



May Case Law Update May 31, 2022

A summary of court opinions decided during the month of April affecting planning in Wisconsin¹

United States Supreme Court Opinions

Government Cannot Exclude Religious Flag From City's Flagpole

The City of Boston owns and manages three flagpoles in front of City Hall. The City raises the United States flag and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Upon request and after approval, the City will occasionally fly another flag for a limited period instead of its own flag. The City has approved 284 flag-raising events over a 12-year period, and never denied a flag-raising application.

Camp Constitution, an organization that seeks "to enhance the understanding of the country's Judeo-Christian moral heritage," applied to fly a "Christian flag" for its event but the City denied the request out of concern it would violate the Establishment Clause of the First Amendment (the Clause prohibits governments from promoting one religion over others). Camp Constitution sued alleging the City's refusal to fly a private religious organization's flag depicting a cross on a city flagpole violated the organization's First Amendment rights. The district court found for the City. On appeal, the U.S. Court of Appeals for the First Circuit affirmed.

The U.S. Supreme Court accepted review of the case and reversed the decision of the Court of Appeals. A key question in the case was whether Boston reserved the pole to fly flags that communicate governmental messages, or instead opened the flagpole for citizens to express their own views. If the flagpole communicates government speech, Boston is free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause. If the flagpole is for citizens to express their own views, the Free Speech Clause prevents Boston from refusing a flag based on its viewpoint.

In a majority opinion written by Justice Breyer, the Court held that Boston's flag-raising program does not constitute government speech. The Free Speech Clause of the First Amendment disallows the government from engaging in "impermissible viewpoint discrimination." When it is not speaking for itself, the government may not exclude speech based on "religious viewpoint." Thus, Boston's refusal to allow Shurtleff and Camp Constitution to raise their flag based on "religious viewpoint" violated the Free Speech protections of the First Amendment.

Justice Kavanaugh authored a concurring opinion to reiterate that the government does not violate the Establishment Clause when it treats religious persons or organizations equally with secular persons or

¹ Previous updates are available at: wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/

organizations, but it does violate the Free Speech Clause when it excludes religious persons or organizations.

Justice Alito authored a concurring opinion, joined by Justices Thomas and Gorsuch. Justice Alito would ask “whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the ‘regulation of private speech.’”

Justice Gorsuch authored a concurring opinion, joined by Justice Thomas, criticizing the test the Court adopted for resolving Establishment Clause disputes. Justice Gorsuch argued that Boston erroneously relied on the now-abandoned *Lemon* test, leading it to believe that flying the flag would violate the Establishment Clause.

The case is [Shurtleff v. Boston](#), 596 U.S. ____ (2022).

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

[No planning-related cases to report.]

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]