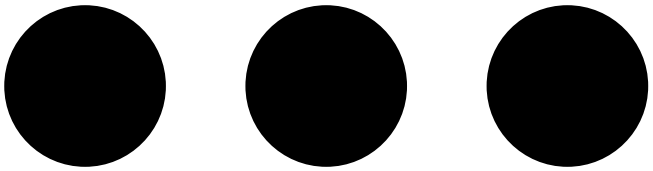
Written by **Elad Hakim** on May 2, 2022

According to SCOTUS, a Christian Flag May Fly High in Boston

On Monday, the Supreme Court issued an important ruling protecting free speech.

The case, *Shurtleff v. City of Boston*, involved an appeal by Camp Constitution ("Camp"), a Christian group that, in 2017, applied to fly a flag with a Christian cross on it over City Hall in Boston. Camp was a volunteer association that sought "to enhance understanding of the country's Judeo-Christian moral heritage."



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Camp's application was made in accordance with Boston's flag-raising program. As the Supreme Court noted in its opinion:

> For years, Boston has allowed private groups to request use of the flagpole to raise flags of their choosing. As part of this program, Boston approved hundreds of requests to raise dozens of different flags. The city did not deny a single request to raise a flag until, in 2017, Harold Shurtleff, the director of a group called Camp Constitution, asked to fly a Christian flag. Boston refused. At that time, Boston admits, it had no written policy limiting use of the flagpole based on the content of a flag.

Notwithstanding, Camp's request was denied in accordance with Boston's policy to "refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's prohibition of government establishment of religion." The District Court for the District of Massachusetts ultimately ruled in Boston's favor and the First Circuit affirmed. The Supreme Court disagreed and reversed the First Circuit's decision.

In rendering its decision, the Supreme Court considered two questions. First, the court had to determine whether Boston's flag-raising program constituted government speech. If it did, then Boston could select the flags it chose to fly without worrying about the First Amendment's free-speech clause. If not, Boston could not refuse to fly a flag based on a particular viewpoint. Second, the court had to determine whether Boston's refusal to allow Camp to raise its flag amounted to improper viewpoint discrimination.

To determine whether the flag-raising program constituted government speech, the court applied the three factor test set forth in *Pleasant Grove City v. Summum*, which considered the history of the use of the medium by the government, how closely the public identified the medium with the government, and the degree of control the government maintained over the message conveyed.

While the court felt that the first two factors were close calls, or possibly even favored Boston, the final factor was determinative in this specific case. According to the court, Boston simply did not actively control the flag raisings and shape the messages the flags sent. As the majority noted, "But it is Boston's control over the flags' content and meaning that here is key; that type of control would indicate that Boston meant to convey the flags' messages."

To support this finding, the court noted that Boston previously permitted many different types of flags in accordance with its flag-raising policy, some of which had nothing to do with Boston whatsoever. The court also made additional findings that reflected how little control Boston had over the flags and/or their messages. Specifically, the court noted:

> For one thing, Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza. The application form asked only for contact information and a brief description of the event, with proposed dates and times. The city employee who handled applications testified by deposition that he had previously "never requested to review a flag or requested changes to a flag in connection with approval"; nor did he even see flags before the events. The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff 's. Boston acknowledges it "hadn't spent a lot of time really thinking about" its flag-raising practices until this case. App. in No. 20–1158 (CA1), at 140 (Rooney deposition). True to its word, the city had nothing — no written policies or clear internal guidance — about what flags groups could fly and what those flags would communicate.

In accordance with these findings, the court determined that Boston's flag-raising program did not constitute government speech. As a result, and in response to the second question for the court's determination, Boston could not exclude speech based on religious viewpoint, as doing so would constitute impermissible viewpoint discrimination. Specifically, since government speech was not involved in this case, and because Boston initially denied Camp's request based on the Establishment Clause (i.e., religion), Boston engaged in viewpoint discrimination in violation of the Free Speech Clause.

The court's decision, while fact specific, was a victory for free speech advocates. Following the court's decision, Hal Shurtleff, the director of Camp Constitution, told *The New American* that he was thrilled with the decision and that he hoped that people learned more about the Constitution and the rights protected under the First Amendment by virtue of what transpired in this case.