

Government Flagpole, Government Speech? Supreme Court Decides Boston Lawsuit

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When the government allows a private group to display its message on public property, the message does not necessarily become government speech, and the private speaker may remain entitled to First Amendment protections. *Shurtleff v. Boston*, 596 U.S. ____ (2022). Whether a message is held to be government or private speech has significant implications in cases involving the display of religious messages on public property.

In *Shurtleff*, the City of Boston allowed private groups to hold ceremonies at city hall and raise private flags on a city flagpole during the ceremonies. Over the years, the city allowed “pride” flags to be flown to commemorate Boston Pride Week, for example, but also the flag of a community bank. City officials granted every request for a community organization to fly a flag, until one organization requested permission to fly a “Christian flag” during a ceremony. City officials denied the request because they were concerned the flag could be seen as endorsing religion in violation of the Establishment Clause. The organization countered that its rights under the Free Speech Clause were being violated because the city was engaging in “viewpoint discrimination” by permitting or forbidding speech based on the viewpoint of the speaker.

The U.S. District Court for the District of Massachusetts and the First Circuit Court of Appeals sided with Boston, but the Supreme Court reversed in a 9-0 opinion issued on May 2. Although the justices were split on *why* the court should find in favor of the organization, they were united in finding that the city had violated the Free Speech Clause.

The Supreme Court recognized that when the government is speaking for itself, it may advocate a specific point of view. For example, if Boston wanted to congratulate the Red Sox, Boston need not “simultaneously transmit the view of disappointed Yankees fans.” In *Shurtleff*, however, the court determined that Boston was not the one “speaking” when it allowed private organizations to raise flags during their ceremonies.

The court recognized that the “historical practice of flag flying at government buildings” favored a finding that the flag was government speech. However, the court found that “the city’s lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raising as private, not government, speech....”

The court noted that, with adoption of appropriate policies, “Boston could easily have done more to make it clear it wished to speak for itself by raising flags.” The court cited as an example another city’s written guidelines that “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.’” The court observed that “nothing prevents Boston from changing its policies going forward” to adopt similar policies.

Shurtleff presented a relatively easy decision for the Court because of the policies and practices, or lack thereof, that Boston had implemented prior to the lawsuit. A different set of facts might have produced a different outcome. Similar issues of government versus private speech are being considered in *Kennedy v. Bremerton School District*, argued on April 25, and that opinion may provide further guidance. If you have questions about these developments and how they may affect your organization, please contact the authors or your Miller Canfield attorney.