

SHURTLEFF V. CITY OF BOSTON

Supreme Court of the United States

Robert Arcangeli, Senior Assistant Corporation Counsel, City of Boston Law Department Deanna B. FitzGerald, Senior Attorney, Ropes & Gray LLP

Massachusetts Select Board Association Annual Business Meeting, January 21, 2023

Boston's City Hall Plaza



The City Hall Flagpoles



Boston's Flag Raising Practice



Boston Renegades

Petitioners' Request to Fly the "Christian Flag"



"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Opinion of the First Circuit

"The plaintiffs' most loudly bruited argument is that the Free Speech Clause of the First Amendment does not permit the City to display a plethora of third-party flags in front of City Hall while refusing to display the Christian Flag proffered by the plaintiffs. The district court determined that this group of claims was foreclosed by the government speech doctrine, and so do we."

Shurtleff v. City of Boston, 986 F. 3d 78, 86 (1st Cir. 2021).

Government speech:

- Whether governments have historically used the medium to convey a government message;
- 2. Whether "the public mind" closely identifies a medium with the government; and
- 3. Whether the government maintains direct control over the messages conveyed through the medium.



Hon. Bruce M. Selya

Opening Lines of the City's Merits Brief

In the Supreme Court of the United States

No. 20-1800 HAROLD SHURTLEFF AND CAMP CONSTITUTION, PETITIONERS

v.

CITY OF BOSTON AND ROBERT MELVIN, IN HIS CAPACITY AS COMMISSIONER OF THE CITY OF BOSTON PROPERTY MANAGEMENT DEPARTMENT

> ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

It is evident from petitioners' brief that their case depends on purported facts bearing little resemblance to the actual record. Petitioners' claim is premised on the surprising assertion that the City of Boston (City) intentionally converted one of the three towering flagpoles standing immediately in front of the entrance to City Hall, and on which the vast majority of time the City flag flies alongside those of the United States and Commonwealth of Massachusetts, into a designated "public forum" on which any member of the public may fly any flag of its choosing, carrying any message of its choosing, on any date of its choosing, subject only to neutral time, place, and manner restrictions. To the contrary, the flagpole that stands prominently at the City's seat of government is a means by which the City communicates its own message, and has not simply (1)

It is evident from petitioners' brief that their case depends purported bearing little on facts resemblance to the actual record. Petitioners' claim is premised on the surprising assertion that the City of Boston (City) intentionally converted one of the three towering flagpoles standing immediately in front of the entrance to City Hall, and on which the vast majority of time the City flag flies alongside those of the United States and Commonwealth of Massachusetts, into a designated "public forum" on which any member of the public may fly any flag of its choosing, carrying any message of its choosing, on any date of its choosing, subject only to neutral time, place, and manner restrictions. To the contrary, the flagpole that stands prominently at the City's seat of government is a means by which the communicates its own message, and has not simply been turned over to private parties as a forum to pronounce their own messages, including those

antithetical to the City's.

"284 flag raising approvals with no denials"

"Over the course of twelve years prior to the denial of Camp Constitution's application that gave rise to this litigation, the City approved 284 such flag raisings by private organizations, with zero denials, allowing them to temporarily raise their flags on the City Hall Flag Poles for the limited duration of their events."

Petitioners' Merits Brief at i.

Amicus Support

- National Council of the Churches of Christ in the USA, et al.
- Massachusetts, Connecticut, Delaware, The District of Columbia, Hawaii, Maine, Minnesota, New York, Oregon, and Virginia
- Jewish Alliance for Law and Social Action, The Episcopal City Mission, GLBTQ Legal Advocates and Defendants, Inc., Jetpac Resource Center, Inc., Keshet, Inc., MassEquality, and Unitarian Universalist Massachusetts Action Network, Inc.
- Local Government Organizations National Association of Counties, National League of Cities, United States Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association (IMLA)
- Freedom From Religion Foundation and Center for Inquiry
- Anti-Defamation League

Oral Argument



Responses from the Bench

| 14 | Likewise, this is not in the record, |
|----|--|
| 15 | but it's common knowledge that I think in 2014 |
| 16 | then-Mayor Walsh raised the flag of the |
| 17 | Montreal Canadiens, a hockey team that I think |
| 18 | had just defeated the Boston Bruins in a |
| 19 | playoff series. That flag is not |
| 20 | CHIEF JUSTICE ROBERTS: Well, I can |
| 21 | understand why it wasn't put in the record. |
| 22 | (Laughter.) |





| 10 | CHIEF JUSTICE ROBERTS: do I |
|----|--|
| 11 | understand you to be saying that, to some |
| 12 | extent, the City approves of every flag that |
| 13 | flies? |
| 14 | MR. HALLWAR -DRIE FIER: The it has |
| 15 | to confirm that raising a flag is consistent |
| 16 | with the City's message. That's the |
| 17 | stipulation. |
| 18 | CHIEF JUSTICE ROBERTS: All right. |
| 19 | Well, I I I don't know, there may be some |
| 20 | dispute about it, but does the mayor of Boston |
| 21 | really approve of the Montreal Canadiens? |
| 22 | MR. HALLWARD-DRIEMEIER: So the the |
| 23 | mayor of Boston made a bet with a fellow mayor |
| 24 | and lost the bet and agreed to raise the |
| 25 | Canadiens flag. The the Bruins flag would |
| 1 | have had to rise in in Montreal if the |
| 2 | Bruins had won. |
| | |

The Flag Raisings As Boston's Speech

| 2 | And it's not to say that the Christian |
|----|--|
| 3 | flag is any of this. As a person of faith, |
| 4 | that is not what we are saying. What we are |
| 5 | saying is that the outcome in this case has to |
| 6 | be the same, whether this is the Christian |
| 7 | flag, the Summum flag, the Confederate flag |
| 8 | in Walker, or the New York Yankees flag. |
| 9 | The City can is either compelled to |
| 10 | raise all of them or none of them because it's |
| 11 | the City's speech. The City feels that it must |
| 12 | retain that control. It felt that it did have |
| 13 | that control because the the parameters were |
| 14 | clear enough. |



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Supreme Court Opinion

Cite as: 596 U.S. ____(2022)

Opinion of the Court

NOTICE: This optime is subject to formal revision before publication in the probaneary point of the United States Reports. Random are separated to only the Reporter of Resonance, Supernov Coart of the United States, Wank inglish, D. C. 2003E, draw (ppagesphical is states formed revises, in substituti corrections and be made before the publicance y point game to press.

SUPREME COURT OF THE UNITED STATES

No. 20-1800

HAROLD SHURTLEFF, ET AL., PETITIONERS &. CITY OF BOSTON, MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[May 2, 2022]

JUSTICE BREYER delivered the opinion of the Court.

When the government encourages diverse expression say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint. See Rosenberger v. Rector and Visitors of Unin. of Va., 515 U. S. 819, 828–830 (1995). But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to "promote a program" or "espouse a policy" in order to function. Walker v. Texas Div., Sons of Confederate Veteraus, Inc., 576 U. S. 200, 208 (2016). The line between a forum for private expression and the government's own speech is important, but not always clear.

This case concerns a flagpole outside Boston City Hall. For years, Boston has allowed private groups to request use of the flagpole to raise flags of their choosing. As part of this program, Boston approved hundreds of requests to raise dozens of different flags. The city did not deny a single request to raise a flag until, in 2017, Harold Shurtleff, the director of a group called Camp Constitution, asked to fly a Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its "flagpoles are not intended to serve as a forum for free expression by the public,'" and lists approved flags that may be flown "as an expression of the City's official sentiments." See Brief for Commonwealth of Massachusetts et al. as *Amici Curiae* 18.

All told, 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—though nothing prevents Boston from changing its policies going forward.

New City of Boston Flag Policy

ORDINANCES 2022- CHAPTER 6 Offered by Councilors Bok, Louijeune, Flynn, Arrayo, Breadon, Coletta, Fernandes Anderson, Lara, Finherty and Worrell CITY OF BOSTON IN CITY COUNCIL ORDINANCE AMENDING CITY OF BOSTON CODE. ORDINANCES, SECTION 1, TO CODIFY CITY POLICY REGARDING THE DISPLAY OF FLAGS ON CITY BALL PLAZA. WHEREES. The City of Boston traditionally displays three flags on City Hall Plaza of the United States, the Commonwealth of Massachusetta, and the City of Boston, and WHEREAS. Historically, the City of Boston has also on occasion flown various other flags in place of the flag of the City of Boston: and WHEREAS. The question of what parameters could be legally applied to the selection of such other flags because a subject of dispute in 2017 when the City declined to fis the Christian flag of Camp Constitution, prompting the yourt case Shurtleff v. Boston, which was appended all the way to the Supreme Court of the United States; and WHEREAS Since the runter came under consideration by the Supreme Court, flying of other flags on City Hall Plaza in place of the City of Boston flag has been raspended; and WHEREAS. In June 2022, the Supreme Court released an opinion in Shartleff v. Boston stating that the City of Bosten's prior policy for datermining which flags could fly on the third flagpole did not meet the standard of government speech, as it did not clearly limit such flag-raisings to expressing official massages of the City, and therefore this prior policy had to be regarded as creating a public forum for private speech to which all voices were untitled to access; and WHEREAS. Writing for the Court, however, Justice Stephen Broyer laid out a test by which the raising of other flags on the City's flagpoie could be properly limited to government speech, and stated explicitly that "nothing prevents Boston from changing its policies going forward"; and WHEREAS It is important that the City of Boston, as a city of immigrants, be able to express its official solidarity with people who have come to Boston from other nations, and to express other official, City-endorsed messages from the Mayor and City Council that may be appropriately accompanied by commonial flag-raising; and #705RE45. For these expressions of official City sentiment to be clearly construed by the residents of Boston, it is also important to clearly demascate and codify that the City's flagpoles are not intended to serve as a forum for free expression by the public; and WHEREAS. The clearest way to establish a new City of Boston policy in regard to the display of flags on City Hall Plaza is to enshrine our stenderds for such displays in city ordinance; NOW, THEREFORE Be it ardained by the City Council of Boston as follows: SECTION 1: City of Boston Code, Ordinances, Section 1, is havely assended by inserting after Section 1-3, the following new subsection:

1-3A DISPLAY OF FLAGS ON CITY HALL PLAZA

The purpose of this Oxformate is to establish galdelines for the simplar by the City of Booton (1) (log of governments recognized by the Foderal Government, and (2) other large on City (log how. Nothing herein shall be construed to conflict with City of Booton Code, Ordzancen Sections 1-2.4 to 1-2.7, inclusive or Section 1-3.

1-SA.1 Pelicy.

It is the policy of the City of Borison that Bags should be displayed in confermance with Federal and State policies, as stated in the Federal OVer Flag" publication of the Compress, House Document No. 96–144; Chapter 2, Section 6 of the Massachasetta General Laws and Chapter 2, Section 6A of the Massachasetta General Laws.

1-3A.2 Order of Procedence.

Outdoor flags will be flown at City facilities in the following order of precadance: first, the United States flag; second, the Corresonwealth of Massachasetts flag; and third, the City of Boston flag.

1-3A.3 Special occasions of Federal, State and Iscal proclamation.

- a. Fings on City Hai. Hums shall be displayed in accordance with the above standards. However, the Mayor may enter flags to be knowned to half while including, but not limited to flags of the United States of America and the Correspondent of Massachaustic in becover of the dash of a City employee killed in the first of data, or is observated as a maximized are origramatance.
- b. Pursuant to proclamation of the Mayor, or resolution of the City Council, other flags may be flown by the City in place of the City of Boston flag.

1-3A.4 Other Flags.

The City's flagpoles are not intended to serve as a forum for free expression by the public. The following flags may be displayed by the City as an expression of the City's official sentiments:

- Flags of Governments Recognized by the United States. Plags of governments recognized by the United States may be displayed upon the proclamation of the Mayor or by resolution of the City Council.
- Flags Displayed in Conjunction With Official Econtr or Germanism ar Annanced by Maporal Proclamation or City Council Resolution. By proclamation of the Mapor er resolution of the City Council, other flags may be displayed as official City versols or commonian.
- a. Flags of Professional Sports Teams. The Mayor may order the display of the flag of a professional sports team is commensuation of a significant achievement involving the City of Boston.
- d. Owwership of Other Flags. The City shall acquire ownership of all flags that it flies in place of the City of Boston flag.

SECTION 2: This Ordinance shall take effect upon passage.





THANK YOU