News

A Christian flag is seen in 2007 amid tornado rubble in Lady Lake, Fla., in this illustration phot

A Christian flag is seen in 2007 amid tornado rubble in Lady Lake, Fla., in this illustration photo. The flag pictured is like the one the group Camp Constitution wanted to have fly outside Boston's City Hall and city officials denied it in 2017. (CNS photo/Shannon Stapleton, Reuters)



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WASHINGTON — Supreme Court justices Jan. 18 seemed to side with a Christian group that was excluded from flying its flag with an image of a cross on it outside of Boston's City Hall.

The group, Camp Constitution, was told in 2017 by city officials that it would not be able to fly its flag on one of the city's flagpoles reserved for different groups because of concerns that the Latin cross on the flag could be viewed as a government

endorsement of a particular religion.

The group sued the city, noting that in the 12 years of different flags flying from this pole, this was the first one that had been denied. However, the U.S. Circuit Court of Appeals for the 1st Circuit, based in Boston, ruled that the city's control of the flagpole program made it government speech.

The Supreme Court justices sought to determine whether the city's third flagpole was essentially a public forum that deserved free speech protections or if it was just a means for government speech.

In the 90-minute arguments, Justice Elena Kagan was skeptical the flag in question could violate the First Amendment's Establishment Clause.

As she put it: "In the context of a system where flags go up, flags go down, different people have different kinds of flags, then it is a violation of the free speech part of the First Amendment and not an Establishment Clause violation."

Justice Brett Kavanaugh similarly said the flag dispute could not be viewed as a violation of the Establishment Clause, noting that "equal treatment of religious and nonreligious groups isn't a violation." The clause prohibits the government from endorsing religion and from favoring one religion over another.

In the current dispute, the Biden administration backed Camp Constitution, a New Hampshire-based group that describes itself on its website as a group dedicated to enhancing "understanding of our Judeo-Christian moral heritage, our American heritage of courage and ingenuity, including the genius of our United States Constitution."

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In court briefs, the administration said that since the city treated the flagpole as a forum for private speech, it can't approve "private civic and social groups while excluding otherwise-similar groups with religious views."

Boston city officials argued that requiring the third pole to be open to everyone — the other two poles are for the U.S. and state flags — could force the city to put up flags that might promote division or intolerance. With that uncertainty, the city

stopped applications for the flag-raising program while the case was argued in court.

Some of the justices said the city should be able to come up with a limited flag-raising program going forward.

Sopan Joshi, the assistant to the U.S. solicitor general who argued on behalf of the United States in support of Harold Shurtleff, the founder of Camp Constitution, similarly emphasized the city could keep the flag-raising program but exclude offensive flags with KKK symbols or swastikas.

Douglas Hallward-Driemeier, arguing for the city of Boston, said the city's policy against allowing religious flags has the aim of being "neutral with respect to religion."

Becket, a religious liberty law firm, filed a friend-of-the-court brief in this case which emphasized that Boston city officials and the lower courts misunderstood the Establishment Clause and were then forced to ban religious elements from the public square simply because they are religious.

The American Civil Liberties Union, which does not always take the same side of Becket, similarly supported Camp Constitution in this case.

In a Jan. 16 opinion piece in The Washington Post, David Cole, ACLU's national legal director wrote: "We argue that no reasonable observer would understand flying Camp Constitution's flag — for just one hour on a single day — to be the government's speech. Like the 284 flags flown before it, this group's flag would be seen as just that — the group's flag. And as such, the city can't turn it down because the flag is religious."

Notre Dame Law School's Religious Liberty Initiative similarly filed an amicus brief in this case. The program's interim director, Nicole Stelle Garnett, a Notre Dame law professor, said this case provides the court with the chance to "clarify that religious voices are welcome in the public square and that our nation and communities are enriched by them."

"This is important" she said, "because, all too frequently, the government excludes (religious voices) because of a mistaken understanding of what the Constitution demands and requires."