

## SCOTUS - Boston's Flag-Raising Decision Unconstitutional

May 16, 2022

On May 2, 2022, the U.S. Supreme Court issued its much-anticipated decision in [Shurtleff v. City of Boston](#), finding that the City's rejection of a request from a religious group to fly a religious flag on City Hall Plaza was inconsistent with the protections of the First Amendment. This decision has important implications for all public entities, and consideration may be given to reviewing flag-raising practices and policies to ensure consistency with the [Shurtleff](#) decision.

As background, over the years, the City allowed numerous organizations to conduct flag-raising ceremonies without reviewing or otherwise exercising control over the flags or the messages promoted. Notably, the City did not have a written policy governing non-governmental use of the flagpole. In [Shurtleff](#), the City denied a request from a Christian organization seeking permission to raise a Christian flag on a City flagpole during a celebration of the Christian community. The City claimed that allowing a religious flag to be flown from a City-owned flagpole might violate the Establishment Clause to the U.S. Constitution. The U.S. District Court and First Circuit Court of Appeals upheld Boston's decision, concluding that the use of the City flagpoles constituted "government speech"; that is, the government's right to express – or decline to express – certain views as representative of the government's policies, goals, and programs. Therefore, these lower courts concluded that the City's rejection of the "Christian" flag-flying request was not unconstitutional viewpoint discrimination under the First Amendment.

The Supreme Court disagreed, however, reversing those lower court decisions and holding against the City. The Court focused on the question of whether raising a flag on City Hall Plaza's third flagpole was an act of government speech (as the lower courts had concluded), or private expression. As noted above, if flying a flag on the City flagpole was "government speech," the City had broad discretion to reject any request to fly a flag, based upon content, without violating the First Amendment. If flying the flag was instead "private expression," then the City's refusal to allow a "Christian flag" to be flown on a space otherwise open to public use, was arguably viewpoint discrimination prohibited by the First Amendment. The Court conducted a "holistic inquiry," focusing on three particular factors: 1) the history of the expression at issue (i.e., flag flying at the seat of government); 2) the public's likely perception as to who (the government or a private person) is speaking; and, 3) the extent to which the government has actively shaped or controlled the expression.

While the display of flags on government flagpoles conveys important governmental messages (thus, "governmental speech"), it was undisputed that the City's practice was to essentially allow any and all requests to hold flag-raising ceremonies utilizing one of the flagpoles on City Hall Plaza, subject only to scheduling and logistic considerations. The City's failure to engage in any examination of the flags' messages, or take any steps suggesting that the City was adopting the flags' messages as "governmental speech," led to the Court's ultimate determination that:

while the historical practice of flag flying at government buildings favors Boston, the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech ... [emphasis added].

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As such, the Shurtleff court held that the City’s rejection of a religious flag violated the First Amendment, in the same way that rejecting an applicant’s request to use a publicly-available community or conference room, based upon religion (or other protected expression), would violate the First Amendment.

The key takeaway from Shurtleff is the importance of giving thoughtful consideration to, and documenting, any formal policies or informal practices allowing nongovernmental entities to fly flags on public flagpoles or otherwise use publicly-owned space open to the public. In recent years, communities have been increasingly faced with requests from private, charitable, or non-profit organizations, citizen groups, private individuals, and even government employees or officials, to fly a particular flag (or display a banner) on government property. This often raises the question of how far the government may go to permit or refuse such requests. Under Shurtleff, consistent with the First Amendment, there are two options:

- A. The government may prohibit this practice entirely, declaring, through a written policy, the municipal flagpole to be a nonpublic forum and a vehicle only for its own governmental speech. The Supreme Court cited the City of San Jose, California’s [flag policy](#), which states that its “flag policies are not intended to serve as a forum for free expression by the public,” and further, lists “approved flags” that may be flown “as an expression of the city’s official sentiments.”

OR

- B. The government may accept requests from private or nongovernmental groups/individuals to fly flags in the same way it does for publicly-accessible meeting rooms, halls, and venues. In that case, government must remain “content neutral” in imposing limitations or restrictions on such use, and may not reject requests based solely upon First Amendment protected expression, as a general rule.

Variations of such approaches will need to be carefully crafted, in consultation with counsel, to reflect each public entity’s unique circumstances.

The holdings of the Shurtleff case suggest that it is an appropriate time to examine existing practices and policies regarding flag raising to ensure compliance with the First Amendment. Public entities may also consider examining their formal or informal policies and practices regarding display of banners, flags, message boards, and other signage on, and use, of public buildings and property. Policies in which the government allows some non-governmental entities or individuals to display their sign or banner of choice on public property, but not others, will likely be highly susceptible to challenge.

Please contact KP Law Attorneys Michele Randazzo, Janelle Austin, or Devan Braun with any First Amendment questions.

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