Court rules Boston violated free speech in Christian flag case

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The U.S. Supreme Court unanimously ruled Boston violated the Free Speech Clause of the First Amendment when it denied a request to fly the Christian flag on a city flagpole.

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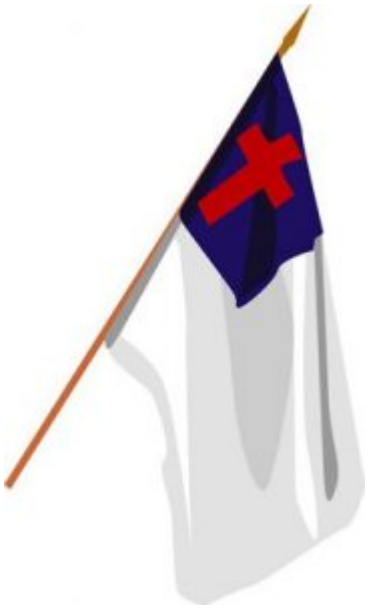
In a 9-0 decision in *Shurtleff v. City of Boston*, the court ruled Boston essentially created a limited public forum by allowing groups to fly a flag of their choosing next to the American flag and flag of the Commonwealth of Massachusetts outside Boston City Hall.

The city makes City Hall Plaza available to the public for events, and it permitted groups to fly about 50 flags in 284 ceremonies between 2005 and 2017. However, it denied Harold Shurtleff, director of the Camp Constitution organization, permission to display the Christian flag.

The commission of the city's property management department cited concern that flying a religious flag outside a municipal building could violate the Establishment Clause of the First Amendment.



The district court held flying private groups' flags from the flagpole outside city hall amounted to government speech, and the city acted within its authority to decline the request to display the Christian flag. After the First Circuit court affirmed the district court's decision, Shurtleff and Camp Constitution petitioned the U.S. Supreme Court.

The Supreme Court ruled Boston's refusal to allow Shurtleff and his group to fly the Christian flag outside city hall "discriminated based on religious viewpoint and violated the Free Speech Clause."

Justice Stephen Breyer, delivering the Supreme Court's opinion on the case, wrote, "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."

Breyer noted Boston "did not deny a single request to raise a flag" until it refused Shurtleff and his group permission to fly a Christian flag.

"We conclude that, on balance, Boston did not make the raising and flying of private groups' flags a form of government speech," Breyer wrote. "That means, in turn, that Boston's refusal to let Shurtleff and Camp Constitution raise their flag based on its religious viewpoint 'abridge[d]' their 'freedom of speech.'"

The city's "lack of meaningful involvement in the selection of flags or in the crafting of their messages leads us to classify the flag raisings as private, not government, speech," Breyer wrote. However, he added, "nothing

prevents Boston from changing its policies going forward."

Connection between free speech and freedom of religion

John Litzler, legal counsel for the Baptist General Convention of Texas, tweeted: "While this case was decided on free speech grounds, it is inextricably intertwined with religious liberty. This connection between free speech and freedom of religion is clear from the language of the opinion."

Brent Leatherwood, acting president of the Southern Baptist Convention's Ethics & Religious Liberty Commission, tweeted: "The Court's decision lines up with much of our @ERLC amicus brief, and is a welcome addition to free speech jurisprudence."

In its friend-of-the-court brief, the ERLC—along with the Congressional Prayer Caucus Foundation, the National Association of Evangelicals, Concerned Women for America, the Christian Legal Society and others—argued the city of Boston violated both the Free Speech Clause and the Free Exercise Clause of the First Amendment.

The brief called the First Circuit Court's decision supporting the city's refusal to fly the Christian flag "manifestly contrary to [Supreme Court] precedent" and said it demonstrated "a hostility toward, rather than a protection of, our religious and speech freedoms."

In a public statement, Leatherwood said the court "resoundingly shot down the city of Boston's incompetent attempt to abridge the free speech rights of an individual and his organization for communicating a 'religious viewpoint.'"

"The reality is, had Boston continued with its established track record of

approving every request that came in, this issue never would have been adjudicated," Leatherwood stated. "Given the united admonition of Boston's unconstitutional actions, I'm sure the city now wishes it had simply granted Mr. Shurtleff's request in the first place."

'A free speech forum, in which religious voices are welcome'

In a series of tweets, Amanda Tyler, executive director of the Baptist Joint Committee for Religious Liberty, wrote she was "not surprised, based on the unique facts of this case (Boston's policy and practice) and questioning by the justices at oral argument."

Breyer's "relatively short and straightforward opinion" indicated Boston's practice was "more indicative of a free speech forum, in which religious voices are welcome."

Amanda Tyler

However, she voiced concern about a concurring opinion by Justice Samuel Alito—joined by Justices Neil Gorsuch and Clarence Thomas—"who have a much more limited view of what constitutes government speech and a violation of the Establishment Clause."

The concurring opinion agreed with the court's judgment but took issue with analyzing the case on the basis of "history, the public's perception of

who is speaking, and the extent to which the government has exercised control over speech."

"To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker," Alito wrote. "The ultimate question is whether the government is actually expressing its own view or the real speaker is a private party and the government is surreptitiously engaged in 'regulation of private speech.'"

Alito concluded: "In my view, the minimum conditions that must be met for expression to count as 'government speech' can be identified by considering the definition of 'government speech' and the rationale for the government-speech doctrine. Under the resulting view, government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."

While she characterized Alito's views as "extreme," Tyler said regarding the court's opinion: "The impact of this opinion seems fairly limited, maybe even to the particular facts of this policy."

She noted the court's opinion made reference to the policy in San Jose, Calif., that explicitly states flown flags are "an expression of the city's official sentiments."

"In other words, there is a way for cities to make clear that flag raisings constitute government speech. Boston didn't do it here, but it can revise its policy for the future," she wrote.