



# **SHURTLEFF V. CITY OF BOSTON**

Supreme Court of the United States

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

# Boston's City Hall Plaza



# The City Hall Flagpoles



# Boston's Flag Raising Practice



**Unity**



**Juneteenth**



**China**



**Ireland**



**Boston Renegades**



**Turkey**



# Petitioners' Request to Fly the “Christian Flag”



# First Amendment

**“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:

1. 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 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 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”**

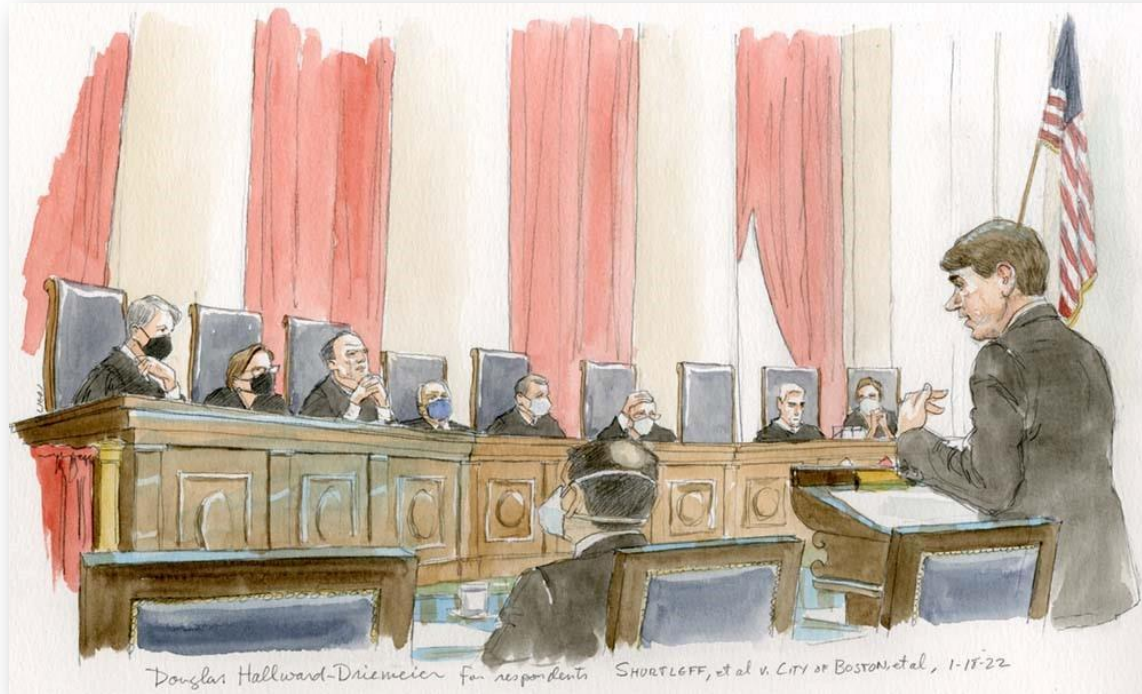
**“Over the course of twelve years prior to the denial of Camp Constitution’s application that gave rise to this litigation, the City approved 284 such flag raisings by private organizations, with zero denials, allowing them to temporarily raise their flags on the City Hall Flag Poles for the limited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

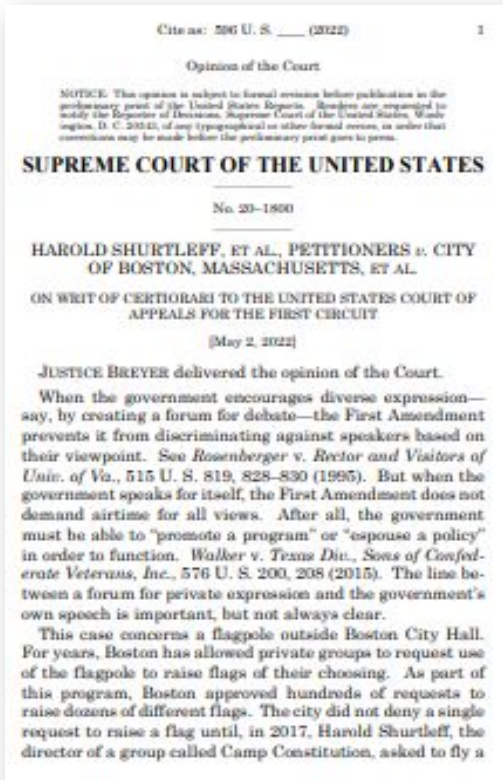
# The Flag Raisings As Boston's Speech

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 as  
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.



# Supreme Court Opinion

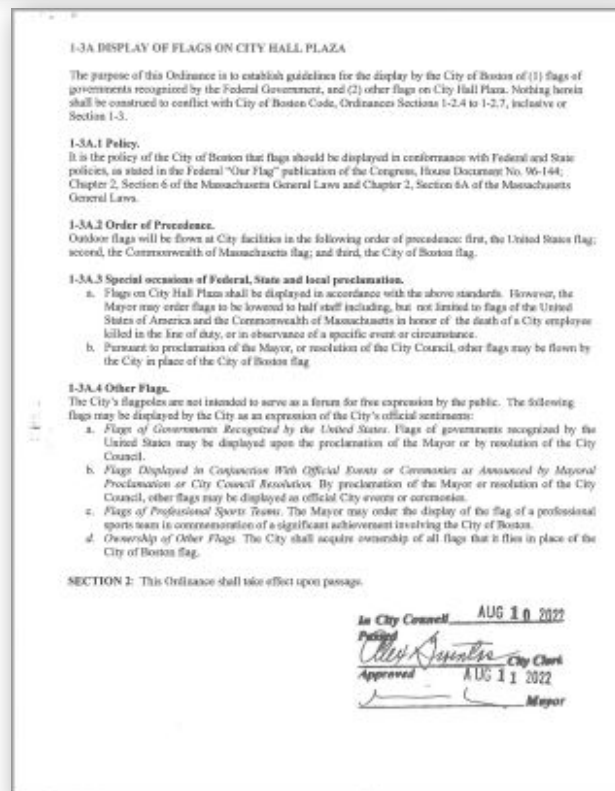
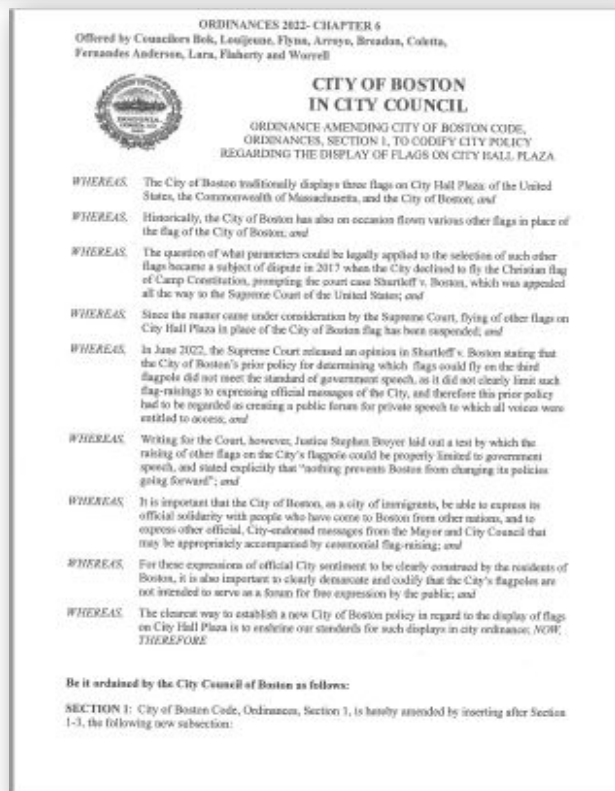


Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its "flagpoles are not intended to serve as a forum for free expression by 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





*THANK YOU*