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## Case of the Month

### Organization's flag flown on a city flagpole is private, not government, speech.

Camp Constitution, a private organization, applied to the city of Boston to fly a "Christian flag" on a flagpole in front of city hall as part of an event honoring the Christian community. The city has three flagpoles in the city hall plaza that normally fly the U.S., state, and city flags, but the city flag may be temporarily replaced when private groups are granted use of the flagpole during special events. Before Camp Constitution's request, the city had given permission to every group requesting use of the flagpole. Concerned, however, that flying a "Christian flag" at city hall would endorse religion in violation of the U.S. Constitution [First Amendment](#) Establishment Clause, the city allowed the event but denied use of the flagpole. Camp Constitution and its founder (Camp Constitution) sued Boston and city staff (the city) alleging the denial violated the First Amendment Free Speech Clause, among other claims. The trial court granted the city's motion for summary judgement, finding that the city could regulate flag-flying as government speech. Camp Constitution appealed.

Reviewing the historical use of the flagpole, the First Circuit Court of Appeals determined that the city used the flagpole to communicate messages. The court determined that an observer would assume a flag on the pole communicated city messaging and the city effectively controlled the messaging of third parties' flags. Therefore, the court concluded that the flag display was government speech subject to city's control and denied Camp Constitution's appeal. Camp Constitution again appealed.

The U.S. Supreme Court agreed that historically the flagpole was used to communicate city messages. However, because the city regularly permitted a third party to raise a flag on a pole that was clearly surrounded by attendees at a private event, a reasonable observer would not necessarily consider the flag's messaging to be the city's. The Court also disagreed that the city maintained effective control, citing evidence that the city had indicated a desire to accommodate everyone who wanted to hold events at these "public forums," staff had never requested to review a flag or asked for changes to a flag as part of an approval process, and the city had no policies or guidance on who could fly a flag and what the flags may communicate. Therefore, the Court concluded that Camp Constitution's flag was private, not government, speech and, in denying permission to fly the flag, the city discriminated against the organization's religious viewpoint. The Court reversed the First Circuit's decision and remanded the case for further proceedings. [Shurtleff v. Boston](#), 142 S. Ct. 1583 (May 2, 2022).

### Why is This Case Significant?

The Supreme Court's analysis in *Shurtleff* should inform a college's decisions about how to craft and ultimately apply policies and procedures to distinguish between the college's speech, which the college controls, versus private speech, which is subject to First Amendment protection.

### Highlights

[Update 43](#) is now available.

### Resources

[Texas Higher Education Coordinating Board](#)  
[Texas Legislature](#)  
[Texas Statutes](#)  
[Texas Attorney General](#)  
[U.S. Department of Education](#)



## From the Courts and the Attorney General

### Business and Finance

Texas's recently-enacted provisions addressing content curation by social media companies were permitted to go into effect during the pendency of the state's appeal of a challenge by trade associations. [NetChoice v. Paxton](#),<sup>1</sup> No. 21-51178, 2022 WL 1537249 (5th Cir. May 11, 2022).

An unpaid subcontractor may sue a university for payment for work performed on a construction project because the university failed to obtain a valid bond from the prime contractor as required by [Texas Government Code section 2253.027](#). [Univ. of Houston System v. Ground Texas Construction](#), No. 14-20-00401-CV, 2022 WL 1463682 (Tex. App.—Houston [14th Dist.] May 10, 2022, no pet. h.).

### Personnel

The U.S. Supreme Court held that emotional distress damages are not recoverable in a private action to enforce either the [Rehabilitation Act of 1973](#) or the [Patient Protection and Affordable Care Act](#). [Cumplings v. Premier Rehab Keller](#), 142 S. Ct. 1562 (Apr. 28, 2022).

Female medical professor failed to provide sufficient evidence to overcome summary judgment on her claims that her supervisor's denial of research opportunities and ridiculing comments constituted gender discrimination, a hostile work environment, and retaliation in violation of [Title VII of the Civil Rights Act of 1964](#). [Saketkoo v. Adm'rs of the Tulane Educational Fund](#), No. 21-30055, 31 F.4th 990 (5th Cir. Apr. 21, 2022).

### Community and Governmental Relations

Citizen's conviction for illegal voting while on federal supervised release was overturned because it was not established that she had actual knowledge her parole status made her ineligible to vote. [Mason v. State of Texas](#), No. PD-0881-20, 2022 WL 1494591 (Tex. Crim. App. May 11, 2022).

Defamation suit by a political candidate accused by his opponent of abusing women was barred by the [Texas Citizens' Participation Act](#), which provides for dismissal of any lawsuit "based on or in response to a party's exercise of the right of free speech." [Moore v. Reed](#), No. 14-20-00463-CV, 2022 WL 1180116 (Tex. App.—Houston [14th Dist.] Apr. 21, 2022, no pet. h.).

### Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings<sup>2</sup> based on requests from Texas community colleges related to:

- The cancellation of a specified request for proposals. Tex. Att'y Gen. [OR2022-11115](#) (Apr. 18, 2022);
- Five categories of information pertaining to a specified request for proposals. Tex. Att'y Gen. [OR2022-11285](#) (Apr. 19, 2022);
- Specified college employees. Tex. Att'y Gen. [OR2022-11518](#) (Apr. 20, 2022);
- Bids from named contractors responding to a specified request for proposals. Tex. Att'y Gen. [OR2022-11577](#) (Apr. 20, 2022);
- Information submitted for review to the attorney general. Tex. Att'y Gen. [OR2022-13073](#) (May 9, 2022); and
- Information submitted in response to requests for proposals. Tex. Att'y Gen. [OR2022-13458](#) (May 11, 2022).

<sup>1</sup> This case was summarized in the [December 2021/January 2022](#) TASB Community College Services *Legal Update*.

<sup>2</sup> Open record letter rulings are limited to the particular records at issue and the facts as presented to the attorney general. These rulings must not be relied upon as a previous determination regarding any other records or any other circumstances.



## Recent Regulations and Guidance

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The Texas Higher Education Coordinating Board (THECB) amended [regulations](#) regarding requirements for selective service registration for state financial aid eligibility, acceptance of the online Texas Application for State Financial Aid (TASFA) by all institutions of higher education through the Apply Texas common application form portal, and caps on transfers between work-study and other state grant programs.

THECB identified stakeholders, including community college representatives, for [appointment](#) to the negotiated rulemaking committee for Open Educational Resources Grant Program.

The Texas Comptroller of Public Accounts amended [regulations](#) relating to use of contract travel services by state agencies, including community colleges.

The Texas State Board for Educator Certification amended [regulations](#) concerning requirements for educator preparation programs.

The Texas Commission on Law Enforcement amended [continuing education requirements](#) for telecommunicators to include cardiopulmonary resuscitation training in response to statutory changes made during the 87th Legislative Session.

U.S. Department of Education's Office of Civil Rights announced its intention to propose [amendments](#) to regulations implementing Section 504 of the Rehabilitation Act of 1973 and requested public comments.



## In the News

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The Texas Higher Education Coordinating Board (THECB) issued [publications](#) addressing deadlines to spend funds for the Nursing Shortage Reduction Program, as well as grant requirements for the Texas Reskilling and Upskilling through Education (TRUE) Grant Program.

THECB also announced [requirements](#) for new Plumbing Instruction and Licensure programs, identifying a course sequence for applicants to become eligible for tradesman licensure in plumbing, in response to statutory changes made during the 87th Legislative Session.

The Tri-Agency Workforce presented for [public review and comment](#) its state workforce development [strategies](#) for interagency coordination in implementing the goals for career education and training programs set out in the [Texas Education and Workforce Alignment Act](#) passed by the 87th Legislature.

A student team from San Antonio College was announced as a finalist for the [2022 Community College Innovation Challenge](#), a national science, technology, engineering, and mathematics competition sponsored by the American Association for Community Colleges and the National Science Foundation.

The U.S. Department of Education announced an expansion of the [Second Chance Pell Experiment](#), issuing invitation to additional institutions of higher education, including Central Texas College, to participate in this program that helps incarcerated individuals access educational programs.

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