public forum, that was
4 not our intent, but if by miscommunication the
5 flagpoles were deemed a public forum, the City
6 acknowledges it cannot exclude religious
7 speech, it cannot exclude offensive speech or
8 discriminatory speech from the flagpole because
9 it -- it has to be viewpoint neutral.

10 JUSTICE GORSUCH: Okay. And -- and --
11 and then let's just back up again just -- and
12 I'll -- I'll grant you your -- your -- your
13 premise. In -- in -- in -- in -- what -- what
14 case, what authority would you cite to support
15 that the government can in any circumstances
16 treat religious viewpoints the equivalent of
17 offensive or inappropriate ones?

18 MR. HALLWARD-DRIEMEIER: They --
19 they're not equal, Your Honor. They are just
20 categories of speech that the City will not
21 itself espouse.

22 JUSTICE GORSUCH: How is that not
23 viewpoint discrimination under our case law?

24 MR. HALLWARD-DRIEMEIER: Well, Your
25 Honor, if it's the City itself speaking, then

1 Sumnum said -- and I'm quoting -- the City is
2 free "to select the views it wants to express."

3 So the City, for the City's own
4 speech, can be viewpoint discriminatory. I
5 don't think it's -- "discriminatory" is an odd
6 word to use when describing the government's
7 own speech. The government is simply
8 fashioning its own message. And it has to be
9 allowed to do that or -- or the democratic
10 system breaks down, Your Honor.

11 So that's why I say whether this was
12 government speech or -- or private speech is
13 dispositive of the outcome here because --

14 JUSTICE BARRETT: But you -- you've
15 said that if you lose this case, you would
16 restructure your program so that you would be
17 able to exercise the kind of control to exclude
18 religious flags like, you know, the one that
19 Camp Constitution wanted to fly.

20 How would you propose doing that?

21 MR. HALLWARD-DRIEMEIER: Well, Your --
22 Your Honor, the United States has -- has
23 proposed what they view as a greater level of
24 governmental involvement.

25 JUSTICE BARRETT: Well, I -- I know.

1 I read the SG's brief. But, I mean, what's the
2 City's position?

3 MR. HALLWARD-DRIEMEIER: I mean, if
4 the Court clarifies that that type of
5 involvement is required, the City is happy to
6 include that in its -- in its program.

7 I think that what we've described is
8 that, in fact, when -- apart from the foreign
9 flags, that -- that is a different, you know,
10 sort of message that the City is sending, that
11 the -- the -- the third-party flags were raised
12 in connection with a -- a -- a City resolution
13 or other recognized public observance.

14 And so I would have no problem, I
15 think the City would have no problem, making
16 that explicit in its policy. This is our
17 speech. We will decide whether and when to do
18 it. One could add the layer of requiring a
19 city official to sponsor it to the city
20 council, to attend the -- the event. Those are
21 -- those are all available. And -- and I think
22 the City would be willing to make clearer, if
23 necessary, that it is the City's speech.

24 But Sumnum talked about not thinking
25 of something as a public forum if calling it a

1 public forum would -- would make it impossible,
2 sort of defeat its essence and effectively
3 result in the removal of the forum.

4 This -- no city -- Justice Kagan, I
5 think you are exactly right. No city can run
6 the risk of being forced to fly the swastika in
7 front of City Hall. And so you cannot have a
8 public forum at the City Hall --

9 JUSTICE KAGAN: Well, I wonder if you
10 think I'm exactly right if I say the
11 following -- and this really does go back to
12 Justice Kavanaugh's point, because the reason I
13 said, like, why wasn't this settled is because
14 my guess is the same as his, that this all came
15 about because of a mistake by Mr. Rooney, and
16 it -- it's actually an understandable mistake.

17 You know, we have a line in one of our
18 opinions that says a City Hall can't fly a --
19 you know, can't have a cross on the -- on the
20 roof. And so some -- you know, somebody looks
21 at this -- Mr. Rooney looks at this and says
22 isn't this kind of the same thing and prohibits
23 it.

24 And, in fact, it's not the same thing
25 because it's in a flagpole where different

1 flags are coming up and going down all the time
2 and expressing a wide variety of views and
3 organizations and so forth.

4 And so this was a mistake. And -- and
5 why is it that people have not been able to
6 correct this mistake?

7 MR. HALLWARD-DRIEMEIER: Your -- Your
8 Honor, the City would be very happy to discuss
9 settlement. The City proposed -- I don't -- I
10 was not part of those discussions. I just know
11 that they've happened.

12 I -- I think that the suggestions for
13 clarification, greater clarification that the
14 policy is as we represent it to this Court,
15 that it is effectively flags of -- of foreign
16 nationalities and flag-raising in connection
17 with something that is a public holiday or
18 something where the City has passed a
19 resolution stating our support, we -- we would
20 be happy to clarify that policy in that way.

21 What the City cannot afford is the
22 idea that the flagpole has become a place
23 where, to use Your Honor's hypothetical, the
24 swastika flag, to use the example of Walker,
25 the Confederate flag, ISIS, al Qaeda, all of

1 these could be flown.

2 And it's not to say that the Christian
3 flag is any of this. As a person of faith,
4 that is not what we are saying. What we are
5 saying is that the outcome in this case has to
6 be the same, whether this is the Christian
7 flag, the Summun flag, the Confederate flag as
8 in Walker, or the New York Yankees flag.

9 The City can -- is either compelled to
10 raise all of them or none of them because it's
11 the City's speech. The City feels that it must
12 retain that control. It felt that it did have
13 that control because the -- the parameters were
14 clear enough.

15 From 2005 up to --

16 JUSTICE ALITO: I doubt that the City
17 really wants to align itself with every
18 national flag that one -- that members of the
19 community want to fly. And yet you're willing
20 to do that, right?

21 MR. HALLWARD-DRIEMEIER: Well,
22 because -- and this is why I think the policy
23 -- the goals, as explicitly stated on the
24 City's website, are important because they say
25 that it is to celebrate the diversity of the

1 communities in Boston.

2 It's not an inconsistency to put up
3 the PRC flag and then put up the flag of Taiwan
4 because Boston is not celebrating either of
5 those governments.

6 JUSTICE ALITO: Well, what if somebody
7 in --

8 MR. HALLWARD-DRIEMEIER: It's the
9 communities --

10 JUSTICE ALITO: -- if someone in
11 Boston wanted a -- wanted you to put up the
12 North Korean flag? Would you do that?

13 MR. HALLWARD-DRIEMEIER: I -- if there
14 was a --

15 JUSTICE ALITO: I don't know what the
16 current flag of Afghanistan is, but if it
17 becomes -- if it becomes the Taliban flag,
18 would you fly that?

19 MR. HALLWARD-DRIEMEIER: If -- if
20 there was a community in Boston that sought to
21 -- they may be refugees from those countries.
22 If they sought to raise a flag, the -- the City
23 would do so in honor of the community here and
24 where they came from. That's the message that
25 the City of Boston is saying.

1 And the fact that the reasonable
2 observer would think that this was the City
3 speaking, Petitioner Shurtleff -- the -- the
4 Massachusetts brief cites his own letter to the
5 editor complaining about saying he's ashamed of
6 Boston for having flown the PRC flag.

7 Based on that, I went and did a
8 search. He published another letter more
9 recently in which he says call your counselor
10 and tell them to stop this.

11 He knows that it's city speech.

12 JUSTICE ALITO: Do you think that
13 every national flag that has religious
14 symbolism has now been drained of its religious
15 significance?

16 MR. HALLWARD-DRIEMEIER: It's not
17 religious symbolism in the context of this
18 flag-raising policy because the policy, as Mr.
19 Rooney made very clear, it's flying -- the --
20 the City is flying the flag because it is the
21 flag of that other country.

22 JUSTICE ALITO: No, but I'm just
23 getting at what the reasonable observer would
24 think.

25 MR. HALLWARD-DRIEMEIER: I don't think

1 that the reasonable observer would think
2 because the -- the Boston flagpole was flying
3 the flag of Turkey that the City of Boston had
4 declared itself Muslim. It's flying -- they
5 would also know, if -- if they know anything,
6 that they're flying other nations' flags
7 routinely throughout the year because, if they
8 went to the website, they would see it's about
9 celebrating the diversity of communities in
10 Boston.

11 JUSTICE ALITO: So who can fly a flag?
12 What -- what exactly is your policy now?
13 National flags, city holidays. Anything else?

14 MR. HALLWARD-DRIEMEIER: I -- well,
15 the -- the policy says that it's raising flags
16 to commemorate an event or occasion. That's
17 paragraph 1 of the City policy. This is at --

18 JUSTICE ALITO: At any event or
19 occasion?

20 MR. HALLWARD-DRIEMEIER: Well, Your
21 Honor, it -- it's the City retains the control.
22 And that's explicit, that -- that it's the sole
23 --

24 JUSTICE BARRETT: But this flag was
25 for Constitution Day, right?

1 MR. HALLWARD-DRIEMEIER: It -- it --
2 that's -- so --

3 JUSTICE BARRETT: Why wouldn't that
4 count as an occasion?

5 MR. HALLWARD-DRIEMEIER: And -- and
6 the City said that they would fly a flag for
7 Constitution Day, and they offered that if you
8 had offered the Camp Constitution flag in honor
9 of Constitution Day, that they would have flown
10 it because the City is already supporting
11 Constitution Day.

12 JUSTICE GORSUCH: Right, the -- the
13 City would have flown that very same flag,
14 right?

15 MR. HALLWARD-DRIEMEIER: If it had
16 been presented as the Camp Constitution flag.

17 JUSTICE GORSUCH: It was just,
18 unfortunately, they admitted that there was
19 some religious inspiration behind the flag,
20 right?

21 MR. HALLWARD-DRIEMEIER: Well, they
22 didn't say that there was religious inspiration
23 behind the Camp Constitution flag. They didn't
24 say it was the Camp Constitution flag. They
25 said they wanted to fly the Christian flag.

1 JUSTICE GORSUCH: Yeah, but if it had
2 been presented as the Constitution Camp flag,
3 it would have been approved, I believe --

4 MR. HALLWARD-DRIEMEIER: That --

5 JUSTICE GORSUCH: -- you said a couple
6 of times.

7 MR. HALLWARD-DRIEMEIER: Yes. Yes,
8 Your Honor.

9 JUSTICE GORSUCH: Okay. And so I want
10 to get back to Justice Kagan and Justice
11 Kavanaugh's point. Mr. Rooney apparently
12 denied the -- the -- the -- the request because
13 he thought the Establishment Clause required
14 him to do so.

15 And if that's mistaken and if we all
16 agree that that's mistaken and that was the
17 basis on which the City's application decision
18 was made, what's left to decide?

19 MR. HALLWARD-DRIEMEIER: Well, Your
20 Honor, the City made clear that the City, for
21 the City's own speech, was respectfully
22 refraining from speaking on the subject of
23 religion. That is absolutely consistent with
24 this Court's precedent.

25 JUSTICE GORSUCH: As I understand it,

1 Mr. Rooney said that he thought it was concern
2 about the so-called separation of state, church
3 and state, or the Constitution's Establishment
4 Clause.

5 MR. HALLWARD-DRIEMEIER: And -- and
6 the concern --

7 JUSTICE GORSUCH: And that's from the
8 record. And if -- if that's correct and we all
9 agree that that's a misunderstanding, forget
10 about the future policies or whatever they may
11 be. Why doesn't it resolve this case?

12 MR. HALLWARD-DRIEMEIER: It -- it --
13 it is not an inaccurate understanding of the
14 Constitution that said -- to say that the
15 concern about the separation of church and
16 state leads us --

17 JUSTICE GORSUCH: In a public --

18 MR. HALLWARD-DRIEMEIER: -- as the
19 government to be --

20 JUSTICE GORSUCH: -- I thought you
21 agreed --

22 MR. HALLWARD-DRIEMEIER: -- silent.

23 JUSTICE GORSUCH: -- in a public
24 forum, you had --

25 MR. HALLWARD-DRIEMEIER: Oh, I'm

1 sorry.

2 JUSTICE GORSUCH: -- that Boston would
3 -- and assume a public forum.

4 MR. HALLWARD-DRIEMEIER: Yeah.

5 JUSTICE GORSUCH: Okay? Assume a
6 public forum and the record shows that the
7 denial was made based on a misunderstanding of
8 the Establishment Clause with respect to public
9 forums. Why isn't that just the end of this
10 case?

11 MR. HALLWARD-DRIEMEIER: It -- it --
12 Your Honor, if it's a public forum, the City
13 acknowledges it has no basis to exclude. The
14 Establishment Clause would not provide a basis
15 to exclude a religious flag from a public
16 forum. I want to be very clear. The City does
17 not think so.

18 The fact that he cited the
19 Establishment Clause was because he believed it
20 was the City's speech. And the Establishment
21 Clause does apply to the government's own
22 speech.

23 JUSTICE KAGAN: I mean, one could add
24 to what Justice Gorsuch just said the fact that
25 it was a public forum doesn't mean it's a

1 public forum for all time in the future, right?
2 The city can decide whether it wants something
3 to remain a public forum.

4 MR. HALLWARD-DRIEMEIER: We think that
5 that --

6 JUSTICE KAGAN: But, if you look at
7 the lack of control over this flagpole, it's
8 hard not to think of it as a public forum. And
9 then it's hard not to think that excluding
10 religious speech from a public forum and -- and
11 -- and -- and particularly excluding it because
12 of this mistaken view -- and, again, I want to
13 say it's not a crazy mistake. You know, a city
14 could not put a cross, in my view, on City
15 Hall.

16 But, in the context of a system where
17 flags go up, flags go down, different people
18 have different kinds of flags, then it is a --
19 a -- a -- a violation of the free speech part
20 of the First Amendment and not an Establishment
21 Clause violation. The end.

22 MR. HALLWARD-DRIEMEIER: Your Honor, I
23 -- I -- I would like to take issue with the
24 idea that there was no control. I mentioned
25 the stipulation in which it was stipulated that

1 he had to review it for whether the City's
2 decision to fly the flag was consistent with
3 the City's message.

4 That was in Mr. Rooney's affidavit as
5 well. There was a deposition taken of Mr.
6 Rooney, and one subject they never asked him
7 about was, what do you do to make sure that
8 it's consistent with the City's message? They
9 never asked that question.

10 And so it's stipulated at 149a that he
11 would review to make sure that the City's
12 decision to fly the flag was consistent with
13 the City's message.

14 JUSTICE SOTOMAYOR: Counsel --

15 MR. HALLWARD-DRIEMEIER: He also --
16 yes.

17 JUSTICE SOTOMAYOR: -- the problem you
18 have with that answer is that the City's verse
19 -- the City's message was diversity of views
20 and backgrounds. And, clearly, religion was
21 one of them.

22 You have no problem and he had no
23 problem with raising flags that had religious
24 symbols on it. You had no problem with having
25 religious groups speak. His only problem was,

1 as Justice Gorsuch pointed out, was this
2 mistaken belief that the Constitution required
3 that the city not raise a flag that had a cross
4 by a religious group.

5 MR. HALLWARD-DRIEMEIER: Well --

6 JUSTICE KAGAN: That -- that's a very
7 different and -- and substantially
8 unsubstantial -- I'm sorry, let me rephrase
9 that. That belief is the one that Justice
10 Gorsuch was challenging.

11 MR. HALLWARD-DRIEMEIER: Your Honor, I
12 think that, with respect to the foreign
13 government flags, yes, it's diversity of those
14 -- the national origins of communities within
15 the city.

16 But -- but that's a distinct thing.
17 That's one message and is reflected in the
18 City's goals document that -- that does in a
19 sense require that diversity of those national
20 origins. But, with respect to the other
21 aspects of the program, which were to celebrate
22 events or occasions, doing it on public
23 holidays or in connection with a -- a city
24 resolution, every other flag that they identify
25 is -- is connected with a city resolution.

1 That's true of the EMS flag, the
2 Mother's Day flag, Bunker Hill, Juneteenth,
3 Malcolm X, the Renegades. Then they cite two
4 flags in their reply for the first time in this
5 litigation, Donate Life.

6 There is a federal Donate Life month.
7 The application -- this is at JA 398 -- refers
8 to the fact that there is going to be state
9 officials at the celebration of Donate Life.
10 Of course, Donate Life is carried out through
11 the Registry of Motor Vehicles and your
12 driver's license. That was a public event.

13 The Metro Credit Union, during
14 Hispanic Heritage Month, the Metro Credit
15 Union, which is a city community lending
16 partner, said we wish to flag -- fly the Juntas
17 Alan Samos flag, Together We Advance, in
18 celebration of the fact that that is the first
19 financial institution recognized for its
20 outreach to the Hispanic community.

21 That too was a public event, Your
22 Honor. They cite it at the last minute, but --
23 and -- and the document that -- that discloses
24 this is both the -- the article that they cite
25 in their brief and also the -- a document

1 produced in discovery, COB 6536.

2 Your Honor, this record shows, as we
3 have demonstrated, that if you take the -- the
4 national flags aside, there is about 10 other
5 flags, and we have demonstrated that they were
6 all in connection with something that had a
7 city message, the celebration of a particular
8 day, an observance, a remembrance.

9 There is not ever a suggestion that
10 the City Hall flagpole was open to all comers.
11 Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 JUSTICE THOMAS: Mr.
16 Hallward-Driemeier, just the -- briefly. You
17 mentioned diversity several times, and what I
18 don't understand is your definition of
19 diversity, because it would seem to me that
20 Christians in Boston would be a part of that
21 diversity calculus.

22 MR. HALLWARD-DRIEMEIER: The -- the --
23 the specific forum of diversity that the City
24 was trying to celebrate was national origin
25 diversity, the references to countries

1 throughout the -- the -- the world.

2 Of course, there are other aspects of
3 diversity. The City can choose to celebrate
4 those aspects of diversity in many ways, and
5 the City does celebrate religious events in
6 other ways. There have been religious events
7 that have happened on city property.

8 The City chose not to start down the
9 road of speaking on the subject of religion
10 from the flagpole. Of course, had they started
11 down that road, then the argument would have
12 been that they had to carry all religious
13 communications because they couldn't prefer one
14 religious communication from the flagpole or at
15 least that would have been the argument.

16 They --

17 JUSTICE THOMAS: So it's --

18 MR. HALLWARD-DRIEMEIER: -- simply
19 chose --

20 JUSTICE THOMAS: -- limited diversity?

21 MR. HALLWARD-DRIEMEIER: -- not to go
22 there.

23 JUSTICE THOMAS: It's limited
24 diversity?

25 MR. HALLWARD-DRIEMEIER: They're

1 celebrating a particular kind of diversity,
2 national origin diversity, Your Honor.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: You mentioned the --
6 the website, which had a good statement of the
7 policy. Was that put up before or after this
8 case began?

9 MR. HALLWARD-DRIEMEIER: The -- the --
10 the policy that --

11 JUSTICE BREYER: No, I'm not saying
12 about the policy. I'm saying, was the website
13 with the policy put up before or after?

14 MR. HALLWARD-DRIEMEIER: The --

15 JUSTICE BREYER: It was either before,
16 after, or instantaneous. I mean, what was it?

17 MR. HALLWARD-DRIEMEIER: So -- so
18 there are just a couple different documents.
19 And to clarify, the policy and the goal and the
20 -- and the rules that are incorporated by the
21 policy was adopted in October of 2018.

22 The website that refers to the goals,
23 it is not in the record at what time that was
24 adopted. In the stipulation of facts, the
25 parties have discussed it in the historic

1 section, not with the new policy and rules, but
2 the -- the record is silent on that.

3 CHIEF JUSTICE ROBERTS: Justice Alito?
4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: No, thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?
7 Justice Gorsuch?

8 Justice Barrett? No?

9 Thank you, counsel.

10 Rebuttal, Mr. Staver?

11 REBUTTAL ARGUMENT OF MATHEW STAVER

12 ON BEHALF OF THE PETITIONERS

13 MR. STAVER: The record does reflect
14 that at the time, 2017, the website was in
15 effect. In fact, that's what Hal Shurtleff
16 used, and the policies specifically written by
17 the City for 2005 to 2017 include the statement
18 that these are public forums open to all
19 applicants. And that's the application that
20 still is there, and it's still being used, and
21 it's the same exact guidelines in 2017 as it is
22 now.

23 In 2019 -- and page 30 footnote of our
24 brief -- we indicate that during an
25 interrogatory, the City confirmed that all the

1 policies that were on the website in 2017 are
2 still there and they are still used. So, in
3 2018, they adopted the policy that's in the
4 Joint Appendix before the court of appeals,
5 beginning at page 569 to 570.

6 That particular policy does not limit
7 subject matters or speakers. It says it's open
8 for any event or occasion. Clearly, Camp
9 Constitution celebrating Constitution Day and
10 Citizenship Day was one of those occasions
11 and/or events.

12 That same flag could have flown but
13 for a mistaken view of the Establishment
14 Clause, and that Establishment Clause caused
15 the ultimate problem. To justify that mistake,
16 they argued that it was government speech and
17 they're bound to censor. But it's very clear
18 that the same flag could have flown with the
19 same exact symbol for the same one-hour event
20 without any incident had Camp Constitution
21 simply lied and said this is not the Christian
22 flag; it's the Camp Constitution flag. They
23 were actually encouraged to actually have a
24 non-religious flag or rename the flag.

25 The reason why it was censored is

1 solely because of the word "Christian," and
2 that is clearly viewpoint censorship. The
3 question here is who was speaking. And by
4 policy and practice, it's very clear, it's not
5 the government. They didn't exercise control.
6 They did ministerial review. They never
7 requested the flag to be changed. They didn't
8 own them. They didn't initiate them. In 2018,
9 the policy says that any individual or
10 organization may apply, and the only viewpoints
11 that would be censored would be those that they
12 deemed to be inappropriate, offensive in
13 nature, or those supporting discrimination or
14 prejudice or religious movements.

15 Apparently, you could be an
16 anti-religious movement and be permitted. But
17 what they clearly indicated is, in 2018, what
18 they had done in 2017, and that is it was an
19 "all comers" policy, no subject matters, no
20 speakers limited. But one particular viewpoint
21 they are going to exclude, and that viewpoint
22 happened to be a Christian or a religious
23 viewpoint.

24 They raised the Establishment Clause
25 mistakenly to justify their decision, but this

1 case cannot fall under government speech. The
2 error of the First Circuit was to begin with
3 the idea -- I see that I'm out of time.

4 CHIEF JUSTICE ROBERTS: Finish your --

5 MR. STAVER: The error of the First
6 Circuit, Mr. Chief Justice, was to begin with
7 the notion that you can never have a flagpole
8 forum. And then they crammed everything else
9 into government speech, foregoing the
10 traditional analysis of public forum doctrine.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:23 a.m., the case
15 was submitted.)

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