The National Standard

BULLETIN OF THE VEXILLOLOGICAL ASSOCIATION OF THE STATE OF TEXAS

NUMBER TWENTY-ONE

FALL-WINTER 2021

PUBLIC FORUM?: Boston Government Center with flagpoles. *Jorge Antonio.*

SUPREME COURT PREVIEW: SHURTLEFF v. CITY OF BOSTON

Note: The U.S. Supreme Court has scheduled oral argument January 12, 2022, in Shurtleff v. City of Boston*;* The National Standard *is pleased to feauture a preview of this case by the Legal Information Institute, Cornell University.*

In this case, the Supreme Court must decide whether the City of Boston violated the First Amendment by refusing to fly a flag bearing a Latin cross on a flagpole in front of City Hall. Boston allowed private parties to apply for permission to raise and display their flags on one of three flag poles in front of City Hall. Before Boston rejected Petitioner Harold Shurtleff's application to fly a flag bearing a Latin cross, it had approved every one of the 284 applications it received. Shurtleff argues that Boston designated the flagpole as a public forum for private speech and committed unconstitutional viewpoint discrimination by refusing to fly Shurtleff's flag because it bore a Christian symbol. Boston responds that, because the flags flown in front of City Hall are government speech, not private speech, Boston could evaluate flag-raising applications with reference to content and viewpoint, without running afoul of the First Amendment. Interested parties on either side of the case warn of potential chilling effects on private speech, as well as the risk of hostility from the government or from private parties.

Questions as Framed for the Court by the Parties

(1) Whether the United States Court of Appeals for the First Circuit's failure to apply the Supreme Court's forum doctrine to the First Amendment challenge of a private religious organization that was denied access to briefly display its flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, conflicts with the Supreme Court's precedents holding that speech restrictions based on religious viewpoint or content violate the First Amendment or are otherwise subject to strict scrutiny and that the establishment clause is not a defense to censorship of private speech in a public forum open to all comers;

(2) whether the First Circuit's classifying as government speech the brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, unconstitutionally expands the government speech doctrine, in direct conflict with the court's decisions in *Matal v. Tam*, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* and *Pleasant Grove City v. Summum*; and

CONTENTS

PREVIEW: *Shurtleff v. City of Boston*

PREVIEW: SHURTLEFF v. CITY OF BOSTON

(3) whether the First Circuit's finding that the requirement for perfunctory city approval of a proposed brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants with hundreds of approvals and no denials, transforms the religious organization's private speech into government speech, conflicts with the Supreme Court's precedent in Matal v. Tam, and circuit court precedents in *New Hope Family Services, Inc. v. Poole*, *Wandering Dago, Inc. v. Destito*, *Eagle Point Education Association v. Jackson County School District* and *Robb v. Hungerbeeler*.

Facts

The City of Boston ("Boston") owns and operates three flagpoles in City Hall Plaza, all of which stand conspicuously in front of the seat of its municipal government. The first flagpole flies the United States and POW/MIA flags, the second flies the Commonwealth of Massachusetts flag, and the third typically flies Boston's flag. However, Boston occasionally allows third parties to submit a request, so that Boston may consider flying another flag for a limited time. This program aims to (among other things) promote diversity, increase inclusivity, and raise international and cultural awareness. Third parties usually submit flag-raising applications when they look to hold events near the flagpoles.

The Commissioner of the City's Property Management Department (the "Commissioner") performs the initial application review. The Commissioner performs administrative functions and ensures that approving a flag would not run afoul of Boston's message, policies, and practices. Applicants provide Boston with a description of the flag they wish to raise, even though the flag itself is not seen during the application.

In the past, Boston has approved numerous applications including flags representing other countries, certain causes, and commemorating historic events. Flags raised have included those of Brazil, China, Italy, Portugal, Turkey, the National Juneteenth Observance Foundation, Bunker Hill Association, and Boston Pride. While some flags contain religious imagery (such as the Islamic star and crescent on the Turkish flag), none were proposed with a religious description.

In July 2017, Harold Shurtleff filed an application to use the flagpole on behalf of co-plaintiff Camp Constitution, a volunteer organization that professes to educate Americans about "the country's Judeo-Christian moral heritage." The application detailed that Shurtleff wished to fly a "Christian Flag" and have local clergy members deliver speeches.

Although no flag-raising application had been denied before, the Commissioner was concerned about the religious nature of this flag. After determining that Boston had not previously approved any religious flags, the Commissioner denied the application. The Commissioner informed Shurtleff that the Boston's policy was to avoid flying non-secular flags of third parties, as Boston believed such practice would violate the Establishment Clause of the First Amendment. The Commissioner offered to fly a secular flag for Shurtleff' event instead, which Shurtleff refused. Shurtleff filed a second similar application in September 2017. Believing that the first rejection was sufficient, Boston never responded to this second application.

Sometime after, the City decided to adopt a written Flag Raising Policy (the "Policy") to clarify the evaluation process. A few months before the written Policy took effect, in July 2018, Shurtleff sued Boston in federal district court. Shurtleff sought injunctive relief, a declaratory judgment, and money damages. Shortly after filing suit, Shurtleff moved for a preliminary injunction.

The district court denied the motion, and the First Circuit Court of Appeals affirmed. As the case developed, both parties moved for summary judgment. After the district court ruled in Boston's favor, the First Circuit affirmed, holding that the flagpole was not a public forum and that Boston engaged in government speech when deciding whether to fly a given flag. The First Circuit further explained that Boston did not violate the Establishment Clause when it refrained from endorsing a religion via a religious flag-raising.

Shurtleff appealed to the Supreme Court, and the Court granted certiorari on September 30, 2021.

Analysis

The Flagpole as a Designated Public Forum

Petitioner Shurtleff argues that the City of Boston designated the City Hall flagpole as a public forum for private speech. Quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, Shurtleff asserts that, to determine whether the government intended to designate its property as a public forum, a court must consider the government's "policy and practice" of regulating access to the property. Shurtleff contends that guidelines published by Boston concerning use of the flagpole, which state that Boston "seeks to accommodate all applicants seeking to [use the City's] . . . public

THE NATIONAL STANDARD (Continuing VAST News) (ISSN 2165-0101 (Print); ISSN 2165-011X (Online)) is published twice each year by the Vexillological Association of the State of Texas, member of the Fédération internationale des associations vexillologiques. For questions or information, contact: VAST, 504 Branard Street, Houston, Texas 77006-5018 USA.
E-mail: info@texflags.org Internet: www.texflags.org

forums," establish Boston's intent to open the City Hall flagpole to all comers. Shurtleff argues that Boston's intent to establish the flagpole as a public forum is evident in the fact that Boston had approved all 284 flag-raising applications it received before Shurtleff's application.

Quoting *Minnesota Voters Alliance v. Mansky*, Shurtleff observes that, in a public forum, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." According to Shurtleff, Boston's denial of Shurtleff's application to fly a flag that the application described as "Christian" was based on viewpoint, because "[r]eligion is a viewpoint." In the alternative, Shurtleff argues that Boston's denial was a content-based restriction that cannot withstand strict scrutiny. Shurtleff denies that Boston's asserted interest in avoiding a violation of the Establishment Clause justifies its refusal to fly his flag. Quoting *Rosenberger v. University of Virginia,* Shurtleff asserts that the Establishment Clause does not prohibit the government from extending benefits to religious actors when the benefits are available according to "neutral criteria and evenhanded policies." Here, Shurtleff argues, Boston would not have violated the Establishment Clause by approving his request, because Boston administered its program according to religiously neutral criteria.

Respondent Boston denies that its policy and practice of granting access to the flagpole establishes its intent to designate the flagpole as a public forum for private speech. According to Boston, the application guidelines cited by Shurtleff, which state Boston's intent "to accommodate all applicants seeking to take advantage of [Boston's] public forums," describe Boston's policy concerning use of "[t]he area at the base of the flagpole," which Boston admits is a public forum, but not the flagpole itself. Boston also argues that, because allowing the flagpole to be used for "unfettered private speech" would have destroyed the pole's "essential function," the City could not have intended to open it for use by all comers. According to Boston, the "essential function" of the flagpole is to display Boston's own flag, a function that would become impossible if Boston is required constantly to replace its own flag with that of a private speaker.

Boston argues that, even if the Court agrees with Shurtleff that it designated the flag pole as a public forum, the Court should specify that Boston is entitled to close the forum and reestablish the flag-raising program as government speech. According to Boston, the Court recognized the government's entitlement to close a designated public forum in *Perry Education Association v. Perry Local Educators' Association*, in which the Court stated that the government "is not required to indefinitely retain the open character" of a designated public forum. Boston also observes that the First, Ninth, Second, Fourth, and Third Circuits have explicitly held that the government can close a designated public forum. Boston argues that the Court should adopt the rule from the First and Ninth Circuits that a closure is permissible as long as the government effects the closure in good faith, rather than for the purpose of suppressing speech. Here, Boston asserts, its purpose in closing the forum is legitimate, because Boston does not intend to burden religious exercise or disfavor certain speech but merely to avoid the appearance that it endorses a particular religion. Additionally, Boston contends that Shurtleff's establishment clause argument does not address Boston's contention. Boston notes that it does not argue that it could exclude Shurtleff's speech from a designated public forum. Instead, Boston maintains that it permissibly declined to speak, and that it did not create a public forum.

Government Speech

Shurtleff argues that Boston's flag-raising program does not constitute government speech under the Court's decisions in *Pleasant Grove City v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans*. According to Shurtleff, the Court's holding in *Summum* that a religious monument displayed in a government-owned park was government speech depended on the facts that the monument was permanent and that the park could accommodate only a few permanent monuments. Quoting from *Summum*, Shurtleff argues that in this case, in contrast to *Summum*, the government property at issue is "capable of accommodating a large number of public speakers." Shurtleff contends that *Summum* would only control if Shurtleff "had requested to permanently occupy" the flagpole or to "permanently place its own flagpole in the ground." Likewise, Shurtleff argues that the vital fact in *Walker*, in which the Court held that specialty license plates approved by Texas were government speech, was that Texas owned the plates and exercised control over their design. Shurtleff contends that in this case, by contrast, the fact that Boston approved every flag-raising request but Shurtleff's makes clear that Boston did not exercise anything more than nominal control over the flags it displayed. Shurtleff argues that the First Circuit erred by deciding the case according to a "formulaic" three-part test for government speech, under which a court considers the history of the speech, whether the speech is likely to be attributed to the government, and whether the government controls the content of the speech. According to Shurtleff, this test threatens to "eviscerate the [designated] public forum doctrine" by focusing courts' attention on the history of a forum rather than on current "policies and actual practices."

Boston argues, in response, that the First Circuit correctly determined that the flag display was government speech according to the three-part test derived from *Summum* and *Walker*. Boston argues that the first element of the test is satisfied because flags flown on government property are traditional means of communicating government messages. According to Boston, the second element of the test is satisfied because a reasonable observer would conclude that a flag flying on a flagpole in front of City Hall represents government speech. Boston denies that knowledge of the process by which Boston decides which flags to fly should be attributed to a reasonable observer. Boston asserts that the third element of the test is satisfied because Boston articulated the values it wished to promote with the flag-raising program and reviewed flag-raising requests to ensure that the flags were consistent with these values. Boston denies that its approval of all requests other than Shurtleff's establishes that Boston did not exercise control over the flag-raising program. Instead, according to Boston, Boston approved all other flags because "none . . . was inconsistent with [its] policies."

Discussion

Chilling Effect on Private Speech

Arguing in support of Shurtleff, Liberty, Life and Law Foundation, a nonprofit corporation largely focused on religious liberty and other related goals, warns of the potential dangers that the government speech doctrine poses. LLLF asserts that the government speech doctrine should be carefully restrained, otherwise the government may be permitted to "stifle private expression or distort debate on matters of public concern." While the line between private speech and government speech is blurred at times, LLLF suggests that affirming the judgment of the lower courts risks allowing the government to inject its own voice into the public discourse, which would displace the private speech of others. Accordingly, LLLF claims that reversal is the best way to avoid a chilling effect on free speech.

The states of Massachusetts, Connecticut, Delaware, Hawaii, Maine, Minnesota, New York, Oregon, Virginia, and the District of Columbia (collectively the "States"), in support of Boston, agree that the outcome of this case can ultimately lead to less speech; however, the States contend that the best way to avoid this result is to affirm the judgment. The States note that reversal in this case could pave the way to allowing profoundly offensive flags to be raised. Noting a 2018 incident in a Wyoming public park where someone replaced a United States flag with a Nazi flag, the States assert that certain people's wish to fly offensive flags "is not a mere hypothetical." Accordingly, the States argue that reversal would cause cities to reduce the public's access to city flagpoles. This could be in the form of a reduction in the types of flags that may be raised or even in the form of eliminating flag-raising programs altogether. The States note that Boston has indicated that it would take such access-reducing measures if the judgment is reversed. The States ultimately argue that a ruling allowing Shurtleff to raise a Christian flag will inevitably prevent countless others from raising their own flags because cities will curtail flag-raising programs altogether.

Avoiding Government or Individual Hostility?

American Cornerstone Institute ("ACI"), in support of Shurtleff, argues that affirming the judgment would promote a pattern of hostility to religion and have the effect of wrongfully privileging secular entities. ACI argues that many of the reasons that Boston gave for its denial of Shurtleff's application are merely "a smokescreen for the City's anti-religious sentiments." ACI further claims that affirming the judgment would allow local governments to adopt the policy that "any accommodation [for religion] at all is accommodation enough" while secular groups may be entitled to greater accommodations. at 17. Looking to previous cases involving religion, ACI argues that the treatment of religious groups' speech in the courts has been inconsistent and has frequently forced religious groups to unnecessarily abide by different standards than secular groups. Ultimately, ACI warns that if the Supreme Court does not reverse, a pattern of unequal and hostile treatment towards religious groups will be permitted to continue.

Conversely, Anti-Defamation League ("ADL"), in support of Boston, proposes that a more concerning form of hostility could result if the judgment is not affirmed. ADL cautions that weakening local governments' discretion to approve what flags are and are not allowed to fly could lead to certain private speakers capitalizing on provocative messaging and propaganda. ADL notes that reversal could open the door to white supremacists and other extremist groups placing their banners alongside the United States flag and state flags. Even if extremist banners do not fly for long, ADL argues that the "photo op" as a propaganda tool does not require the flag to wave for long, as a provocative flag-raising can garner attention long after the banner is lowered. To support this, ADL points to the timeline of events during the 2017 "Unite the Right" rally in Charlottesville, Virginia. ADL notes that although one of the most significant moments of the rally (when marchers encircled a statue of Thomas Jefferson while holding torches, throwing Nazi salutes, and waving swastika flags) lasted a mere nine minutes, the videos and images "live on as a permanent testament to the protesters' message of hate—exactly as intended." Pointing to a statistical uptick in white supremacist activity and violence in the years following the rally, ADL suggests that if the Supreme Court reverses, the result could embolden extremists to increase in both size and in violent behavior.

Bruno Babij and Jack Delano; edited by Noah Welch