THE *SHURTLEFF* CONUNDRUM: RESOLVING THE CONFLICT IN GOVERNMENT-SPEECH AND PUBLIC FORUM ANALYSIS

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INTRODUCTION

Shurtleff v. Boston is the Supreme Court's latest opportunity to clarify the murky line between the government-speech doctrine and public forum analysis. Although the public forum doctrine provides varying degrees of protection from government censorship,[1] the government-speech doctrine provides the State with near-complete immunity from Free Speech Clause scrutiny when the government speaks for itself.[2] In *Shurtleff*, the Court will decide whether the City of Boston's refusal to fly a private organization's Christian flag on Boston's City Hall flagpole merely constitutes the government's right to speak for itself[3] or was unlawful regulation of private speech. The Court should add an additional, dispositive prong to the test for government-speech—requiring sufficient evidence that the government intends to speak for itself—before it may claim the government-speech defense. Doing so would add guidance to the doctrine by resolving the conundrum of distinguishing between government-speech and public forum analysis in close cases. Creating an additional requirement would also narrow the circumstances under which the government may claim the defense, and thereby protect the

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1. *See generally* Part II-A, *infra* (explaining judicial Free Speech Clause scrutiny in the three types of public forums).

2. *Infra*, note 61.

3. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (explaining that the "Free Speech Clause has no application" when the government speaks for itself).

interests of government accountability and free expression.

I. FACTS

The City of Boston operates three flag poles in an area outside its City Hall.[4] While two of the flagpoles are typically occupied by other flags—the United States flag and the Massachusetts flag—the third flagpole is occupied by the Boston city flag.[5] The City will occasionally replace its own flag with an approved flag of a private organization in connection with a private event near the flagpoles.[6] The City's website informs visitors that events on city-owned property near City Hall require permission from the City, which an interested party can obtain after submitting an application.[7] The application in question stated that "Management seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums."[8]

During the relevant period, Gregory T. Rooney was the Commissioner of Boston's Property Management Department.[9] Rooney decides whether a proposed flag-raising is "consistent with the City's message, policies, and practices."[10] Between 2005 and 2017, the City approved all 284 flag-raisings on the third flagpole outside City Hall.[11] The approved flags included banners associated with ethnic celebrations, cultural events, and social causes such as gay pride.[12] In allowing organizations the opportunity to use the city flagpole, the City sought to "commemorate flags from many countries and communities,"[13] establish "an environment in the City where everyone feels included, and is treated with respect," and "foster diversity and build and strengthen connections among Boston's many

4. Shurtleff v. City of Bos., 986 F.3d 78, 82 (1st. Cir. 2021)
5. *Id*.
6. *Id*. at 82–83.
7. *Id.* at 83.
8. Brief for Petitioner at 7, Shurtleff v. City of Bos. (U.S. argued Jan. 18, 2021) (No. 20-1800).
9. *Shurtleff*, 986 F.3d at 82.
10. *Id*. at 83
11. *Id.*
12. *Id.*; *see also* Shurtleff v. City of Bos., 2020 WL 555248 at *2 (D. Mass. Feb. 4, 2020), *aff'd,* 986 F.3d 78 (1st Cir. 2021), *cert. granted sub nom.* Shurtleff v. City of Bos., Massachusetts, 142 S. Ct. 55, 210 L. Ed. 2d 1024 (2021) ("Examples of other flags that have been raised on the third flagpole are country flags, e.g. the flags of Brazil, Ethiopia, Portugal, the People's Republic of China and Cuba, and the flags of private organizations, including the Juneteenth flag recognizing the end of slavery, the LGBT rainbow pride flag, the pink transgender rights flag, and the Bunker Hill Association flag.").
13. *Shurtleff*, 986 F.3d at 83.

communities."[14]

Shurtleff is the founder of Camp Constitution,[15] an organization whose goals are to "enhance understanding of our [country's] Judeo-Christian moral heritage" by coordinating events "inspiring respect for, and appreciation of, God, home, and country."[16] In July 2017, Shurtleff emailed the City requesting permission to fly a "Christian Flag" at City Hall in connection with Camp Constitution's proposed event, which would include speeches by local clergy about Boston's history.[17] The email included an image of the proposed flag containing a red Latin cross.[18]

Although Rooney had never rejected a flag-raising application, he denied Camp Constitution's request after reviewing past flag-raising applications and determining that the City had a practice and policy of not flying religious flags.[19] Rooney explained to Shurtleff that the City prohibits the flying of non-secular flags in compliance with the First Amendment's prohibition on governments from establishing an official religion,[20] and further noted the City's authority to decide how it allocates its limited public resources, like the flagpole outside City Hall.[21]

Shurtleff and Camp Constitution sued the City of Boston and Gregory T. Rooney, in his capacity as Commissioner of the City of Boston Property Management Department, in the United States District Court for the District of Massachusetts.[22] Shurtleff sought to enjoin the City from preventing the display of the plaintiff's "Christian

14. *Shurtleff*, 2020 WL 555248 at *2.

15. *Shurtleff*, 986 F.3d at 84.

16. Camp Constitution, https://campconstitution.net/mission-statement/ (last visited Feb. 22, 2022).

17. Shurtleff v. City of Bos., 928 F.3d 166, 170 (1st Cir. 2019).

18. *Id.*

19. *Shurtleff*, 986 F.3d at 84. *See also id.* at 83 ("Each applicant submits a short description of the flag that it wishes to hoist . . . and it is Rooney's invariable practice to act upon the flag-raising request without seeing the actual flag. The record makes manifest that Rooney has never sought to look at a flag before approving an application. If Rooney concludes that the event meets the City's standards, he then approves the flag-raising event."); *id.* at 84 ("Of course, some of the flags that the City had raised contained religious imagery. . . . [For] example, the Turkish flag situates a star and crescent of the Islamic Ottoman Empire in white against a red background. Indeed, the City's own flag includes a Latin inscription, which translates as 'God be with us as he was with our fathers.'").

20. Shurtleff v. City of Bos., 2020 WL 555248 at *2 (D. Mass. Feb. 4, 2020), *aff'd,* 986 F.3d 78 (1st Cir. 2021), *cert. granted sub nom.* Shurtleff v. City of Bos., Massachusetts, 142 S. Ct. 55, 210 L. Ed. 2d 1024 (2021).

21. *Shurtleff*, 928 F.3d at 170.

22. *Shurtleff*, 2020 WL 555248 at *1.

flag" on the City Hall flagpole.[23] Both parties filed cross motions for summary judgment on all the plaintiffs' claims, which included "1) a violation of the First Amendment free speech clause; 2) a violation of the First Amendment establishment clause; 3) a violation of the Fourteenth Amendment equal protection clause;"[24] and equivalent violations under the Massachusetts state constitution.[25] The district court held that the flagpole constitutes "government speech" and is therefore "not subject to First Amendment restrictions."[26] The court further held that the City violated neither the Establishment Clause of the First Amendment,[27] nor the Equal Protection Clause of the Fourteenth Amendment.[28] Accordingly, the district court granted the defendants' motion for summary judgment.[29] The plaintiffs appealed the decision to the First Circuit Court of Appeals.[30]

II. LEGAL BACKGROUND

Shurtleff implicates the protections guaranteed in the First Amendment, which commands that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[31] On the one hand, public forum analysis represents the judiciary's declaration of varying degrees of Free Speech protection for citizens and allowable conduct by the government, depending on the nature of the medium where private speech is expressed. On the other hand, the government-speech doctrine allows the government to function by providing absolute immunity from Free Speech Clause scrutiny when the government is speaking for itself.

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23. *Id.*
24. *Id.* at *3.
25. *See id*. ("a violation of the freedom of speech clause of Article 16 of the Massachusetts Declaration of Rights . . . a violation of the non-establishment of religion clauses of Articles 2 and 3 of the Massachusetts Declaration of Rights . . . [and] a violation of equal protection under Articles 1 and 3 of the Massachusetts Declaration of Rights. . . . [T]he standard for the claims arising under Massachusetts Declaration of Rights is the same as applies under the U.S. Constitution. . . .").
26. *Id.* at *5.
27. *Id.*
28. *Shurtleff*, 2020 WL 555248 at *6.
29. *Id*.
30. Shurtleff v. City of Bos., 986 F.3d 78, 85 (1st. Cir. 2021).
31. U.S. CONST. amend. I; *See also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating First Amendment protections through the Due Process Clause of the Fourteenth Amendment against abridgement by State actors).

A. Free Speech in Public Forums

1. The Three Forums for Private Speech

Public forum analysis involves three distinct categories of forums each arising under different circumstances, and requiring differing, but often overlapping, constitutional scrutiny. These standards were laid out in *Perry v. Perry*,[32] in which the Supreme Court addressed the question of whether a public school district's restriction of access to an interschool mail system violated the First Amendment, where one union representing the teachers was permitted access, but rival unions were denied.[33] The Court explained that the Free Speech Clause imposes different rights and obligations on the government, depending on the character of the forum.[34]

In the first category, "quintessential public forums," or "places which by long tradition or by government fiat have been devoted to assembly and debate," any content-based restriction must survive strict scrutiny (i.e., be narrowly tailored to serve a compelling government end).[35] Content-neutral "time, place, and manner" restrictions on speech need only survive intermediate scrutiny (i.e., serve a significant government interest and leave open alternative channels of communication.)[36]

A second category of public property is a domain that the government creates by "designation" of a public forum for private expression.[37] Although the government may revoke the open nature of the facility, as long as it remains open the State is bound by the same standards governing traditional public forums: "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling interest."[38]

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32. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

33. *Id.* at 39. The representative union and the school district negotiated a collective bargaining agreement under which the union was granted access to teacher mailboxes for communication with teachers for union purposes, and prohibited access to all other teachers' unions. *Id*. at 40.

34. *See id*. at 44. ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

35. *Id*. at 45.

36. *Id.*

37. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (citing *Perry*, 460 U.S. at 45 and 46, n. 7 (1983)).

38. *Perry*, 460 U.S. at 46.

In the third category, public property that is neither by tradition nor designation a public forum, the government is freer from First Amendment constraints and may regulate the speech in the forum in service of the forum's intended purpose, so long as the regulation is reasonable and not out of hostility to the speaker's viewpoint.[39]

The Court noted that the school district in *Perry* might have created a public forum if "by policy or by practice" it had granted indiscriminate access to the general public.[40] Such was not the case, however.[41] Accordingly, upon finding the forum to be limited or "nonpublic," the Court approved of the school district's preferential treatment of one union.[42] The Court found this preference to be a reasonable content-based restriction, allowable in the third category of limited or nonpublic forums.[43]

2. Government Intent in Public Forum Analysis

The government's intent is a relevant concern for a court tasked with deciding which of *Perry*'s three categories to apply. In *Cornelius v. NAACP*,[44] decided two years after *Perry*, the Court expounded on these principles.[45] The Court explained that the government can only

39. *See id.* ("[The government may] reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

40. *Id.* at 47.

41. *Id.*

42. *Id.* at 47–48. Other cases and courts refer to *Perry*'s third category as "nonpublic," "limited," or "limited public" forums. *See, e.g.*, *Cornelius*, 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46) ("Access to a nonpublic forum, however, can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"); Koala v. Khosla, 931 F.3d 887, 900 (9th Cir. 2019) ("We are concerned with three types of fora: (1) the traditional forum; (2) the designated public forum; and (3) the limited forum."); Seattle Mideast Awareness Campaign v. King Cty., 981 F.3d 489, 496, n.2 (9th Cir. 2015) ("We will refer to this last category as limited public forums, although in past cases they've sometimes been labeled nonpublic forums. The label doesn't matter, because the same level of First Amendment scrutiny applies to all forums that aren't traditional or designated public forums.") (internal citations and quotations omitted).

43. *See Perry*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.").

44. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985).

45. The case involved the legality of the federal government's exclusion from a charity drive aimed at federal employees of certain legal and political advocacy organizations. *Id*. at 790. Accordingly, the Court needed to "identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic." *Id*. at 797.

open a nontraditional forum to the public by doing so intentionally.[46] Whether it has done so is to be decided in light of the government's "policy and practice" with regard to such alleged public forum.[47] Relevant to this question of the government's intent is "the nature of the property and its compatibility with expressive activity."[48] The Court proclaimed that it will neither find that the government has created a public forum absent a clear showing of intent, nor infer such intent where public expression is inconsistent with the nature of the property.[49] The Court noted an additional relevant concern in determining the government's intent: whether there is evidence the government's approval of a private party's participation in a forum is "merely ministerial."[50]

3. Content and Viewpoint Regulation in Forums for Private Speech

The distinction between content and viewpoint discrimination is relevant because the former may be regulated according to which *Perry* category the forum belongs, while the latter cannot be regulated under any circumstances. In *Rosenberger v. UVA*,[51] the Court explained that in general, the government may not regulate speech where the "ideology or opinion or perspective of the speaker is the rationale for the restriction."[52] Although a government can confine a forum to certain speakers or topics in serving its legitimate purpose, it must respect those lawful boundaries once set.[53] Therefore, the Court explained:

> "[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[54]

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46. *Id.* at 802.
47. *Id.*
48. *Id*.
49. *Cornelius*, 473 U.S. at 803 (1985); *see also id.* at 804 ("In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.").
50. *Id*. at 804 (citing Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).
51. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).
52. *Id*. at 829 (citing *Perry*, 460 U.S. at 46).
53. *Id.*
54. *Id*. at 829–30 (1995) (citing *Perry*, 460 U.S. at 46).

More recently, in *Matal v. Tam*,[55] the Court took a broad view of viewpoint discrimination. The case involved the Patent and Trademark Office's (PTO) rejection of trademark registration of the band name "The Slants," a derogatory term for Asian people.[56] The applicant, an Asian-American, hoped to perform under the name and thereby "drain its denigrating force."[57] The PTO denied the application under a provision that barred federal registration of offensive trademarks.[58] The Court found the provision's ban on disparaging trademarks to be unlawful viewpoint discrimination.[59] The Court explained: "To be sure, the clause evenhandedly prohibits disparagement of all groups . . . . But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint."[60]

B. The Government-Speech Doctrine

When expression is labeled "government-speech," the restrictions on the government in forum analysis are inapplicable, and the government is entitled to speak as it sees fit.[61] Therefore, when the government purports to assert its own ideas and messages, it can sometimes cast aside the content-neutrality question entirely and impose content or viewpoint-based restrictions on speech.[62]

1. The Three-Factor Test for Government Speech

The Court iterated a three-factor test for finding government-speech in *Pleasant Grove City v. Summum*.[63] There, Pleasant Grove City, Utah, denied a religious group's request to erect a stone

55. 137 S. Ct. 1744 (2017).

56. *Id*. at 1751.

57. *Id*.

58. *See* 15 U.S.C. § 1052(a) (barring trademark registration of marks that "disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute").

59. *Matal*, 137 S. Ct. at 1763.

60. *Id*.

61. *See* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1166 (2015) (explaining that under the "evolving government speech doctrine . . . the government characterizes messages advanced under the auspices of its financial and other resources as distinctively its own and not subject to First Amendment review.").

62. *Id*. at 1182; *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009) ("[G]overnment speech . . . is therefore not subject to scrutiny under the Free Speech Clause."). *Compare* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–220 (holding that Texas license plates are government-speech and that the DMV lawfully refused approval of a Confederate license plate) *with id.* at 234 (Alito, J., dissenting) ("The [DMV] rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.").

63. 555 U.S. 460, 470–72 (2009).

monument in a public park where the City had previously allowed the permanent display of other monuments donated by private parties.[64] The Court explained the sharp dichotomy between the government regulating private speech and speaking for itself. If the course of conduct falls into the latter category, the "Free Speech Clause has no application."[65] The government-speech doctrine is equally applicable whether the government authors the expression itself or promotes private speech to deliver a government approved message.[66]

The Court supplied three principal reasons why the City's denial of the applicant's monument was government-speech and therefore unrestricted by the Free Speech Clause. First, the Court looked to the history of the relevant medium—whether it had long been used to convey government messages.[67] Second, the Court examined whether reasonable observers would attribute the message to the government.[68] Third, the Court considered the level of control exercised by the government over the medium.[69] Weighing the factors, the Court found it "clear" that the monuments in the public park represented government-speech.[70]

2. Two Recent Examples

The Court encountered the government-speech doctrine in two recent cases in the 2010s, reaching opposite conclusions in each. First, the Court found government-speech in *Walker v. Sons of Confederate Veterans*,[71] which addressed the constitutionality of the Texas DMV's denial of a specialty license plate designed by the Sons of Confederate Veterans.[72] The group had proposed a plate featuring the Confederate battle flag.[73] The Court reiterated its *Summum* three-factor test and held that under the test, specialty license plates were government-

64. *Id*. at 464–65.
65. *Id*. at 467.
66. *Id*. at 468.
67. *Id.* at 470.
68. *See id.* at 471 ("[P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.").
69. *Summum*, 555 U.S. at 471–72 ("[W]hile government entities regularly accept privately funded or donated monuments, they have exercised selectivity. . . . Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.").
70. *Id.* at 472.
71. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).
72. *Id*. at 203.
73. *Id*.

speech.[74] The Court concluded that license plates have historically communicated a message from the State,[75] Texas license plates are associated in the public mind with the State as government IDs,[76] and the State maintained direct control over the license plates.[77]

The Court reached the opposite conclusion on government-speech and signaled a retreat from the doctrine just two years later in *Matal v. Tam*. The Court cautioned against expansion of the government-speech doctrine, noting that "it is susceptible to dangerous misuse."[78] The government should not be able to pass off private speech as government-speech with a mere "seal of approval" and thereby silence objectionable viewpoints.[79] The Court therefore rejected the argument that federally registered trademarks are government-speech.[80] Significant factors for the Court were the lack of discretionary approval on the PTO's part and the sheer diversity and inconsistency in the messaging of approved marks. The Court explained, "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently."[81] The Court warned that *Walker* "likely marks the outer bounds of the government-speech doctrine."[82]

III. FIRST CIRCUIT HOLDING

The First Circuit upheld the district court's determination that Shurtleff's Free Speech Clause claims were foreclosed by the government-speech doctrine.[83] Citing *Walker* and *Summum*, the court noted that "[e]ven though the First Amendment restricts government regulation of private speech in government-designated public forums, such restrictions do not apply to government speech."[84] The court then applied the *Summum*/*Walker* three-factor test to the specific issue of

74. *See id.* at 209–10 (summarizing *Summum*'s three factors and stating, "Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue.").
75. *Id.* at 210–11.
76. *Id.* at 212.
77. *Walker*, 576 U.S. at 213.
78. Matal v. Tam, 137 S. Ct. 1744, 1758 (2017).
79. *Id.*
80. *Id.*
81. *Id*; *see also id.* n.9 (comparing contradictory registered trademarks criticizing abortion and supporting Planned Parenthood; criticizing and supporting Capitalism; criticizing and supporting Global Warming).
82. *Id.* at 1760.
83. Shurtleff v. City of Bos., 986 F.3d 78, 86 (1st. Cir. 2021).
84. *Id.* at 86 (italics removed).

flag-raising outside Boston City Hall.[85]

Turning to the first factor, "the historical use of flags by the government,"[86] the court declared that "governments have used flags throughout history to communicate messages and ideas."[87] The court noted that flags have the capacity to communicate messages about a government's values, and that a "government flies a flag as a 'symbolic act' and signal of a greater message to the public."[88]

The court then turned to the second factor, "the issue of whether an observer would attribute the message of a third-party flag on the City's third flagpole to the City."[89] The Court determined that a person observing the private third-party flag juxtaposed with the United States and Massachusetts flags would likely attribute the message to the government.[90]

The court finally addressed the third factor, "whether the City maintains control over the messages conveyed by the third-party flags."[91] The court placed significance on the application procedure and its express requirement of city permission, noting the City's awareness of the flags flown at City Hall and the City's requirement that such third-party flags promote approvable messages.[92] The court framed Boston's control over its City Hall flagpoles as complete and conclusive: "[The City's] final approval authority means that when a third-party flag flies over City Hall, it flies only because the City chose to fly it."[93] Shurtleff attempted to discount the level of control actually exercised by the City, which had approved 284 flags consecutively with

85. *See id.* at 87–90 (summarizing the issues and factors in *Summum* and *Walker* and applying them to flag-raising on city owned property.)

86. *Id.* at 88. *See also* Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) (noting that public monuments have been used to convey government messages since ancient times); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 210–11 (2015) ("[T]he history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States.").

87. *Shurtleff*, 986 F.3d at 88.

88. *Id.* (quoting Shurtleff v. City of Bos., 928 F.3d 166, 173 (1st Cir. 2019)).

89. *Id.* at 88. *See also Summum*, 555 U.S. at 471 (determining that reasonable observers would attribute the message conveyed by a monument on public property to the government); *Walker*, 576 U.S. at 212 (noting that Texas license plates are attributed in the public mind to the government as "essentially, government IDs.").

90. *Shurtleff*, 986 F.3d at 88.

91. *Id.* at 90. *See also Summum*, 555 U.S. at 471 (noting that governments exercise "selectivity" in which privately-donated monuments they choose to allow in public places); *Walker*, 576 at 213 ("Third, Texas maintains direct control over the messages conveyed on its specialty license plates.").

92. *Shurtleff*, 986 F.3d at 90.

93. *Id.* at 91.

no denials.[94] But the court rejected the argument, noting that all 284 flags had been "secular," and the number of flags approved did not suffice to show universal access.[95]

The court ultimately held that each of the three *Summum*/*Walker* factors favored the determination that Boston engages in government-speech when it elevates third-party flags outside City Hall.[96] The court also rejected the argument that Boston had created a public forum by referring to the flagpole and the surrounding area as "public forums,"[97] noting that the "conclusion that the City has designated the flagpole as a public forum 'is precluded by our government-speech finding.'"[98]

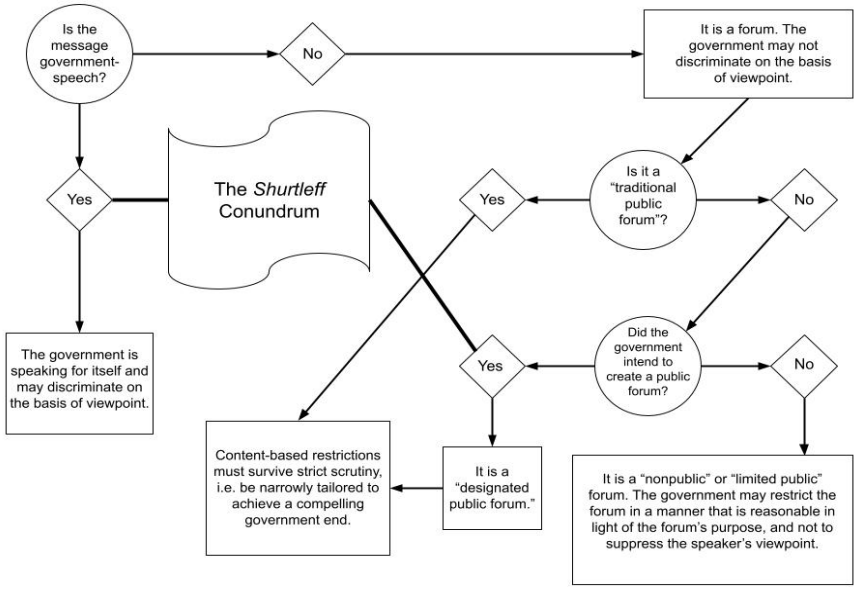
IV. ANALYSIS

The Court should use *Shurtleff* as an opportunity to clarify the role of government intent in the interplay between the government-speech doctrine and forum analysis. Under the current doctrine, the label "government-speech" is significant. The government is free from even the most limited constitutional review when it engages in government-speech and can simply "say what it wishes."[99] Nonetheless, the government generally may not discriminate on the basis of viewpoint in *any* forum for private speech.

Doctrinally, government-speech and public forum analysis are logically divorced. If the question "is this government-speech?" can be answered affirmatively, a court need not even proceed to forum analysis.[100] Nevertheless, sensing the intuitive relationship between the two doctrines—both of which invoke the Free Speech Clause—courts facing a challenge to a forum restriction and a government-speech defense have been compelled to answer both inquiries in a logically consistent manner.[101] Current doctrine can be summarized in the

94. *Id.*
95. *Id.* at 92.
96. *Id.*
97. *Id.*
98. *Shurtleff*, 986 F.3d at 93 (quoting Shurtleff v. City of Bos., 928 F.3d 166, 175 (1st Cir. 2019)).
99. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).
100. *See, e.g., Shurtleff*, 986 F.3d at 93 (quoting *Shurtleff*, 928 F.3d at 175) ("[A] conclusion that the City has designated the flagpole as a public forum is 'precluded by our government-speech finding.'").
101. *Compare* Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009) ("In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech"), *with id.* at 473 ("[Pleasant Grove City] does not claim that [it] ever opened up the Park for the placement of whatever permanent monuments might be offered."). *Compare* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015) ("In our view, specialty license plates

following chart:[102]



A court facing a government-speech defense to an alleged Free Speech violation can begin by applying the *Summum/Walker* government-speech factors: the history of the medium, the level of speech attributed to the government, and the level of control exercised by the government.[103] If the factors are satisfied, the court may label it "government-speech" and conclude the analysis. But if the government-speech factors are not satisfied, the court may then proceed to forum analysis, considering, among other things, whether the government intended to create a public forum.

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issued to Texas's statutory scheme convey government speech."), *with id.* at 216 ("Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum.").

102. *See generally* Part II, *supra* (explaining the relationship between the government-speech and public forum doctrines). "The Shurtleff Conundrum" referenced in the chart is not addressed explicitly in the doctrinal cases, but is the challenge posed in *Shurtleff*: resolving the situation that blurs the line between two purportedly non-overlapping doctrines.

103. *See generally* Part II-B, *supra* **(**explaining the three-factor test and its application in *Summum* and *Walker*).

A *significant* conundrum, however, arises in cases where speech arguably passes the government-speech test but there is ample evidence that the government intended to create a public forum. Logically, government-speech and a public forum for private speech cannot coexist. Therefore, a court facing this conundrum must decide between the absolute extremes of Free Speech Clause scrutiny: "government-speech," which is afforded *no* Free Speech Clause scrutiny,[104] and "public forum," which is afforded the *highest* degree of Free Speech Clause scrutiny.[105] A court cannot even choose the happy medium of limited public forum analysis, which preserves the right of the speaker to be free from viewpoint discrimination but allows the government to regulate content in a reasonable manner.[106]

Part of the conundrum can be explained by the lack of clarity regarding what the government-speech question is *really* asking. For some Justices, the government-speech test focuses primarily on whether the public reasonably understands that the government is expressing itself.[107] The facts of *Shurtleff* present a compelling case for government-speech under this view, which places heavy weight on the degree of attribution to the government by an observer. The First Circuit described how an observer would perceive Boston's hoisting of a third-party flag in front of City Hall.[108] The observer would arrive at the City's seat of government, observe government employees replacing the Boston flag with the third-party's flag, and watch as the

104. *Summum*, 555 U.S. at 464.

105. *See* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (explaining that even in the designated public forum, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.").

106. *See id*. at 46 (explaining the low standard in limited public forum scrutiny). This "happy medium" choice is unavailable because the finding of intentional designation as a public forum shifts the analysis from the more lenient standards applicable in limited public forums to the stringent standards in designated public forums, which are afforded the same, *highest* scrutiny as traditional public forums, so long as the government holds the medium open to the public. *Supra*, note 38.

107. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 221–22 (2015) (Alito, J., dissenting) ("Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by . . . . [W]ould you really think that sentiments reflected in these specialty license plates are the views of the State of Texas and not those of the owners of the cars?"); *Id.* at 229 (describing the first *Summum* prong reasoning: "Governments have always used public monuments to express a government message, *and members of the public understand this*.") (emphasis added); *Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment) ("To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonably and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige. . . .").

108. Shurtleff v. City of Bos., 986 F.3d 78, 89 (1st. Cir. 2021).

organization's flag is hoisted over eighty feet up the flagpole to join the United States and Massachusetts flags—two clear symbols of government power.[109] In the First Circuit's view, a reasonable observer could not be expected to "partition such a coordinated three-flag display . . . into a series of separate yet simultaneous messages (two that the government endorses and another as to which the government disclaims any relation)."[110]

Despite the flagpole arguably constituting government-speech, a compelling case can be made that Boston intentionally designated its flagpole as a public forum. The City explicitly represented the flagpole and other public spaces as such on its application form,[111] and its 284 consecutive approvals of flag-raisings provides substantial evidence that the act of approving is "merely ministerial."[112] A court facing this conundrum is currently without explicit Supreme Court guidance on how to resolve the Free Speech Clause conflict.

The Court can resolve this conundrum by explicitly adding a fourth factor to the *Summum*/*Walker* test for government-speech: "Does the government intend to speak for itself?" Asking both whether the government intends to speak for itself and whether citizens understand the government to be speaking for itself would narrow the instances in which a government entity may claim the government-speech defense.

Such a proposal is modest, as it merely makes explicit what is implicit in the caselaw. For example, the *Walker* Court implicitly merged government intent and observer attribution in its government-speech analysis, stating "Texas explicitly associates itself with the speech on its plates,"[113] and "Texas's specialty license plate designs 'are meant to convey and have the effect of conveying a government message.'"[114] The *Summum* Court noted how the City selected monuments "for the purpose of presenting the image of the City that it wishes to project"[115] and that there was "little chance that observers [would] fail to appreciate the identity of the speaker."[116] Under the proposed four-factor test, a government therefore must be willing to

109. *Id.*
110. *Id.* at 89.
111. Brief of Petitioner, *supra* note 8, at 7.
112. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804 (1985).
113. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015).
114. *Id*. (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).
115. *Summum*, 555 U.S. at 473.
116. *Id*. at 471.

take ownership of and endorse the message being conveyed to claim the government-speech defense.

Adding this fourth factor is also consistent with the Court's recent signaling that it may rein in the government-speech doctrine. The *Matal* Court warned that surpassing the "outer bounds of the government-speech doctrine" would permit the government to silence disfavored viewpoints.[117] For a government entity to suppress viewpoints, *both* parties must understand that the government is speaking. And to stay within the "outer bounds" of government-speech, the citizen should prevail in cases where government intent is not sufficiently clear.

The City of Boston would fail the four-part government-speech test because it has not sufficiently demonstrated that it intends to speak for itself through the flying of flags outside of City Hall. Where a government entity does not make this explicit showing, it must be restricted to the public forum doctrine, and here, the City has run afoul of those forum protections by discriminating against those wishing to use the third flagpole to express a religious viewpoint.[118]

V. ORAL ARGUMENT

The Court began oral arguments by calling attention to the stakes of the case. Justices Kagan and Kavanaugh asked Petitioner Shurtleff whether a city would be compelled to fly a Nazi, KKK, or Al-Qaeda flag.[119] Petitioner Shurtleff's counsel explained that cities can avert these dilemmas by making a clearer showing of intent to speak for themselves by maintaining "very specific control of the subject matters and messages" and being "very clear that it is their speech."[120]

Justices Breyer and Kagan inquired about a lay observer's perception of the three-flagpole arrangement, asking Petitioner's

117. *Id*. at 1758–60.

118. Although it may be argued that no viewpoint discrimination exists where the government bans *all* religious flags, irrespective of the speaker's views regarding such flags, the Court has framed viewpoint discrimination more broadly, disfavoring this type of analysis. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831–32 (1995) (explaining that the University of Virginia's ban on funding to all religious student groups is still viewpoint discriminatory: "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another . . . viewpoint. The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.").

119. Transcript of Oral Argument at 9–10, Shurtleff v. City of Bos. (U.S. argued Jan. 18, 2021) (No. 20-1800).

120. *Id.* at 12.

counsel how any observer could not attribute the speech to the City.[121] Justice Kagan noted that an observer would have to be "very, very informed" to attribute the third flag to a private party.[122] Justice Sotomayor hinted that the Petitioner might not even be *that* informed, as he had on one occasion complained about the City's flying of the Chinese flag, implying that he attributed the flag's message to the government.[123]

Justice Kagan's line of questioning alluded to an issue related to the *Shurtleff* conundrum. Kagan inquired how the Court should view situations where an observer attributes the speech to the government, but the government showed little intent to control the forum.[124] Later, Justice Kagan noted that "if you look at the lack of control over this flagpole, it's hard not to think of it as a public forum."[125] Kagan's comments display the kind of reasoning judges must undertake in resolving the government-speech and public forum doctrines. In her view, where the government exercises "merely ministerial"[126] approval over private messages—a factor tending to show that the government has in fact intended to designate a public forum—this necessarily implies that the government does not control the forum, a factor weighing against government-speech.[127] However, the finding of "merely ministerial" review (and therefore lack of control) does not provide a satisfying answer to the government-speech question where the factor of observer-attribution weighs heavily, as it does in *Shurtleff*.

During Respondent Boston's time, Justice Alito asked how much weight the observer's perceptions should be given in a government-speech finding and whether the flag's placement in front of City Hall was dispositive.[128] Counsel for Respondent replied that it is "almost dispositive . . . because I do think that all observers would understand that that is the City speaking."[129] Justice Alito later hinted that the

121. *Id.* at 15, 17.
122. *Id*. at 18.
123. *Id*. at 20–21.
124. *Id.* at 29.
125. Transcript of Oral Argument, *supra* note 119, at 80.
126. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 804 (1985).
127. Justice Kagan had previously stipulated, for the sake of argument, "that there was essentially no control" of the flagpole, after counsel for the United States (as amicus curiae, supporting reversal) had highlighted the fact that Boston approved flag-raising applications in an "almost ministerial manner," an apparent reference to the designated public forum factor noted in *Cornelius*. Transcript of Oral Argument, *supra* note 119, at 28–29.
128. *Id.* at 59. Justice Breyer's inquiry was in response to Respondent's counsel arguing that "everyone would think [a flag flown on the City Hall flagpole] is the government speaking."
129. *Id.*

government's intent to endorse its messaging is relevant to finding government-speech, stating he "doubt[ed] the City really wants to align itself with every national flag [community members] want to fly."[130] Counsel for Respondent clarified that by flying national flags, the City was not endorsing the various countries but rather celebrating the diverse Bostonian community, including members from those nations.[131]

The lines of questioning from Justices Kagan and Alito frame the concerns upon which the Court may fashion its ruling. For these Justices, observer attribution and government intent might be in contradiction with each other. In particular, the discussion between Alito and Respondent over the meaning the government attributes to the flag-raisings highlights that when it is not even clear what the government is *saying*, it is an even farther stretch to assert that the government is *speaking* for itself.[132]

CONCLUSION

The conundrum in government-speech and public forum analysis places the citizen in a Catch-22 in relation to his government. On the one hand, where private citizens take issue with the actual speech being expressed in government-created mediums, the government may shield itself from accountability and criticism by claiming the speech at issue is merely a private individual expressing himself in a forum. On the other hand, when government entities want to discriminate against private speech, the government may defend on the grounds that since the government is speaking, it may discriminate for any or no reason at all. Consequently, the law is unsatisfyingly blurry for courts attempting to distinguish the doctrines and unsatisfyingly permissive to the government for those concerned with free expression and government accountability.

The Court should resolve the conundrum between government-speech and forum analysis by explicitly requiring the government to intend to speak for itself to claim the protection of the government-speech doctrine. Cases like *Shurtleff* and other Free Speech Clause conundrums will doubtlessly arise in the future, so the Court should

130. *Id.* at 72.

131. *Id*. at 72–73.

132. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1758 (2017) (noting that government-speech would be "far-fetched" in a situation where the government is "babbling prodigiously and incoherently.")

take advantage of the opportunity to add needed clarity and predictability to the doctrine. The Court must make clear what questions the government-speech test should really be asking rather than continuing to employ the current "jurisprudence of labels."[133] In doing so, Free Speech Clause doctrine can garner a degree of predictability, and the rights guaranteed by that Clause can gain more protection.

133. Pleasant Grove City v. Summum, 555 U.S. 460, 483 (2009) (Breyer, J., concurring).