



**Town of Arlington
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To: Select Board

Cc: Adam Chapdelaine, Town Manager

From: Douglas W. Heim, Town Counsel

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Re: Case Update: *Shurtleff v. City of Boston*

Members of the Board, I write at the request of the Chair to provide a case update germane to the Board's long-term consideration of sign, flag, light pole and banner policies for Town Hall, Town light poles and other Town public spaces. In short, permit me to confirm that the *Shurtleff* case presents a variety of legal issues which will inform Town and School policies about expressive conduct by the government and use of public spaces, especially buildings and flagpoles to support, endorse, or even raise awareness about of issues of concern. The issues at work in the case represent familiar First Amendment tensions for local government officials between exercising the discretion to decide what the government does and do not stand for, and excluding or curtailing speech the government disagrees with.

Background to the Controversy

As the Board may recall from prior meetings, the City of Boston has been litigating a series of appeals regarding its decision to deny the application of “Camp Constitution” and Harold Shurtleff to fly a “Christian flag” at Boston City Hall. While a variety of arguments have been made at various stages of litigation, including now before the United States Supreme Court, Boston’s chief argument remains that it is entitled to “government speech.” The Government Speech Doctrine posits that the government itself (be it a city hall, town hall, state house or federal building) has the right to convey messages about what it does, and syllogistically what it does not favor by choosing the messages and symbols it displays. The petitioner-appellant however claims that rather than serving as a venue for government speech, Boston’s flagpole policy created a designated public forum, which may not engage in viewpoint discrimination.

While the case has broad implications, the specifics of Boston’s decision are important to briefly outline. Boston, similar to many other municipalities typically flies the same three or four primary flags on its City Hall flagpoles throughout most of the year: the American flag (often with a POW/MIA flag beneath it), the flag of the Commonwealth on the second flagpole, and the City of Boston flag on the third. However, the City permits flying a flag in the place of the Boston flag by application. In total, some 242 applications were granted to fly non-standard flags over 12 years by various Boston groups, including LGBTQIA+ pride flags, flags of other countries, and flags that commemorate the observation special days like Juneteenth (presumably prior to becoming a state recognized holiday).

The Appellant-Petitioners contend however, that in permitting such flags Boston created a designated public forum that cannot pick and choose which messages it agrees with; or at a best, that the City lacked any meaningful criteria for reviewing flag applications until Camp

Constitution requested a flag to recognize the role of Christian heritage (per the petitioner's characterization of the facts).¹ Generally speaking, once a public forum is created (as opposed to government speech or a so-called non-public forum) strict scrutiny is applied to regulations upon the content of speech in such a forum. Indeed in many public forums², the rule of thumb is that one should not have to look at the content of signage or displays to know whether or not they are permitted.

Framing the Parameters of Government Speech

A critical element of the case in the many briefs filed and at oral argument is how symbols such as flags (and presumably other forms of symbols and signage on government buildings) are received by the viewer. Boston, and by amicus briefs the Commonwealth of Massachusetts (lead by AG Healy and joined by several other states) and a coalition of municipal organizations (the National League of Cities, National Association of Counties, U.S. Conference of Mayors, the ICMA and the IMLA), forcefully contend that flying a "Christian" flag over Boston City Hall confers upon the average viewer the sense that the government supports the message of such a flag, and as such City Hall is made into a religious rather than secular public space.

¹ The Petitioners also contend that their application was denied based upon a mistaken belief by city personnel that the Establishment Clause prohibited flying a religious symbol on government property. This facet of their argument is noteworthy because it may provide an "escape hatch" for the Supreme Court to limit the scope of its findings to affirming prior holdings on public forums rather than addressing tensions in the Government Speech Doctrine. Because the Establishment Clause only applies to the government (and not private speech in or out of a public forum) the Court *could* find that Boston only erred in determining that they could not fly a religious flag in a designated public forum.

² Please note that "public forum" as used herein is a legal term of art for the variety of expressive activities subject to differing levels of government regulations and associated constitutional scrutiny and access depending on the nature of the forum – Traditional, Limited or Designated, and Non-Public forums.

It requires little imagination to foresee even more controversial manifestations of a policy where any and every flag and sign sought by an applicant must be displayed in order to satisfy viewpoint neutral criteria – a confederate flag, a flag associated with more recent hate groups, etc.³ flying outside Boston City Hall because the City has to remain viewpoint neutral would likely discourage the City from allowing any flags or messages to be displayed on the request of individuals or groups or events. In theory, such a policy could result in the Boston flying a rainbow flag one month, and being required to fly the flag of an anti-LGBTQ group the very next month. Boston contended, and the First Circuit agreed, that the endgame of such a framing of the issues would require local governments to broadcast all messages and therefore no meaningful or coherent messages at all. As alternately outlined in its *amicus* brief on behalf of the Commonwealth of Massachusetts to the Supreme Court:

This Court has repeatedly recognized that allowing governments the latitude to speak on our own behalf “is important—indeed, essential.” *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). A governmental entity, this Court has explained, “has the right to speak for itself” and “is entitled to say what it wishes and to select the views that it wants to express.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (citations and internal quotation marks omitted). When a governmental entity does so, it is engaging in government speech, to which “the Free Speech Clause has no application.” *Id.* at 467.1 “Were the Free Speech Clause interpreted otherwise, government would not work.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). **Governments are elected by their constituents in order to advance certain priorities—indeed, “[i]t is the very business of government to favor and disfavor points of view.”** *Summum*, 555 U.S. at 468 (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment))... “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.” *Matal*, 137 S. Ct. at 1757.

³ The Petitioner and many supporting entities contend that hate speech could be precluded by sound policies without, in this Office’s opinion, offering much in the way of feasible substance on such a score.

Brief for Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Minnesota, New York, Oregon and Virginia as *Amica Curiae* in Support of Respondents at pp. 4-5(emphasis added).

The opposing viewpoint (supported by its own coalition of legal experts ranging from religious organizations to the Solicitor General and the ACLU) of course places a higher premium on a competing set of concerns. While briefs in support of Shurtleff articulate some differing rationales and motivations, many share a common anxiety that the Government Speech Doctrine could be abused to discriminate against speech the government dislikes. Moreover, it may be difficult to ascertain the difference between government speech and the government opening public forums. As stated by the ACLU in their brief:

In some cases, it may be “difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.” *Summum*, 555 U.S. at 470. But this is not such a case. The government creates a designated public forum if it “intentionally open[s] a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802. To ascertain the government’s intent, this Court looks to the government’s “policy and practice,” as well as “the nature of the property and its compatibility with expressive activity.” *Id.* Here, those factors demonstrate that the City designated its third flagpole a public forum for temporary flag displays by private speakers.

Brief of American Civil Liberties Union and American Civil Liberties Union of Massachusetts in Support of Petitioners, pp. 6-7.

Meanwhile, the Solicitor General of the United States suggested that some middle ground might be possible, requesting the Court rule in favor of the Appellant on the specific facts before it, but also “reaffirm that the First Amendment affords the City and other governments ample latitude to craft expressive programs — including programs involving contributions from private parties — without relinquishing their right to control the message or exclude other private speakers.” Brief for the United States as *Amicus Curiae* Supporting Reversal, at pp. 7-8.

Implications for Arlington Flags, Banners, Light Poles and Signs

The Supreme Court's consideration of the arguments before it have significant implications for far more than flags and flagpoles, which are only one means by which a government might express its speech. At most, a decision of the Court could significantly define the limits and dimensions of the Government Speech Doctrine in both practical and philosophical fashion. At the very least, the Court's decision may provide signals for how Arlington should tailor policies to make it clear when the government is speaking as opposed to providing forums for others to speak.

For example, if the Court construes flagpoles as designated public forums, the Town will likely have to at least consider refraining from allowing any flags, banners, or signs outside Town buildings or on Town fixtures, or run the risk of facing challenges to display the types of flags or signs requested by "Camp Constitution" or controversial symbols which are contrary to the Town and its leadership's expressed values. On a more optimistic note, the Court may establish clearer guidelines for how municipalities can create manageable designated public forums without allowing for objectionable content or violating First Amendment rights.

If on the other hand, the Court affirms the First Circuit, the Board's discretion and judgment with respect to expressive messaging would afford it significantly greater latitude. More likely, rather than sharpening rules of designated public forums, the Court may articulate firmer guidance for how the Select Board and Town at large can best clearly indicate when the government is speaking and when it is providing a forum.

For all the foregoing reasons, it will be important for the Town to consider the *Shurtleff* decision in its future plans for flags, signs, banners, and displays of all kinds. Those interested in further study of these compelling issues may find the briefs for the parties and varies supporting

and opposing legal advocates online. I will however be happy to discuss the matter further with the Board at its meeting.