

No. 20-1158

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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HAROLD SHURTLEFF; CAMP CONSTITUTION, a public charitable  
trust,

*Plaintiffs–Appellants,*

v.

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

*Defendants–Appellees.*

On Appeal from a Final Judgment of the  
United States District Court for the District of Massachusetts  
Case No. 1:18-cv-11417, Hon. Denise J. Casper

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**BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF *AMICI CURIAE*  
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL  
(ANTI-DEFAMATION LEAGUE); AMERICAN HUMANIST ASSOCIATION;  
CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF  
PRESBYTERIANS; GLOBAL JUSTICE INSTITUTE; HINDU AMERICAN  
FOUNDATION; MAINE CONFERENCE, UNITED CHURCH OF CHRIST; MEN OF  
REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION;  
NATIONAL COUNCIL OF JEWISH WOMEN; NEW HAMPSHIRE CONFERENCE,  
UNITED CHURCH OF CHRIST; PEOPLE FOR THE AMERICAN WAY  
FOUNDATION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; THE SIKH  
COALITION; SOUTHERN NEW ENGLAND CONFERENCE, UNITED CHURCH  
OF CHRIST; UNION FOR REFORM JUDAISM;  
AND WOMEN OF REFORM JUDAISM**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici* are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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**Other Authorities**

*About the Presbyterian Mission Agency*,  
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AKHIL REED AMAR, THE BILL OF RIGHTS:  
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<i>History</i> , NAT’L COUNCIL OF CHURCHES, <a href="https://bit.ly/2IfaWcy">https://bit.ly/2IfaWcy</a> .....	21, 22
WINTHROP S. HUDSON, RELIGION IN AMERICA (3d ed. 1981).....	14
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JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett Publ’g Co. 1983) (1689) .....	9
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Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 HARV. L. REV. 1409 (1990) .....	8, 14, 15

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
ALISTER E. McGRATH, CHRISTIANITY: AN INTRODUCTION (3d ed. 2015) .....	19, 20
JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION (2006).....	15
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Philip A. Saigh, <i>The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren</i> , 109 J. SOC. PSYCHOL. 167 (1979).....	18
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RICHARD TAYLOR, HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS (2003) .....	20
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ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644), <i>reprinted in</i> 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963) .....	7, 14
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## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* are religious and civil-rights organizations whose members include adherents to a wide array of faiths and beliefs, including those that have historically been subjected to religious discrimination and official disfavor. *Amici* are united in respecting the important but distinct roles played by religion and government in the life of our Nation. From the time of the founding, the Establishment Clause and the religious and philosophical ideals on which it is premised have protected religious freedom for all Americans by ensuring that government does not interfere in private matters of conscience.

An official governmental display of the Christian flag in front of city hall is exclusionary to the countless Americans not represented by that religious symbol. More than that, it places a heavy thumb on the scale in favor of one religion over other faiths and belief systems. *Amici* have strong interests in ensuring that religious freedom is protected against such governmental favoritism and that this Court's jurisprudence remains true to the fundamental principles on which the Religion Clauses of the First Amendment are based.

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<sup>1</sup> *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

*Amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- American Humanist Association.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Global Justice Institute.
- Hindu American Foundation.
- Maine Conference, United Church of Christ.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of Jewish Women.
- New Hampshire Conference, United Church of Christ.
- People For the American Way Foundation.
- Reconstructionist Rabbinical Association.
- The Sikh Coalition.
- Southern New England Conference, United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

## INTRODUCTION AND SUMMARY OF ARGUMENT

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982); accord, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (government must remain “neutral[] between religion and religion, and between religion and nonreligion” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

By ordaining that civil government and religious authorities operate in separate spheres, the Framers sought to safeguard religious freedom for all: When free from governmental influence and interference, religions may grow organically, letting all worship and pray, or not, according to the dictates of their conscience. And by prohibiting the alignment of secular and religious power, the Framers undertook to “cut off the means of religious persecution.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833). Thus, the First Amendment does not allow government to express support or preference for any faith or denomination.

Flying religious flags on government flagpoles is inconsistent with that constitutional tenet. Religious symbols are powerful expressions of ideas, and it no doubt would be profoundly affirming for many people to see a flag promoting their own religion flying on the City’s flagpole outside City

Hall. But to those who do not subscribe to the beliefs represented by the flag, the display instead may send a stigmatizing message of exclusion from the political community. And even for adherents to the favored religion, the government's use, for its own purposes, of their religious symbol may be demeaning to both their faith and the revered symbol.

As our Nation becomes increasingly pluralistic, the need to uphold the separation between government and religion is more important than ever. Boston's policy here not to display religious flags in front of City Hall respects the diverse faiths of all city residents, in keeping with the First Amendment and the fundamental freedoms that it safeguards. This Court should therefore reject any invitation to forsake our Nation's "profound commitment to religious liberty" (*McCreary*, 545 U.S. at 884) and should instead respect the City's decision to reaffirm the founding principles and essential protections for religious freedom that have served this country and all its people so well for so long.

## **ARGUMENT**

As the district court held, the flags displayed at City Hall constitute government speech. (Addendum to Appellants' Br. at A11.) The messages conveyed by the flags must therefore comply with the dictates of the Establishment Clause. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

The Christian flag that Shurtleff has asked the City to raise outside City Hall depicts a red Latin cross inside a blue canton on a white field. (J.A. 592 ¶ 55.) “[T]he cross has long been a preeminent Christian symbol.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019). The Christian flag straightforwardly represents Christians and Christianity (*see infra* Part II.B.2), and according to Shurtleff it also represents our country’s “Judeo-Christian heritage” (J.A. 593 ¶ 59).

Were the City to fly the flag alongside the American and Massachusetts flags—the very symbols of government—its action would unambiguously proclaim the value of a particular religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining that a Latin cross atop city hall would unconstitutionally proselytize Christianity). By declining to do so, the City has properly preserved its neutrality among religions, as the Framers directed and the Establishment Clause requires.

**A. THE JUDGMENT IS CONSISTENT WITH THE HISTORY, PURPOSE, AND ORIGINAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE.**

The architects of the First Amendment recognized that “Religion & Govt. will both exist in greater purity, the less they are mixed together.” Letter from James Madison to Edward Livingston (July 10, 1822),

<http://bit.ly/2zUXhBT>. This principle—that religion flourishes best when government is involved least—has deep roots in theology and political philosophy that long predate the founding of the Republic. Grounded in the understanding that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religiously based strife and oppression, the principle of separation recognizes that governmental support for religion corrodes true belief, makes religious denominations and houses of worship beholden to the state, and places subtle—or not so subtle—coercive pressure on individuals and groups to conform.

**1. Our Nation is built on the understanding that even modest governmental involvement with religion is a grave threat to religious freedom.**

a. The notion of freedom of conscience as a moral virtue traces to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be a moral guide and that acting against one’s conscience is sin. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 356–57 (2002). Martin Luther built on this idea, teaching that the Church lacks authority to bind believers’ consciences on spiritual questions: “the individual himself c[an] determine the content of his conscience based on scripture and reason.” *Id.* at 358–59. John Calvin developed the idea further, preaching that individual conscience absolutely

deprives civil government of authority to dictate in matters of faith. *See id.* at 359–61.

These tenets found expression in the New World teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that for religious belief to be genuine, people must come to it of their own free will; compelled belief and punishment of dissent are anathema to true faith, and religious practices are sinful unless performed “with[ ] *faith* and true perswasion that they are the true institutions of God.” ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE* (1644), *reprinted in* 3 *COMPLETE WRITINGS OF ROGER WILLIAMS* 12 (Samuel L. Caldwell ed., 1963).

Thus, Williams taught that keeping government from involving itself with or taking sides in matters of religion is crucial to protecting religious dissenters against persecution and to safeguarding religion itself against impurity and dilution. *See id.* at 12–13; EDWIN S. GAUSTAD, *ROGER WILLIAMS* 59 (2005); RICHARD P. MCBRIEN, *CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA* 248 n.37 (1987) (“[T]he Jews of the Old Testament and the Christians of the New Testament ‘opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world. . . . [I]f He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world.’”



(quoting Williams)). When government involves itself in matters of religion, even if just to give the barest nod of approval to a particular faith or set of beliefs, the inherent coercive authority of the state debases religion and impedes the exercise of free will. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 434 n.20 (1962) (explaining Williams’s view that “the doctrine of separation of church and state . . . was necessary in order to protect the church from the danger of destruction which he thought inevitably flowed from control by even the best-intentioned civil authorities”).

b. Not only did this theology guide the development of religion in America, but it also became the foundation for the political thought that shaped our constitutional order. Notably, John Locke, whose writings influenced the Framers of the First Amendment (*see* Feldman, *Intellectual Origins*, *supra*, at 350–52; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430–31 (1990)), built the teachings into his theory of government. Echoing Williams, he expressed the view that religious acts are meaningful only if done sincerely and freely. NOAH FELDMAN, *DIVIDED BY GOD* 29–30 (2005). And he incorporated the principle into his argument for religious toleration:

[W]hatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes

compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 38 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

Based on this understanding, Locke reasoned that citizens must not and cannot delegate matters of individual conscience to government. See FELDMAN, DIVIDED BY GOD 30. Thus, he concluded, “civil government” should not “interfere with matters of religion except to the extent necessary to preserve civil interests.” Feldman, *Intellectual Origins, supra*, at 368 (summarizing Locke).

Many of this Nation’s founders took these teachings to heart. Benjamin Franklin, for example, stated:

When a Religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not take care to support [it], so that its Professors are oblig’d to call for the help of the Civil Power, ‘tis a Sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), <http://bit.ly/2jMsrVO>. And James Madison viewed governmental support for religion as “[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize.” Letter from James Madison to William Bradford (Apr. 1, 1774), <http://bit.ly/2h57Xm5>.

c. Madison’s commitment to freedom of conscience informed his opposition to Patrick Henry’s proposal in 1784 that Virginia fund religious education through property taxes. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL’Y 51, 77–78 (2009). Madison objected to Henry’s proposed legislation as an infringement on “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience,” a gross intrusion into religion, and a threat to civil government. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 12–13, 15, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.). He argued that governmental support for religion would only “weaken in those who profess [the benefited] [r]eligion a pious confidence in its innate excellence,” while “foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.” *Id.* ¶ 6.

These arguments not only led to the defeat of Henry’s proposal but also inspired passage of the Virginia Statute for Religious Freedom, which was drafted by Thomas Jefferson (see Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY (Dec. 1994), <https://bit.ly/3jdany8>) and is the forebearer of the First Amendment’s Religion Clauses (see *Everson*, 330 U.S. at 13).

The Virginia Statute declared it an “impious presumption of legislators and rulers, civil as well as ecclesiastical . . . [to] assume[] dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others.” Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), reprinted in *FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY* 94, 95 (John J. Patrick ed., 1995). And it recognized that governmental favoritism “tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.” *Id.* at 95. Or as Madison put it, “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. . . . What have been [their] fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.” Madison, *Memorial and Remonstrance* ¶ 7.

In short, the Virginia statute embodied the belief that religion neither requires nor benefits from the support of government: “truth is great and will prevail if left to herself.” Jefferson, *Virginia Statute, supra*, at 95. And it conveyed the understanding that even modest, seemingly benign governmental favoritism influences individual religious practice and

pressures clergy, houses of worship, and denominations to conform their teachings to the predilections of bureaucrats. *See id.* at 94–95.

d. “[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.” *Everson*, 330 U.S. at 13. That vision, premised on a commitment to robust freedom of conscience, accordingly defined the original understanding of the Establishment Clause. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183–85 (2012) (identifying Madison as “the leading architect of the religion clauses”); *accord Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011); *Flast v. Cohen*, 392 U.S. 83, 103 (1968). “[T]he Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison’s life, thought and sponsorship.” *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting).

That constitutional tradition recognizes “that a union of government and religion tends to destroy government and to degrade religion” (*Engel*, 370 U.S. at 431) and that “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere” (*Illinois ex rel.*

*McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948); accord Letter from James Madison to Edward Livingston, *supra*). “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate” (*Engel*, 370 U.S. at 431–32)—perversion that occurs when a faith is favored as much as when one is disfavored (see *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (“The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.”))).

**2. The Framers recognized that religious pluralism and civic harmony require government to refrain from taking sides in matters of religion.**

The Framers intended not only to protect “the freedom of the individual to worship in his own way,” but also to guard against the “anguish, hardship and bitter strife that could come when zealous religious groups struggle[] with one another to obtain the Government’s stamp of approval.” *Engel*, 370 U.S. at 429.

a. Though the United States was more homogenous in 1789 than it is today, this country has, from the beginning, been home to unprecedented religious diversity. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; Quakers

influenced society significantly in Pennsylvania. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 45 (1998); WINTHROP S. HUDSON, *RELIGION IN AMERICA* 46 (3d ed. 1981). And the Framers well knew that “[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Everson*, 303 U.S. at 8–9. Religious pluralism thus represented not only a great national strength but also a profound danger should the mistakes of the past be repeated. The Framers recognized that separation of civil power from religious was the antidote to divisiveness and violence.

The writings of Williams and Locke supported this conclusion as well. Williams made the religious case against using the tools of the state to promote religion, even to the slightest degree, because that inevitably leads to “persecution for cause of Conscience” in breach of the “expresse command of God that Peace be kept.” WILLIAMS, *supra*, at 59, 61. And Locke, “[w]riting in the aftermath of religious turmoil in England and throughout Europe,” had recognized “the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others’ province,” producing civil strife. McConnell, *supra*, at 1431–32. Locke argued, therefore, that separation was a prerequisite to lasting peace. *See id.*

b. Hence the Framers set out to create a sustainable system of government for the Nation’s diverse people and faiths (*see* JON MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 101* (2006))—one that ensured religious liberty for all through the acceptance and preservation of religious pluralism (*see* JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45* (2d ed. 2005) (citing *THE FEDERALIST NOS. 10, 51* (James Madison)); *see also* McConnell, *supra*, at 1513, 1516 (arguing that Free Exercise Clause was result of, and protection for, religious pluralism)). It was against this backdrop, including the lived experience of the persecution of Baptists and other religious dissenters at the hands of the established Anglican church in Virginia (*see* Andy G. Olree, “*Pride Ignorance and Knavery*”: *James Madison’s Formative Experiences with Religious Establishments*, 36 *HARV. J.L. & PUB. POL’Y* 211, 215, 226–27, 266–67 (2013)), that the Framers conceived the constitutional protections for religious freedom that exist today.

In short, the Establishment Clause reflects Madison’s and Jefferson’s “plan of preserving religious liberty to the fullest extent possible in a pluralistic society,” allowing religion to flourish while quelling the civil strife that pluralism may engender. *See McCreary*, 545 U.S. at 882 (O’Connor, J., concurring). “[A]ssur[ing] the fullest possible scope of



religious liberty and tolerance for all” was understood to be the only way “to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

As our country becomes ever more religiously diverse (*see* DANIEL COX & ROBERT P. JONES, PUB. RELIGION RESEARCH INST., AMERICA’S CHANGING RELIGIOUS IDENTITY (2017), <http://bit.ly/2wboSZW>), these fundamental safeguards for the freedom of all to believe, or not, and to worship, or not, according to the dictates of their conscience are more important today than ever before.

**B. THE CITY’S POLICY AGAINST FLYING RELIGIOUS FLAGS ADVANCES RELIGIOUS FREEDOM.**

**1. Symbols have concrete, real-world effects.**

a. Symbols have power. They communicate complex ideas, often more effectively and more forcefully than mere words. “The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Symbols not only communicate ideas but also persuade and motivate action. “[T]hey attract public notice, they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart.”

NICHOLAS JACKSON O'SHAUGHNESSY, POLITICS AND PROPAGANDA 102  
(2004).

Hence, “[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Barnette*, 319 U.S. at 632. For example, “[p]regnant with expressive content, the [American] flag as readily signifies this Nation as does the combination of letters found in ‘America.’” *Texas v. Johnson*, 491 U.S. 397, 405 (1989). That is why images of the Stars and Stripes being hoisted atop Mount Suribachi on Iwo Jima in 1945 and above the rubble of the World Trade Center in 2001 carry such immense cultural and emotional meaning: They express American resilience more completely and eloquently than words ever could.

b. The same is true for religious symbols. They may convey at a glance millennia of collective experience, hope, and triumph to those who hold them dear—and at times the opposite messages to those who do not.

Empirical research confirms this commonsense understanding: Religious symbols have real, measurable effects on adherents and nonadherents alike, even when displayed with no intent to proselytize or coerce. Viewing religious symbols has, for example, a statistically significant effect on students’ academic performance. Researchers found in controlled experiments that Catholic-school students did systematically

better on standardized tests when the examiner wore a cross and systematically worse when the examiner wore a Star of David. See Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417–18 (1986). And both Christian and Muslim students scored better than expected when the examiner wore a symbol of their faith and worse than expected when the examiner wore a symbol of the other faith. See Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168–70 (1979).

These effects are not limited to children. Research has also revealed that exposure to religious symbols that adult test subjects viewed as negative (such as an inverted pentagram) suppressed brain activity, while exposure to religious symbols that the subjects regarded as positive (such as a dove) had no deleterious effects. See Kyle D. Johnson et al., *Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity*, 1 SPIRITUALITY IN CLINICAL PRAC. 82, 82, 84 (2014), <http://bit.ly/2ifUo4M>.

**2. The Christian flag, which bears the Latin cross, is a potent religious symbol.**

a. Perhaps no religious symbol is more commonly known, or more laden with meaning, than the Latin cross. *See, e.g.*, ALISTER E. MCGRATH, CHRISTIANITY: AN INTRODUCTION 256–57 (3d ed. 2015). Since the earliest days of Christianity, “[t]he cross has been the universally acknowledged symbol of the Christian faith.” *Id.* at 256. It achieved special prominence beginning in the fourth century, when the Roman Emperor Constantine adopted Christianity for the Empire. BRUCE W. LONGENECKER, THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL 2–5, 11 (2015).

The cross has been consistently and unequivocally associated with Christianity ever since. *See* MCGRATH, *supra*, at 256. It was the primary symbol used during the Crusades to distinguish the crusaders from opposing forces. *See* JONATHAN RILEY-SMITH, THE CRUSADES: A HISTORY 16 (2d ed. 2005). And it was vitally important to Medieval and Renaissance art, when “the painted picture was invaluable as an interpreter and exponent of religious truths,” because the cross visually communicated the Church’s message of redemption. GEORGE WILLARD BENSON, THE CROSS: ITS HISTORY AND SYMBOLISM 121, 136 (1934). Thus, countless portrayals of Jesus’s death included the cross, not just as representational art, but to

disseminate Church doctrine. See MCGRATH, *supra*, at 257. For similar reasons, crosses have historically adorned and been design elements for churches, inside and out. See RICHARD TAYLOR, *HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS* 39–42 (2003).

Pope Francis has explained: “The Christian Cross is not something to hang in the house ‘to tie the room together’ . . . or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.” *Pope Francis: the Cross is the gate of salvation*, VATICAN RADIO (Mar. 12, 2017), <https://bit.ly/399Rjwf>; cf. U.S. CONFERENCE OF CATHOLIC BISHOPS, *BUILT OF LIVING STONES: ART, ARCHITECTURE, AND WORSHIP* § 91 (2000) (“[T]he image of Christ crucified . . . makes tangible our belief that our suffering when united with the passion and death of Christ leads to redemption.”).

In short, the cross is not merely *a* symbol of Christianity; it is *the* symbol. See MCGRATH, *supra*, at 256; *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment) (“The cross is of course the preeminent symbol of Christianity.”). It is the physical embodiment of the Christian tenets of resurrection and redemption. See, e.g., *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (“[T]he Latin cross . . . represents with relative clarity and simplicity the Christian

message of the crucifixion and resurrection of Jesus Christ.” (internal quotation marks omitted)).

b. The potency of the cross for transmitting complex spiritual messages and encouraging Christian belief is why it is the sole symbol on the flag designed to represent all of Christendom. Conceived in the 1890s (Elesha Coffman, *Do You Know the History of the Christian Flag?*, CHRISTIANITY TODAY (Aug. 2008), <https://bit.ly/2zHTmGq>), the Christian flag was designed to trade on the symbolic power of flags and the cross, with the aim to unite all the world’s Christians under a single banner (*see The Children’s Own: The Christian Flag*, 84 CHRISTIAN ADVOCATE 1802, 1802 (Nov. 11, 1909), <https://bit.ly/2Tn6y0b>). With that goal in mind, the flag’s colors and emblem were chosen with care to represent core Christian principles and concepts. Its white field represents peace and purity. Coffman, *supra*. Its blue canton signifies fidelity. *Id.* And most crucially, its Latin cross, colored red to denote the blood of Christ (*id.*), symbolizes Christianity itself (*The Children’s Own, supra*, at 1802).

The Federal Council of Churches, which represented dozens of Christian communities (*History*, NAT’L COUNCIL OF CHURCHES, <https://bit.ly/2IfaWcy> (last visited July 3, 2020)), formally recognized the flag in 1942 (5 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES 1359

(George Thomas Kurian & Mark A. Lamport eds., 2016)).<sup>2</sup> And the Presbyterian Mission Agency, the “ministry arm of the Presbyterian Church” (*About the Presbyterian Mission Agency*, PRESBYTERIAN MISSION, <https://bit.ly/2qARzyX> (last visited July 3, 2020)), acknowledges the Christian flag on its website as a “symbol of God’s realm” that, if used, should be “given a preeminent place” over other flags in a church (*Frequently Asked Questions: Signs and Symbols*, PRESBYTERIAN MISSION, <https://bit.ly/2UYqYJq> (last visited July 3, 2020)).

**3. The City’s decision to refrain from flying the Christian flag appropriately respects the First Amendment and all city residents.**

a. At the core of the Establishment Clause is the principle that government must not take sides on religious matters. *E.g.*, *McCreary*, 545 U.S. at 860, 881. Government is therefore forbidden to promote, express favor for, or affiliate itself with any religion. *See id.* at 860, 875–81. Official display of religious symbols to promote religious messages falls squarely within that prohibition. *See, e.g.*, *Salazar*, 559 U.S. at 715 (plurality opinion

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<sup>2</sup> The Federal Council of Churches was formed in 1908, when 32 Christian communities in the United States banded together to seek social reforms. *History*, NAT’L COUNCIL OF CHURCHES, *supra*. In 1950, the Federal Council merged with eleven other Christian interdenominational agencies to form the National Council of Churches, creating what is now “the largest ecumenical body in the United States.” *National Council of the Churches of Christ in the U.S.A.*, ENCYC. BRITANNICA, <https://bit.ly/2RKOEzo> (last updated Oct. 15, 2018).

of Kennedy, J., joined by Roberts, C.J., and Alito, J.) (“[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”) (quoting *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part (alteration in original)); *McCreary*, 545 U.S. at 869 (holding that Ten Commandments display violated Establishment Clause because it conveyed “unmistakably religious statement”); *Stone v. Graham*, 449 U.S. 39, 41–43 (1980) (holding that Ten Commandments display in school classrooms violated Establishment Clause); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 276 (7th Cir. 1986) (holding that illuminated cross atop fire station to celebrate religious holiday violated Establishment Clause).

Yet Shurtleff asks this Court to compel the City to fly a religious flag that represents a single religion’s adherents and beliefs. The location of the proposed display—side-by-side with the flags of the United States and Massachusetts and high above the entrance to City Hall, itself a symbol of government—would communicate an especially powerful statement that Christianity holds a special place in the City. *See, e.g., Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) (placement of religious



display at seat of government heightens establishment concerns). Indeed, it appears that Shurtleff's purpose is to have the City broadcast that very message, for being able to fly the Christian flag at City Hall Plaza without using the City's flagpoles—something that the City would not object to (*see* Appellees' Br. at 18)—is not enough for him. *See Walker v. Sons of Confederate Veterans*, 576 U.S. 200, 212–13 (2015) (explaining that drivers likely preferred messages to be on license plates rather than bumper stickers because the former conveyed government approval); *see also* J.A. 593 ¶ 59 (Shurtleff views Christian flag as symbol of American “Judeo-Christian heritage”); Mission: Camp Constitution Expansion, CAMP CONSTITUTION.NET, <https://bit.ly/2BYTjLa> (last visited July 16, 2020) (Camp Constitution's mission includes spreading the message that “America was founded as a Christian nation”).

Shurtleff's requested display of the Christian flag on a city flagpole is wholly unlike the century-long display of a cross as a war memorial that the Supreme Court allowed to remain on public land in *American Legion*, 139 S. Ct. 2067. The Court reasoned there that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones,” as “[t]he passage of time gives rise to a strong presumption of constitutionality.” *Id.* at 2085. The plaintiffs in *American Legion* did not overcome that presumption: The Court concluded

that the cross there communicated a secular message—honoring soldiers who perished during World War I—because it reflected and evoked the crosses marking the graves in Europe of the Americans who died in that war. *Id.* at 2074–76, 2085, 2089. The Court also emphasized that many additional war memorials without religious symbolism had been erected near the cross, further providing secular context to the display. *See id.* at 2077, 2089. And the Court determined that there was no evidence that the cross was used in the memorial with an intent to favor Christianity over other religions. *Id.* at 2074.

Here, on the other hand, the proposed flag display would not be entitled to any presumption of constitutionality: It would be a new display, as the City has never before displayed *any* religious flag (J.A. 152), let alone a Christian flag. There is no historical context that can give the Christian flag—a purely religious symbol—a nonreligious meaning. The physical context here—displaying the flag in between the American and Massachusetts flags—would only accentuate the impression that the City is favoring Christianity. *See, e.g., Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 772–73 (7th Cir. 2001) (display of Ten Commandments together with Bill of Rights and constitutional preamble accentuated message that government favored religion). And the proposed display is specifically intended to promote a particular religion: Shurtleff wants the

flag flown as “an important symbol of our country’s Judeo-Christian heritage.” (J.A. 593 ¶ 59.)

Ignoring the case law that prohibits government from promoting any religion, Shurtleff argues that the Establishment Clause’s mandate that government be neutral with respect to religion *requires* the City to display the flag. (Appellants’ Br. at 56–58.) But that would stand the Establishment Clause and its settled jurisprudence on its head. Even Justice Kavanaugh, while expressing views more permissive of religious displays on public property than did the majority in *American Legion*, was clear that the Establishment Clause “does not *require* the State to maintain the cross [at issue there] on public land.” 139 S. Ct. at 2094 (Kavanaugh, J., concurring) (emphasis added). Government remains neutral on matters of religion when it refrains from presenting any messages on the subject, especially any that might be construed as communicating a preference for a particular faith. *See McCreary*, 545 U.S. at 876, 878, 881. The City’s policies are consistent with this principle—it flies neither religious nor anti-religious flags, to ensure that it equally respects all citizens regardless of their religious views.

b. A contrary approach would disrespect and infringe on the religious freedom of all Bostonians. Governmental “sponsorship of a religious message . . . sends the ancillary message to members of the audience who

are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

Boston is home to considerable religious diversity. See *Metro-Area Membership Report: Boston-Cambridge-Newton*, ASS’N OF RELIGION DATA ARCHIVES, <https://bit.ly/2X7sIC2> (listing over 100 different “religious bodies” represented in Boston metropolitan area as of 2010). Seeing at the seat of city government, which ought to represent all of us, the City’s display of a religious symbol that represents only some, flying in place of the Boston flag and with equal dignity to the American and Massachusetts flags, would announce with utmost clarity: “This city is Christian. Those who don’t share our faith do not belong.” That message is not just wrong but dangerous, for “nothing does a better job of roiling society” than “when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876.

Nor are nonadherents the only people who may be alienated and pressured if the City were forced to display the Christian flag. Many Christians would view the display as official misappropriation of their sacred symbol—a gross intrusion on the ability of the faithful to define their own beliefs and a denigration of the cross and the Christian flag. See

Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 645–46 (2012). And displaying the flag at the seat of city government would, through the government’s power and “special status” in the marketplace of ideas (*see McCreary*, 545 U.S. at 883 (O’Connor, J., concurring)), interfere with our constitutional commitment to freedom of conscience by forcibly associating a religion and its adherents with the City and its policies, with which members of the putatively favored faith may strongly disagree. After all, “[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.” *Id.* The First Amendment rightly makes individuals, not government, the final arbiters in religious matters. *See id.* Boston followed that mandate here.

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The Establishment Clause commands that government stay out of contentious theological disputes as a means to ensure religious freedom for all. *Lee*, 505 U.S. at 591. That is all that the City has done here. Its refusal to exhibit official religious displays implies no disrespect for religion, for it is not antireligious to say that matters of faith and belief are best left to individuals, families, and their houses of worship, free from the heavy hand of government. *See Engel*, 370 U.S. at 435. “The explanation lies in the lesson of history . . . that in the hands of government what might begin as a

tolerant expression of religious views may end in a policy to indoctrinate and coerce.” *Lee*, 505 U.S. at 591–92.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. The City of Boston is bound to respect the religious beliefs of all its citizens. By declining Shurtleff’s demand that it display a religious symbol, the City did just that: It properly refrained from aligning itself with any particular religion, thus remaining true to our national heritage and deep commitment to religious freedom.

## CONCLUSION

The judgment of the district court should be affirmed.

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,280 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ Alex J. Luchenitser



**CERTIFICATE OF SERVICE**

I certify that on July 24, 2020, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

*/s/ Alex J. Luchenitser*