

RESOLUTION NO. 2022-86

A RESOLUTION OF THE CITY OF MARINA APPROVING THE FLYING OF THE RAINBOW PRIDE FLAG AT CITY HALL THROUGHOUT THE REMAINDER OF THE MONTH OF JUNE AS FURTHER RECOGNITION OF JUNE 2022 AS LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, PLUS (LGBTQ+) PRIDE MONTH IN THE CITY OF MARINA

**WHEREAS**, the City of Marina has a diverse Lesbian, Gay, Bisexual, Transgender, Queer, Plus (LGBTQ+) community and is committed to supporting visibility, dignity, and equity for all people in the community; and

**WHEREAS**, many of the residents, students, employees, and business owners within the City of Marina who contribute to the enrichment of our City are part of the LGBTQ+ community; and

**WHEREAS**, the City of Marina strives to be a place where all residents and visitors feel accepted and welcome; and

**WHEREAS**, the Rainbow Flag, also known as the LGBTQ+ Pride Flag or Gay Pride Flag, has been used since the 1970s as a symbol of LGBTQ+ pride and social movements; and

**WHEREAS**, on June 7, 2022, the City Council of the City of Marina declared the month of June as Lesbian, Gay, Bisexual, Transgender and Queer Pride month symbolizing the City's celebration of diversity and support for the Lesbian, Gay, Bisexual, Transgender, Queer and Plus community; and

**WHEREAS**, the City Council has this date adopted a Flagpole Policy; and

**WHEREAS**, the Council of the City of Marina wishes to establish the Rainbow Pride Flag as a commemorative flag of the City of Marina in accordance with the Flagpole Policy to communicate its support for diversity, inclusivity, equality, and respect in our City; and

**WHEREAS**, flying the City's Rainbow Pride Flag during the month of June further symbolizes Marina's official recognition of June as LGBTQ+ Pride month and reflects the City of Marina's viewpoint, and symbolizes the City's celebration of diversity and support for the LGBTQ+ community.

**NOW, THEREFORE, BE IT RESOLVED** that the City Council of Marina, California does hereby find, determine and approve as follows:

Section 1. Approving the flying of the Rainbow Pride Flag at City Hall throughout the remainder of month of June through July 22, 2022, and during the month of June each consecutive year thereafter

Section 2. This resolution shall become effective immediately upon its passage and adoption.

**PASSED AND ADOPTED** by the City Council of the City of Marina, California at a regular public meeting thereof held on the 21<sup>st</sup> day of June 2022 by the following recorded vote:

AYES, COUNCIL MEMBERS: Medina Dirksen, Burnett, Berkley, Biala, Delgado

NOES, COUNCIL MEMBERS: None

ABSTAIN, COUNCIL MEMBERS: None

ABSENT, COUNCIL MEMBERS: None

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Bruce C. Delgado, Mayor

ATTEST:

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Anita Sharp, Deputy City Clerk

Honorable Mayor and Members  
of the Marina City Council

City Council Meeting  
of June 21, 2022

**CITY COUNCIL CONSIDER ADOPTING RESOLUTION NO. 2022-,  
ADOPTING THE CITY OF MARINA FLAGPOLE POLICY; AND  
CONSIDER ADOPTING RESOLUTION NO. 2022-, APPROVING THE  
FLYING OF THE RAINBOW PRIDE FLAG AT CITY HALL  
THROUGHOUT THE REMAINDER OF THE MONTH OF JUNE 2022 AS  
FURTHER RECOGNITION OF JUNE 2022 AS LESBIAN, GAY, BISEXUAL,  
TRANSGENDER, QUEER, PLUS (LBGTQ+) PRIDE MONTH IN THE CITY  
OF MARINA.**

**RECOMMENDATION:** City Council consider

1. Consider adopting Resolution No. 2022-, adopting the City of Marina Flagpole Policy; and
2. Consider adopting Resolution No. 2022-, approving the flying of the Rainbow Pride Flag at City Hall throughout the remainder of the month of June 2022 as further recognition of June 2022 as Lesbian, Gay, Bisexual, Transgender, Queer, Plus (LBGTQ+) Pride Month in the City of Marina.

**BACKGROUND:**

At the June 7, 2022, City Council meeting the City Council under the Special Presentations part of the meeting approved a LGBTQ+ Proclamation declaring the month of June as lesbian, gay, bisexual, transgender, Queer and Plus Pride month symbolizing the City's celebration of diversity and support for the lesbian, gay, bisexual, transgender, queer and plus community. A donation of a Pride flag was made to the City and the City Council expressed a desire to raise the Pride flag on a city flagpole for the remainder of June during Pride month. The Council was advised that the City does not have a flag policy and that the appropriate way to do this to avoid potential future free speech and constitutional legal challenges would be to adopt a flag policy first that establishes policies and procedures for displaying flags on city flag poles.

**DISCUSSION**

There are constitutional concerns as to whether the City Council can limit free speech through a flag policy or allow religious flags or flags that advocate for a policy party of issue. The first amendment to the United States Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

**Constitutional Freedom of Speech**

*Forum Analysis*

The First Amendment does not require government in general to always allow all speech and at all locations. "Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the

nature of the property or to the disruption that might be caused by the speaker's activities.<sup>1</sup> Thus, the Supreme Court has adopted what is known as "forum analysis" to determine whether government can control speech on government-owned property.

A "traditional public forum" is a place that has traditionally been used by the public for the free exchange of ideas such as a public park. In pre-Twitter days, standing on a soapbox in the public square was the easiest way for a speaker to reach the most people. Regulations on speech in a traditional public forum must serve a compelling government interest and the regulation be narrowly drawn to achieve that interest. This is known as the strict scrutiny test.<sup>2</sup>

A "designated or limited public forum" is property that the government has intentionally opened for expressive activity under certain conditions, with limitations on the content of speech subject to strict scrutiny, but with other restrictions just needing to be reasonable. The City Council Chambers is an example of a designated or limited public forum during a City Council meeting in which there can be time limits on public speakers, but the public cannot be prohibited from criticizing City government.<sup>3</sup> This concept of strict scrutiny on the content of speech is sometimes referred to as "viewpoint neutrality."

A "nonpublic forum" is all remaining government property that is not dedicated to general debate or the free exchange of ideas. Reasonable restrictions are allowed in a nonpublic forum if the intent is not to suppress speech due to the speaker's viewpoint.<sup>4</sup> Once the government allows public speech on nonpublic forum property- "opens the forum"- then it has arguably created a "designated or limited public forum" where the limitations on the content of speech are subject to strict scrutiny with other restrictions needing to be reasonable. Likewise, a city that has allowed public speech on nonpublic forum property can choose to adopt a policy to close that forum. This was the case when the City of Lexington, Virginia decided to no longer allow third-party groups to fly flags on streetlight flagpoles throughout the city -- other than the flags of the United States, Virginia and Lexington -- after the Sons of Confederate Veterans flew Confederate flags throughout the city.<sup>5</sup>

## Government Speech

However, when the State is speaking on its own behalf ("government speech"), the First Amendment restrictions related to various types of government-established forums do not apply.<sup>6</sup> The Supreme Court provided this example of government speech in the *Matal* case:

*During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but*

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<sup>1</sup> (*Clark v. Burleigh* (1992) 4 Cal. 4th 474, 482, quoting *Cornelius v. NAACP Legal Defense & Educ. Fund* (1985) 473 US 788)

<sup>2</sup> *Ward v. Rock Against Racism* (1989) 491 US 781 (consistent sound amplification restrictions on a rock concert in a public park did not violate First Amendment.) "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas v. Johnson* (2015) 491 U.S. 397, 414)

<sup>3</sup> (see *White v. City of Norwalk* (9th Cir 1990) 900 F.2d 1421)

<sup>4</sup> (*Cornelius v. NAACP Legal Defense & Educ. Fund* (1985) 473 US 788)

<sup>5</sup> (*Sons of Confederate Veterans v. City of Lexington* (2012) 894 F. Supp. 2d 769)

<sup>6</sup> (*Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S. Ct. 2239 (Supreme Court held that Texas' specialty license plate designs are governmental speech and the State was allowed to reject a flag design with the Confederate flag); *Pleasant Grove City v. Summum* (2008) 555 U.S. 460 (Supreme Court found that the display of a permanent monument in a public park is governmental speech not subject to forum analysis)) "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, [citations omitted] but imposing a requirement of viewpoint- neutrality on government speech would be paralyzing."

*the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities*<sup>7</sup>.

A unanimous Supreme Court ruled on May 22, 2022 in Surtleff v City of Boston<sup>8</sup> that the City of Boston violated the free speech rights of a conservative activist when it refused his request to fly a Christian flag on a flagpole outside City Hall.

Justice Stephen Breyer wrote for the court that the city discriminated against the activist, Harold Shurtleff, because of his “religious viewpoint,” even though it had routinely approved applications for the use of one of the three flagpoles outside City Hall that fly the U.S., Massachusetts and Boston flags. The city had approved 284 consecutive applications to fly flags, usually those of other nations, before it rejected Shurtleff’s because it was a Christian flag. The high court said the lower courts and the city were wrong. The case hinged on whether the flag-flying is an act of the government, in which case Boston can do whatever it wants, or private parties like Shurtleff, Justice Breyer wrote.

“Finally, we look at the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent. The answer, it seems, is not at all. And that is the most salient feature of this case.” Breyer wrote that “the city’s lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech—though nothing prevents Boston from changing its policies going forward.”

This case stands for the proposition that in order to shape the message the flags send as government and not private speech the City should have a written policy and clear guidelines. In summary, regarding the First Amendment and Freedom of Speech issues, the display of flags at City facilities beyond the flags of the United States, State of California and City raises First Amendment Free Speech issues and thus the potential for litigation. Those issues depend, in part, on whether the flag is treated as government speech by the City or an opportunity for speech on public property by members of the public (“designated public forum”). If a flagpole is deemed by the City (or later determined by a court) to be “designated public forum” under the First Amendment, the City could not choose which commemorative flags to fly, except on a content-neutral basis. Thus, under the “designated public forum” approach, the City would not be able to avoid disfavored or potentially divisive flags as the City of Lexington discovered after Confederate flags were flown there or the City of Boston found with reference to Mr. Shurtleff’s Christian flag.

However, under the “government speech doctrine”, the City may, in accordance with a written policy creating meaningful involvement by the legislative body in the selection of the flags and the selectin of their message to advance its own government speech on flagpoles it controls- i.e. messages conveyed by flags - without requiring viewpoint neutrality, but will face other potential constraints on governmental speech, such as endorsing a religion or a political party under either the United States Constitution or California Constitution or laws.

### **Establishment Clause**

Government speech must still comply with the Establishment Clause.<sup>9</sup> In determining whether a governmental regulation or governmental speech impermissibly “establishes” religion, the United

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<sup>7</sup> (*Matal v. Tam* (2017) 137 S. Ct. 1744, 1758)

<sup>8</sup> *Surtleff et al. v City of Boston et al.* (2022) Docket No. 20-1800) 596 U.S. tbd

<sup>9</sup> (*Pleasant Grove City v. Sumnum*, 555 U.S. at 468)

States Supreme Court looks to the following factors:

- 1) Does the activity have a valid state secular purpose - does not endorse nor disapprove of religion;
- 2) Does the activity have a principal or primary effect that neither advances nor inhibits religion; and
- 3) Does the activity not foster an excessive government entanglement with religion<sup>10</sup>?

The governmental regulation on speech cannot have the purpose or effect of endorsing, favoring or promoting religion - or disapproving of religion.<sup>11</sup> If the City holds the position that flags on City flagpoles are government speech - i.e. the viewpoint of the City -- a flag waving on a City flagpole at City Hall would be attributed to the City as the speaker. Further, a flag of a religion or religious movement waving alongside two other powerful governmental symbols -- the flags of the United States and the State of California -would seem to send a strong message of endorsement.

There are historic examples of nonsecular references in governmental operations, such as the motto "In God We Trust" on American money; National Days of Prayer; and reference to "God" in the Pledge of Allegiance to the Flag.<sup>12</sup> These long-standing uses of nonsecular references to religious heritage are treated somewhat differently by the courts. However, a newly created "Christian flag" that has not been part of the religious heritage in the United States or California would arguably not be given the same deference. Further, California's broader legal separation of church and state would suggest even less deference to a new Christian flag flying from a City Hall flagpole. To that end, the Ninth Circuit has found that the Latin crosses on a city's official insignia violated the California Constitution's "no preference" clause.<sup>13</sup>

There have also been many cases regarding religious displays on public property that balance the question of avoiding a violation of the First Amendment's prohibition on the establishment of religion with the First Amendment's freedom of speech. These are fact-based determinations, typically in the context of a public forum (like a public park) or a limited public forum (like the entryway to a county courthouse) and not in the context of "governmental speech." If a religious display in a traditional public forum like a public park can violate the First Amendment's Establishment Clause and the California Constitution's additional "no preference" clause, then arguably a flagpole with a religious flag that the City is deeming not to be a public forum but government speech would cross the line of government endorsing religion.

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<sup>10</sup> (*Lemon v. Kurtzman* (1971) 403 U.S. 602)

<sup>11</sup> "Endorsement sends a message to nonadherent that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." (*Lynch v. Donnelly* (1984) 465 U.S. 668, 688-89 (O'Connor, J. concurring))

<sup>12</sup> (*Lynch v. Donnelly* (1984) 465 U.S. 688, 674-678) The United States Supreme Court described these as "illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." (*Lynch v. Donnelly* (1984) 465 U.S. 688, 677) In challenges to the motto on money, the federal Ninth Circuit Court held that the motto was not the establishment or sponsorship of religion, but "its use is of a patriotic or ceremonial character it is excluded from First Amendment significance because the motto has no theological or ritualistic impact." (*Newdow v. Lefevre* (9th Cir. 2007) 598 F 3d 638, 644 quoting *Aronow v. United States* (9th Cir. 1970) 432 F. 2d 242)).

<sup>13</sup> (*Ellis v City of La Mesa* (9th Cir 1993) 990 F2d 1518)

## **First Amendment's Free Exercise of Religion Clause**

As to the Free Exercise of Religion Clause of the First Amendment, courts evaluate the following factors in determining whether a governmental practice impermissibly interferes with the free exercise of religion<sup>14</sup>:

- 1) The magnitude of the statute's impact on the exercise of the religious belief;
- 2) The existence of a compelling state interest justifying the imposed burden on the exercise of the religious belief; and
- 3) The extent to which recognition of an exemption from the statute would impede the state's objectives.

A flag waving on a city flagpole does not impact the exercise of religion: it does not allow nor prohibit the free exercise of religion. People can practice religion - or not practice religion - regardless of whether there is a flag flying at City Hall. The City's interest in avoiding an Establishment Clause violation would arguably be compelling even if an argument could be made that not allowing flags of a religious movement somehow impacts the exercise of a religious belief.

## **Prohibition on Partisan Flags or Advocating a Certain Vote in an Election**

Under the government speech doctrine, the City may generally advance its own speech without requiring viewpoint neutrality, subject to Constitutional and other legal limits. In considering other categories of speech that would be problematic, a flag of a political party would seem to violate the nonpartisan nature of local elections.<sup>15</sup> Likewise, the use of City resources to make and fly a flag advocating a certain election result would likely violate the California Supreme Court's restriction on the use of public funds to assist the passage or defeat of a ballot measure.<sup>16</sup>

## **CONCLUSION**

Flagpoles on City property, including those at the City Hall, are not traditionally intended to serve as a forum for free speech by the public. Instead, and in accordance with a written policy, these flagpoles can be treated as a nonpublic forum used by the city for expressing its own governmental speech. Under the governmental speech doctrine, the City can choose to fly only the flags of the United States, State of California and the City. The City could also choose to fly commemorative flags; although, this would increase the risk of a legal challenge once decisions are made to fly some flags but not others. Nonetheless, the government speech doctrine supports the City Council advancing its own government speech on City flagpoles without requiring viewpoint neutrality, so long as the City Council does not endorse a flag of a religion or political party or a particular outcome in an election or any other prohibited subjects under federal or state law.

The attached policy (**"EXHIBIT A"**) complies with current legal and Constitutional restraints and would allow the City Council to select and display a Commemorative Flag.

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Layne Long  
City Manager  
City of Marina

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<sup>14</sup> (*Callahan v Woods* {9th Cir 1984} 736 F2d 1269, 1273, citing *EEOC v Pacific Press Publ'g Ass'n* (9th Cir 1982) 676 F2d 1272, 1279) (on the issue of whether plaintiff could obtain welfare benefits without a social security number because of his belief that numbers are "the mark of the Antichrist"))

<sup>15</sup> (*Cal. Elections Code* section 334)

<sup>16</sup> (*Stanson v. Mott* (1976) 17 Cal. 3d 206)

RESOLUTION NO. 2022-85

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA  
APPROVING A FLAGPOLE POLICY

**WHEREAS**, the City of Marina displays and handles all flags in accordance with Federal and State law, and

**WHEREAS**, the City does not have local rules or guidelines regarding the display of flags at City facilities and

**WHEREAS**, The City wishes to adopt a policy to provide clear guidelines about the display of flags at City facilities that declares that the City's flagpoles are not intended to be a forum for free expression by the public but rather are used to express official views of the City Council of the City, and

**WHEREAS**, said City facilities and flagpoles are under the exclusive control of the city and are not public forums for the free expression of the view of the public.

**NOW, THEREFORE, BE IT RESOLVED** that the City Council of the City of Marina does hereby:

1. Approve and adopt the policy for the display of flags at City facilities contained in Exhibit A attached hereto.

**PASSED AND ADOPTED** by the City Council of the City of Marina at a regular meeting duly held on the 21<sup>st</sup> of June 2022 by the following vote:

AYES, COUNCIL MEMBERS: Medina Dirksen, Burnett, Berkley, Biala, Delgado

NOES, COUNCIL MEMBERS: None

ABSENT, COUNCIL MEMBERS: None

ABSTAIN, COUNCIL MEMBERS: None

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Bruce C. Delgado, Mayor

ATTEST:

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Anita Sharp, Deputy City Clerk

## Exhibit A

### CITY OF MARINA POLICY FOR FLYING FLAGS AT CITY FACILITIES

It is the policy of the City of Marina that the City's flag poles are not intended to serve as a forum for free expression by the public but rather for the display of the Flags of the United States and the State of California. The flag poles located at all City facilities may also be used to display the flags of the City of Marina, Sister Cities, the existing POW Flag and any Commemorative Flags as may be authorized by the City Council as an expression of the City's official sentiments.

A Commemorative Flag under this policy means a flag that identifies with a specific date historical event, cause, nation or group of people, whereby the City honors or commemorates the date, event, cause, nation or people by flying the flag.

Commemorative Flags shall be displayed at City facilities only upon City Council direction, consistent with the City's vision, mission, and ongoing and strategic priorities.

The City of Marina may hold a ceremony for approved flag raising upon the first raising of the set flag.

#### PROCEDURE

In addition to the flags of the State of California and the United States of America, the City Council may, by resolution direct City staff to display any Commemorative Flag on the flag poles at City facilities as an expression of the City's official sentiments, for those dates and times and on those terms and conditions as set forth in the resolution. A majority vote of the Council will be required to establish a flag as a commemorative flag of the City of Marina.

Commemorative Flags shall be displayed for a period of time that is reasonable or customary for the subject that is to be commemorated, but no longer than 30 continuous days or one calendar month. No more than one commemorative flag shall be displayed in any given period. This Policy shall remain in effect until modified by the City Council.