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# LIBERTY COUNSEL

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Reply to: Virginia

September 14, 2017

**Via E-Mail Only**

Mayor Martin J. Walsh  
City of Boston  
1 City Hall Square, Suite 500  
Boston, MA 02201-2013  
United States  
Mayor@Boston.gov

Re: Unconstitutional denial of Christian Flag permit request

Dear Mayor Walsh:

Liberty Counsel is a non-profit litigation, education, and public policy organization with an emphasis on constitutional law. With offices in Florida, Virginia, and Washington, D.C., and numerous affiliate attorneys around the country, including Massachusetts, Liberty Counsel provides *pro bono* legal assistance to individuals, organizations and government entities in matters touching First Amendment law and the Establishment Clause. We have had particular success representing our clients' interests in federal court.

Liberty Counsel represents Hal Shurtleff and Camp Constitution in their request to the City of Boston ("City") for use of a City Hall Plaza flagpole as part of their permitted cultural event. Mr. Shurtleff had requested permission to raise a Christian Flag next to the United States flag and the City of Boston flag, as part of other permitted speech activities at that location in September 2017. The City grants permits to display secular flags upon request, and makes note on its website of the cultural activity associated with the flag-raising event. Here, however, the City has denied the Christian Flag solely on the basis that it is "religious." I hereby request that the City approve the flag permit request, for the reasons set forth below.

I understand the following facts to be true: [Camp Constitution](#) is a public charitable trust which seeks to enhance young people's understanding of America's Judeo-Christian moral heritage; America's heritage of courage and ingenuity; the genius of the U.S. Constitution; and principles of free enterprise. Camp Constitution seeks to motivate, inspire and activate youth to be patriotic leaders for tomorrow. Camp Constitution has placed information tables on Boston Common for years, and has distributed free copies of the U.S. Constitution to all comers.

Hal Shurtleff, founder of Camp Constitution, had sought to hold an event on a Thursday in late September, 2017, on the steps of City Hall Plaza by the flag poles, to include short presentations by clergy members, a brief historical overview of Boston as “the city set on a hill,” and the raising of the Christian Flag on one of the City Hall Plaza flagpoles, next to the American Flag and the City Flag, in celebration of our nation’s heritage. Confirmed speakers include pastors from diverse backgrounds, and one of the topics is racial reconciliation. Mr. Shurtleff began the permitting process in July 2017, and offered the City several proposed dates, including September 7, 14 or 25th, but it was not until September 5, after much follow-up by Mr. Shurtleff, that the request relating to the flagpole was verbally denied.

Mr. Shurtleff requested a written denial, and on September 8, Property Management Commissioner Gregory Rooney sent an email as follows:

I am writing to you in response to your inquiry as to the reason for denying your request to raise the “Christian Flag”. **The City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles.** This policy and practice is consistent with well-established First Amendment jurisprudence prohibiting a local government from “respecting an **establishment of religion.**” This policy and practice is also consistent with City’s legal authority to choose how a limited government resource, like the City Hall flagpoles, is used.

According to the above policy and practice, the City of Boston has respectfully denied the request of Camp Constitution to fly on a City Hall flagpole the “Christian” flag, as it is identified in the request, which displays a red Latin cross against a blue square bordered on three sides by a white field.

**The City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one.** (Emphasis added).

This denial is unconstitutional, and by means of this letter, the invitation to submit a “non-religious” flag is respectfully declined. In addition to this written statement, the City’s past and current practice (and permit application) provides that City Hall Plaza flagpoles are available for privately-selected flags to be flown upon request of virtually any private association or activity. The City has never denied a request based upon the viewpoint expressed by the selected flag, until now.

Numerous private organizations have raised flags related to their respective events. These events have included ethnic and other “cultural celebrations,” corresponding with the raising of the flags of various countries or causes, and announcements of the same on the CityHallPlazaBoston.com website. Approved flags flown at such events include those of [Albania](#), [Brazil](#), [Ethiopia](#), [Italy](#), [Panama](#), [Peru](#), [Portugal](#), [Puerto Rico](#), [Mexico](#), as well as of [Communist China](#) and [Cuba](#). The flag of the private “[Chinese Progressive Association](#)”<sup>1</sup> has been raised. The “[Juneteenth](#)” flag has been raised by the private [National Juneteenth](#)

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<sup>1</sup> <http://cpasf.org/about>; <http://cpaboston.org/>

[Observance Foundation](#). The homosexual rainbow flag has been raised by the private organization [Boston Pride](#). Even the “[transgender](#)” pink and blue flag has been raised. Where these are all true, the City cannot deny Camp Constitution’s request to fly the Christian Flag in the same manner.

Establishment Clause concerns notwithstanding, a flat ban on flags constituting private religious expression “cannot be constitutionally justified.” *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). Government must treat private religious messages on equal terms and conditions with private non-religious messages. Whatever the ultimate extent of a forum, government must treat all persons and groups seeking to use the forum equally, regardless of their viewpoint. *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001). It cannot be gainsaid that the City has opened a forum for privately-selected flags on its flagpoles in coordination with privately-sponsored events.

The Free Exercise Clause “protect[s] religious observers against unequal treatment” and subjects to the strictest scrutiny laws that target the religious for “special disabilities” based on their “religious status.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted). The Supreme Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest “of the highest order.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

The Free Speech Clause also protects religious expression. There is a crucial difference between *government* endorsement of religion, which is prohibited by the Establishment Clause, and *private speech*, which government is bound to respect. As the Supreme Court has made clear, “**private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.**” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis added). The “Establishment Clause requires neutrality, as opposed to hostility, towards religion.” *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829–30 (1995)).

**In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional...**when government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1995). (Emphasis added).

Here, the City has opened a “forum” – flagpoles in front of City Hall Plaza – and the opportunity to fly privately-selected flags on them pursuant to a permit scheme. Where this is true, the government cannot then prohibit flags it deems “religious” in nature. There is no potential government endorsement, because the flags are private speech. It does not matter

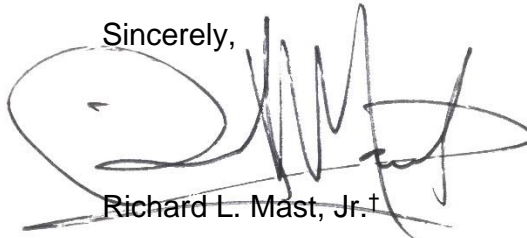
what someone subjectively “might perceive,” in terms of true government neutrality (and not hostility) toward private religious expression. “[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779–780 (1995) (O’Connor, J. concurring). Courts simply “do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.” *Id.* at 780, (O’Connor, J., concurring) (quoting *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir.1992) (en banc)) (emphasis and brackets in original).

In sum, “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar [the Christian flag from City Hall Plaza].” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

For these reasons, Liberty Counsel hereby requests that the City of Boston approve Camp Constitution’s original flagpole use request for one of the future dates on the accompanying application attached hereto. **Please confirm to Liberty Counsel in writing by September 27, 2017**, that 1) the City will permit a Camp Constitution event at City Hall Plaza, complete with the raising of the Christian Flag, as a cultural celebration of the contributions of Christians to the City’s diversity, religious tolerance, and the American rule of law; and 2) that the City will announce the same on CityHallPlazaBoston.com utilizing an electronic representation of the Christian Flag, complete with the supplied description of the event.

If I do not receive this response, I will conclude the City does not dispute the facts or law set forth herein, and Liberty Counsel will take additional actions to prevent irreparable harm to the rights of our clients. Thank you for your prompt assistance in this matter.

Sincerely,



Richard L. Mast, Jr.†

Attachments

CC

**Via Email:**

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Exhibit A – Christian Flag



**Property and Construction Management Department  
City Hall and Faneuil Hall Event Application**

*Boston City Hall, Rm. 811*

*Boston MA, 02201*

*Phone: 617-635-4100 Fax: 617-635-3250*

Name of Contact Person: Harold Shurtleff  
Billing Address: 12 March Ave West Roxbury, MA 02132  
Telephone Number: 857-498-1309  
E-Mail Address: Shurtleffhal@aol.com

Name of Event: CAMP CONSTITUTION'S CHRISTIAN FLAG RAISING  
Event Date (s): OCTOBER 19, 2017 OR ALTERNATE DATE OCTOBER 26, 2017  
Event Start Time: 11:00 (a.m./p.m.) Event End Time: 12:00 a.m./p.m.  
Set-up Date(s): OCTOBER 19, 2017 OR ALTERNATE DATE OCTOBER 26, 2017  
Set-up Start Time: 10:45 (a.m./p.m.) Break-down Time: 12:05 (a.m./p.m.)

**Location:**

Faneuil Hall  Samuel Adams Park  City Hall Plaza   
City Hall Lobby  City Hall Flag Poles  North Stage

**Will your event require:**

Music  DJ  Radio/CD

**Event Description**

Celebrate and recognize the contributions Boston's Christian community has made to our city's cultural diversity, intellectual capital and economic growth. The Christian flag is an important symbol of our country's Judeo-Christian heritage. During the flag raising at the City Hall Plaza, Boston recognizes our Nation's heritage, and the civic accomplishments and social contributions of the Christian community to the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution, which together gave our nation an unprecedented history of growth and prosperity. The event program includes a speech by Rev. Steve Craft, an instructor at Camp Constitution on the need for racial reconciliation, a speech by Pastor William Levi, formerly of the Sudan, on the blessings of religious freedom in the U.S. and an historic overview of Boston by Hal Shurtleff, director of Camp Constitution.