

Constitutional Considerations in 2024

Prepared for the January 2024 MMA Business Meeting and Trade Show

Two seminal cases concerning government regulation of speech were decided last year, both of which were subjects of previous KP Law guidance. Each case has remained, or become even more, important for municipalities to consider and carefully review. For your convenience, links to our March 8, 2023 and May 16, 2022 guidance can be found [here](#) and [here](#).

- In Shurtleff v. City of Boston, 596 U.S. 243 (2022), the U.S. Supreme Court held that the City of Boston's rejection of a request from a religious group to fly a religious flag on City Hall Plaza was a violation of the First Amendment. The City previously allowed numerous organizations to fly flags without reviewing or exercising any control over the flags or the messages they promoted. Furthermore, the City did not have a written policy governing non-governmental use of the flagpole in question. The Supreme Court held that the City's practice of allowing any and all requests to raise and fly flags, with no exercise of control or discretion over the selection of flags and crafting of messages created a public forum. This meant that the City's denial of the religious flag was an impermissible restriction of private speech based upon a particular viewpoint rather than a more-readily regulated expression of governmental speech.
- In Barron v. Kolenda, 491 Mass. 408, 413 (2023), the Massachusetts Supreme Judicial Court held that the Town of Southborough's public comment policy violated the Massachusetts Declaration of Rights by requiring that all public comments be "respectful and courteous, [and] free of rude, personal or slanderous remarks." In this case, the Supreme Judicial Court concluded that the policy unconstitutionally regulated political speech and appeared to discriminate against speech based on viewpoint.

In 2024, the Shurtleff and Barron cases will continue to be extremely relevant to municipalities, both in their implementation and application of public comment policies and in response to requests from private individuals or groups to fly flags on government property. In recent months, cities and towns across the Commonwealth have noted a significant increase in inquiries regarding both constitutional issues. As the full import of these two significant cases becomes even more apparent in 2024, we continue to recommend that public entities review their policies and practices with respect to public comment and flying flags (or posting other signage) on government property, as set forth in the linked guidance on each topic.

For further information, please contact your KP Law attorney at 617.556.0007 with questions or contact Attorneys Lauren F. Goldberg (lgoldberg@k-plaw.com), Mark R. Reich (mreich@k-plaw.com), Janelle M. Austin (jaustin@k-plaw.com) or Michele E. Randazzo (mrandazzo@k-plaw.com).

Disclaimer: This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.

THE LEADER IN PUBLIC SECTOR LAW

617.556.0007 | 1.800.548.3522 | www.k-plaw.com | ©2024 KP Law, P.C.