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To: Mark Purple

From: Jason R. Talerman, Town Counsel
Katherine M. Feodoroff, Town Counsel
Matthew D. Provencher, Town Counsel

Re: Town of Southborough
Article 12, Special Town Meeting Warrant for Oct. 13, 2022

Date: October 5, 2022

You have requested our opinion with respect to the above-captioned matter. Specifically, you have asked to whether current First Amendment jurisprudence mandates or advises alteration of Town By-Laws to restrict the placement of flags in the Old Burial Ground to solely the flag of the United States of America. In our opinion the Town's current practices are not in violation of the First Amendment. More particularly, be advised as follows

I. Facts

Article 12 of the Special Town Meeting Warrant for the Town of Southborough was proposed by Citizen Petition brought by Deborah Demuria and Rebecca Deans-Rowe. The Article proposes:

To see if the Town of Southborough will vote to request that the Select Board restrict the placement of flags in the Old Burial Ground to the official flag of the United States of America, flown on the single existing permanent pole. In accordance with state and federal preservation guidelines, and out of respect for those buried within, all additional flags on raised flagpoles shall be removed. This policy shall not apply to individual grave markers.

The summary of the petition notes that it "seeks to limit the placement of flags in the Old Burial Ground to only the American flag[.]" The petition is stated to "follow[] the recent unanimous U.S. Supreme Court decision regarding free speech rights under the First Amendment[.]" which is a reference to *Shurtleff v. City of Boston*, ___ U.S. ___, 142 S. Ct. 1583 (2022). The article is filed due to concerns over Gadsden flags flown at the Old Burial Ground, and would limit the only flags flown at the site to the United States flag.

II. Analysis

Shurtleff v. City of Boston arose out of a dispute relating to public access to a flag pole present at Boston City Hall, specifically on the grounds of City Hall Plaza. City Hall Plaza has three flag poles present: one flies the United States flag, the second the Massachusetts flag, and the third flew either the flag of the City of Boston

or the flag of a group that requested to use the flagpole to fly its own flag or device. *Shurtleff*, 142 S. Ct. at 1588. City Hall Plaza is itself open to the public for use as event space. *Id.* Furthermore, the City had, since roughly 2005, maintained a policy that private groups or associations could request the use of the flagpole normally flying the City flag. *Id.* There were no written criteria for access to or use of the flagpole, and the facts in *Shurtleff* showed that there was no evidence the City had ever refused a group's request to fly a flag. The dispute in the case came about because a request to fly a Christian flag was denied by the City. The requesting group and the City fundamentally disagreed on the character of the flag display: to the City, the arrangement of flags was an exercise of government speech by and on behalf of the City itself; and to the requesters, the City had created a public forum for speech, in which it could not discriminate between speakers. Ultimately, the dispute reached the Supreme Court of the United States, which held that the City's program of allowing individuals and groups to request the use of the flagpole created a forum for speech, which prohibited the City from rejecting applicants on the basis of their speech's viewpoint. To wit, the court stated:

Boston concedes that it denied Shurtleff's request solely because the Christian flag he asked to raise "promot[ed] a specific religion." Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

Id. at 1593 (citations omitted).

Article 12 does not follow or otherwise create greater adherence to the *Shurtleff* decision. There does not appear to be any enactment or official policy of the Town that allows access to the Old Burial Ground flagpoles for private use. Nor does it appear that there is any reason to believe that the Gadsden flag is being flown as part of a policy allowing private groups to request to use the flagpole. There is therefore no forum that has been created in which the Town is discriminating by viewpoint.

If the cemetery is not a public forum, and the flags flown on the poles therein are flown solely at the direction and control of the Town of Southborough, then the flag flying is a form of government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). There are still some limits on government speech, as, for example, "government speech must comport with the Establishment Clause[.]" but absent some other Constitutional concern, the Town's choice of a non-religious flag is not likely to create a First Amendment issue on its own. *Id.* at 468. Even assuming the opposite, if the Old Burial Ground flagpoles are a public forum, they are ones created by specific action. Public forums are found using a variety of means, but most commonly are found in "traditional" public forums, like public ways, parks, and sidewalks, or as the result of specific government action to create a forum where one had not previously existed. *Id.* at 469-70. Flagpoles in an historic cemetery, even though in an area open to the public, are not traditionally used as a public speech forum, nor are they similar to public ways, sidewalks, or parks where speech activity has been commonplace. If the flagpoles at the Old Burial Ground have been used as a designated public forum by the Town of Southborough, Article 12 would close the forum, rather than ensure its neutrality, as it would prevent any other flags from being flown, which similarly does not adhere to *Shurtleff*. In the event, this would still be permissible, as "The government is free to change the status of any nontraditional forum as it wishes." *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004).

In any event, it does not appear that the Town of Southborough has created a public forum for use in flag-flying in the Old Burial Grounds. The flags flown there express the views of the municipal government that controls them. The Town is free to fly the flags of its choice, or no flags at all. Even assuming the opposite is true, as a nontraditional public forum, a shift to allow no flags but the United States flag disallows all other flags equally and neutrally closes the forum.

Based upon the foregoing, it is our opinion that the Town's current practice is legal and that Article 12 does not address or remedy any inconsistency with the *Shurtleff* decision. Accordingly, we find the commentary appended to the Article to be incorrect and, in some respects, misleading. That said, we also find that the article, as drafted, does not propose an action that is illegal. While such Article is advisory only, the Town is free to adopt a policy that limits flags flown in the cemetery to the American flag.