

Shurtleff v. City of Boston
United States Supreme Court
Docket No. 20–1800
May 2, 2022

When expressing official points of view local government can control the content of signs and flags displayed on municipal property under a written policy

Through this decision the U.S. Supreme Court has defined the difference between unconstitutional viewpoint discrimination and permissible control of the content of speech when government speaks for itself.

For many years the City of Boston allowed private groups to raise a flag of their choosing at a flagpole near the entrance of Boston City Hall. This was permitted when a private group was hosting an event or other commemoration in the City Hall Plaza. The City did not have a written policy limiting the use of the flagpole based on the content of the flag. Between 2005 and 2017 the City approved 50 unique flags raised at 284 ceremonies. In 2017 Camp Constitution sought permission to raise the Christian Flag (a red cross on a blue field against a white background) to commemorate the civic and social contributions of the Christian community. The City denied the request based on the concern that flying the flag would violate the Establishment of Religion clause of the First Amendment.

When government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it can choose what to say and what not to say. Thus, local government can select what points of view it wishes to promote and not run afoul of the First Amendment. However, when government does not speak for itself it may not exclude speech as that constitutes impermissible viewpoint discrimination.

Examining the private flag flying history at Boston City Hall Plaza, and whether the public would view that activity as government speech, the Court concluded that the lack of any effort by the City to control and shape the messages meant this was not government speech but instead exclusion of a religious viewpoint in violation of the First Amendment. The Court did cite with approval a City of San Jose written policy that city flag poles are not intended to serve as a forum of free expression by the public and provided a list of approved flags that may be flown as an expression of the City's official sentiments.

Practice Pointer: Municipalities can adopt policies that controls the content of signs and flags that are displayed at government venues. First, a written policy should be developed that makes clear that the government venue is not intended to serve as a forum of free expression by the public, rather any sign or flag displayed is an expression of the sentiments of local government. Thus, where signs are allowed to be displayed on municipal property, those signs could be limited to community non-profit organizations that are promoting civic events. Similarly, if flags are allowed to be flown on a municipal flag pole, a list of approved flags could be provided.