

No. 25-1356

In the United States Court of Appeals for the First Circuit

STEPHEN SCAER; BETHANY R. SCAER,

Plaintiffs - Appellants,

v.

CITY OF NASHUA, NEW HAMPSHIRE; JAMES W. DONCHESS, Mayor, City of
Nashua, New Hampshire, in their official and individual capacities;
JENNIFER L. DESHAIES, Risk Manager, City of Nashua, New Hampshire,
in their official and individual capacities,

Defendants - Appellees.

Appeal from an order of the United States District Court
for the District of New Hampshire, The Hon. Landya B. McCafferty
(Dist. Ct. No. 1:24-cv-00277-LM-TSM)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Roy S. McCandless
ROY S. MCCANDLESS, ESQ., PLLC
125 North State Street
Concord, New Hampshire 03301
(603) 841-3671, Ext. 101
roysmccandless@gmail.com

Nathan J. Ristuccia
Endel Kolde
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave, NW
Suite 801
Washington, DC 20036
202-301-3300
nristuccia@ifs.org
dkolde@ifs.org

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Counsel for Plaintiffs-Appellants

DISCLOSURE STATEMENT

Stephen Scaer and Bethany Scaer are natural persons with no parent corporations or stockholders.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiffs-Appellants Stephen and Bethany Scaer respectfully request oral argument. The City of Nashua discriminates against disfavored viewpoints in a limited public forum and manipulates government-speech doctrine to justify this discrimination. Oral argument would be helpful in this appeal, because it would assist the Court in understanding and deciding the weighty First Amendment issues presented in this case regarding the proper extent of government-speech doctrine and eliminating the danger of governments abusing this doctrine as a subterfuge for favoring certain private speakers over others based on viewpoint.

JURISDICTIONAL STATEMENT

(a) The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the First and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

(b) Plaintiffs Stephen and Bethany Scaer are individuals and citizens of Nashua, New Hampshire. Defendant, the City of Nashua, is a local government entity situated in New Hampshire. Defendants James Donchess and Jennifer Deshaies are officers of the City of Nashua.

(c) Plaintiffs Beth and Stephen Scaer appeal from the district court's order adopting the magistrate judge's December 16, 2024 report and recommendation and denying their motion for preliminary injunction. *See* Add.1, 37. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).

(d) The order appealed from was entered on March 28, 2025. Add.37. Plaintiffs filed their notice of appeal from the order on April 4, 2025. App.156-157; *see also Calvary Chapel of Bangor v. Mills*, 984 F.3d 21, 28 (1st Cir. 2020) (denial of a preliminary injunction immediately appealable). The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether governments may avoid First Amendment limits in regulating speech by adopting it as government speech, without acquiring any property interest or permanent possessory interest over that private speech?

2. Whether a government speaks or merely regulates private speech when it uses its final approval authority to permit or to prohibit the display of certain messages on government property, without shaping or altering the content of those messages?

3. Whether Plaintiffs are likely to succeed in their claim that the City of Nashua's policies and practices regarding flags displayed on its Citizen Flag Pole and flag-raising ceremonies conducted on its City Hall Plaza constitute viewpoint discrimination, or are vague, overbroad, or effect a prior restraint on speech?

4. Whether Plaintiffs are entitled to a preliminary injunction against those policies and practices?

INTRODUCTION

Nashua officials believe that they can manipulate government-speech doctrine to subsidize viewpoints that they like and discriminate against citizens whose views they disfavor. The City has sought to maintain a Citizen Flag Pole in front of city hall as a forum for favored constituents, while using its written policies to create a superficial appearance of compliance with controlling precedent. But the city discriminates against minority and dissenting views—exactly those views that need First Amendment protection.

Nashua reserves the Citizen Flag Pole for citizens to fly flags expressing messages important to them—to support their cultural heritage, observe an anniversary, honor an accomplishment, or advocate a cause. The pole has thus flown flags celebrating a wide variety of causes. But having established the Citizen Flag Pole as a platform for private speech, Defendants cannot now deny access to this forum to people whose viewpoints they find unacceptable.

Since May 2022, however, Nashua has done this explicitly. It only permits flags and flag-raising ceremonies whose message Nashua “wishes to express and endorse”—speech that is “in harmony with city policies and messages” and in “the City’s best interest.” Furthermore, Nashua’s 2022 flag policy lacks any objective criteria for evaluating flag applications and gives officials unbounded discretion to chill the speech of citizens they disagree with. The city has repeatedly rejected flags

proposed by Plaintiffs Bethany and Stephen Scaer—critics of Nashua’s political leaders. Nashua’s policies are unconstitutionally vague, overbroad, and arbitrary prior restraints.

The district court below correctly held that the motion for preliminary injunction is not moot and that the material facts in this case are not subject to dispute. But the court erred when it held that the flags on the Citizen Flag Pole are government speech and thus declined to enjoin Nashua’s unconstitutional policies and practices. The district court ignored precedent and allowed Nashua to adopt speech by merely exercising final approval authority over that speech. This Court should reverse.

STATEMENT OF THE CASE

A. The Citizen Flag Pole on Nashua’s City Hall Plaza

The material facts of this case are “undisputed.” Add.3, 37. Until October 2024 (a month after the filing of this lawsuit), Nashua permitted people to apply to display flags on a specific pole on the plaza in front of city hall. Add.4. The Nashua community refers to this pole as the “Citizen Flag Pole,” a title that Defendants themselves used at least as recently as December 2023. *See, e.g.*, App.42, 53, 89, 91-92, 99, 102, 104, 117. The Citizen Flag Pole is reserved for “persons to fly a flag in support of cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause.” App.56, 62.

Before May 2022, Nashua had no written policy limiting what people could display on the Citizen Flag Pole. Add.4-5. Those wishing to use the pole had to submit a Special Events Application, provide the physical flag (which remained the applicant's property), pledge to abide by local ordinances, and indemnify the city in the event of damage. Add.5; App.60-61. Nashua never refused to fly any flag prior to October 2020. *See* Add.12; App.44-45, 48.

Short ceremonies on City Hall Plaza often accompanied flag raisings. App.34-35, 42-43. At least until October 2024, Applicants wishing to hold a flag-raising ceremony on City Hall Plaza—or, indeed, any event on the plaza—applied using the same procedures and the same Special Events Application as for flag applications. Add.5; App.60-61. Local politicians sometimes attended flag-raising ceremonies, spoke at them, or used them as an opportunity to interact with constituents. Add.5; App.34-35. Other flags, however, were raised by the applicants themselves, without ceremony or with a ceremony attended only by private citizens and no city officials. *See* App. 34, 36, 42-43, 45, 47. Examples of flags flown include flags celebrating Indian Independence Day, Brazilian Independence Day, Kurdistan, Francophonie, Christianity, Lutheranism, Pride Month, the Libertarian Party, the Lions Club, and organ donation. Add.5-6.

B. The creation of the 2022 Flag Pole Policy

On May 11, 2022—just over a week after the Supreme Court’s unanimous decision in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), curtailing the government speech doctrine in the context of another citizen’s flag pole—Nashua issued a written flag policy. Add.9. The new policy stated:

A flag pole in front of City Hall may be provided for use by persons to fly a flag in support of cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause. Any group wishing to fly a flag must provide the flag. This potential use of a City flag pole is not intended to serve as a forum for free expression by the public. Any message sought to be permitted will be allowed only if it is in harmony with city policies and messages that the city wishes to express and endorse. This policy recognizes that a flag flown in front of City Hall will be deemed by many as City support for the sentiment thereby expressed, city administration reserves the right to deny permission or remove any flag it considers contrary to the City’s best interest.

App.62. Nashua’s website added almost identical language and criteria to regulate applications for events on City Hall Plaza, such as flag-raising ceremonies. *Compare* App.56 *with* App.53.

Around the same time, Nashua also revised its Special Events Procedure to include a section describing flag applications. Add.9. The revised Procedures state, in part:

Requests to fly a flag shall be made to the Risk Manager or designee and will be evaluated in accordance with the City’s

flag pole policy. Applications shall include a photograph of the flag proposed and an explanation of the message intended to be conveyed. No single organization or agency shall monopolize the City flag pole.

A. The Special Event Application (SEACH2022) should be completed in its entirety and shall be subject to review and approval of the Risk Manager. The Risk Manager reserves the right to decline any non-compliant application for use of the City flag pole for a given day or time period.

App.64. Nashua's Risk Manager and others in the mayor's office decide which flags to approve, without consulting the Board of Aldermen. *See, e.g.,* App.71, 122. Rejected applicants may appeal to the mayor. *See, e.g.,* App.68-69.

C. The Scaers' applications to fly flags and conduct flag-raising ceremonies

Nashua resident Bethany Scaer first applied to display a flag on the Citizen Flag Pole in October 2017 and was permitted to raise the Luther Rose Flag in honor of the 500th anniversary of the Protestant Reformation. Add.6. Beth provided a flag she owned, raised it on the pole herself, and organized a small ceremony attended by approximately six people, none of whom represented the city. App.35, 45. Beth has also been permitted to fly her Lutheran Flag again in April 2021, a flag honoring the ratification of the Nineteenth Amendment in August 2021, and the Christian Flag in April 2024. Add.7-8, 11; App.35-36, 45, 47. Small ceremonies—attended by fewer than a dozen people—

accompanied each of these flag raisings, but no city officials attended any of them. Add.7-8, 11.

In 2020, Beth received permission to raise a Save Women's Sports flag, which expresses her viewpoint that allowing biological males to compete in women's sports denies women their rights and the equality due them under the Constitution and Title IX. Add.6-7; App.36, 45, 50-51, 77. Beth planned to fly the flag from October 10 to October 16 and hold a fundraiser at the end of that week. App.45. She raised the flag, but a day into that week, Nashua revoked its permission and took the flag down after people complained that the flag was "transphobic." Add.6-7; App.66. Scaer appealed to Mayor Donchess, but the city refused to allow the flag, relying on *Shurtleff v. City of Boston*, 928 F.3d 166 (1st Cir. 2019). App.46, 67. After the Supreme Court overturned this Court's *Shurtleff* decision, Beth and a friend both applied to fly different versions of the Save Women's Sports flag, but Defendants again refused to allow it. Add.10.

On February 7, 2024, Stephen Scaer, Beth's husband, applied to hold a flag-raising ceremony and display the Detransitioner Awareness Flag, in remembrance of Detrans Awareness Day on March 12. Add.10-11; App.73, 77. The Detransitioner Awareness Flag celebrates the bravery that gender detransitioners show by enduring threats, ridicule, discrimination, and often painful and expensive medical care to live according to their biological sex. App.37-38. On February 14, Defendant

Deshaies denied Stephen’s application because the Detransitioner Awareness Flag supposedly “is not in harmony with the message that the City wishes to express and endorse,” and Defendant Donchess upheld that denial on appeal. App.74-76.

On May 27, 2024, Beth applied to the fly the Pine Tree Flag and hold a flag-raising ceremony to commemorate the Nashua soldiers who fought and died at the Battle of Bunker Hill (fought June 17, 1775). Add.11; App.69-70. The Pine Tree Flag is a traditional American emblem, carried by New England troops during the early years of the American Revolution, and is still flown throughout New Hampshire due to the flag’s importance in the state’s history. App.49, 71-72, 78. Beth wanted to raise the flag in celebration of the political ideas of the American Revolution, such as limited government, divinely endowed rights, and the right of the people to rebel against tyranny. App.49-50. Defendant Deshaies denied Beth’s application, stating that the Pine Tree Flag “is not in harmony with the message that the City wishes to express and endorse.” App.70. Defendant Donchess upheld that denial on appeal. App.68.

D. Nashua’s repeal of the 2022 Flag Pole Policy

On September 6, 2024, Plaintiffs filed this lawsuit and moved for a preliminary injunction. App.3, 9. On October 7—three days before Defendants filed their opposition brief—Defendant Mayor Donchess

repealed all previous flag policies and adopted a new policy. Add.12-13. The 2024 policy states that flagpoles “shall henceforth be exclusively controlled by city government” and that Nashua “does not seek input from other sources” about what to fly. App.81. But Nashua continued to use a City Hall Plaza Events policy with language almost identical to the defunct 2022 flag policy. Add.18 n.7; App.62, 112. And as of the November 2024 oral argument, Nashua’s Special Events Procedure and Special Events Application also remained unchanged, and both still referred to private requests to fly flags. *See* App.64, 85, 112, 133:17-135:13.¹

E. The on-going chilling of the Scaers’ speech rights

Plaintiffs intend to fly a variety of flags expressing their political viewpoints on the Citizen Flag Pole, if Defendants would allow it. Add.13. If given permission, for instance, the Scaers would fly the Pine Tree Flag on the anniversary of Bunker Hill, the Save Women’s Sports Flag for the anniversary of Title IX, the Detransitioner Awareness Flag for Detrans Awareness Day in March, and the Pro-Life Flag for the anniversary of the Supreme Court’s *Dobbs* decision. App.38-39, 50-51. Even if she cannot fly flags and organize flag raisings in the future,

¹ This Court may take judicial notice that sometime after oral argument, Nashua removed the 2022 Special Events Procedure and 2022 Special Events Applications from its website and replaced them with revised versions of these documents. *See* <https://www.nashuanh.gov/543/City-Hall-Plaza-Events>.

Beth Scaer still intends to apply to hold ceremonies at City Hall Plaza in support of the causes that are important to her. Add.13; App.85-86. Plaintiffs find it frustrating and degrading to have their applications denied, while other residents—whose views find favor with a majority of Nashua residents or at least are not offensive to them—are allowed to promote their viewpoints. App.39-40, 51-52. Absent injunctive relief, the Scaers expect to make fewer or different applications. Add.13; App.39-40, 51-52.

F. District court proceedings

On November 5, 2024, the magistrate judge heard oral argument on the requested preliminary injunction. *See* Add.2, 128. The magistrate judge issued a report and recommendation (“the Report”) about this motion on December 16. Add.36. The Report found that the preliminary injunction was not moot, because Defendants failed to demonstrate that the 2022 Flag Pole Policy would not be reinstated, as the voluntary cessation doctrine requires. Add.15-18.

The Report, however, concluded that Plaintiffs were unlikely to succeed on the merits and recommended denial of the preliminary injunction. Add.35. According to the Report, two of the three main factors (history and control) used in government-speech doctrine weighed in favor of the City of Nashua’s position and one (public perception) favored neither party. Add.20, 25, 29. As a result, the

Report considered the flags displayed on the Citizen Flag Pole under the 2022 Flag Pole Policy to be government speech. Add.35.

Plaintiffs objected to the Report, *see* App.7, but the district court approved it on March 28, 2025, Add.37. The district court found that “[f]or the reasons explained in the Report and Recommendation,” Plaintiffs had failed to demonstrate a likelihood of success on the merits. *Id.* According to the district court, application of the government-speech factors to “the undisputed facts” showed that “the flags displayed on the Citizen Flag Pole pursuant to Nashua’s 2022 Flagpole Policy constituted government speech.” *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the denial of a preliminary injunction because Plaintiffs have demonstrated that they are likely to succeed on the merits. The City of Nashua has abused the government-speech doctrine into a subterfuge for favoring certain private speakers over others based on viewpoint.

The district court applied the wrong legal standard to the undisputed facts. According to the district court, all the flags expressing diverse and even conflicting messages that have flown on the Citizen Flag Pole since May 2022 have been government speech. But to reach this conclusion, the district court had to ignore the Supreme Court’s warnings about the narrow bounds of government-speech doctrine and to extend improperly

the government-speech doctrine by allowing Nashua to adopt speech by merely affixing a seal of approval.

The history of the Citizen Flag Pole, the public's perception of this pole, and Nashua's failure to shape and control the messages conveyed by flags and flag-raising ceremonies all demonstrate that the Citizen Flag Pole and City Hall Plaza in general are fora for both government speech *and* private citizen speech—not outlets reserved exclusively for the government's own voice. Nashua does not shape or edit the message of flags or flag-raising ceremonies and acquires no property or permanent possessory interest over these flags. Instead, Nashua merely has final approval authority over flags and ceremonies—which is insufficient as a matter of law under binding precedent.

Applying the correct legal standard, Plaintiffs Beth and Stephen Scaer proved their entitlement to a preliminary injunction. Constitutional harm is always irreparable—no matter how small or short in duration. And when free speech rights are at stake, the equities tip in favor of protecting those rights. This Court should reverse the district court's denial of the preliminary injunction as contrary to law.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a preliminary injunction denial for abuse of discretion, reviewing the district court's factual findings for clear error but its legal conclusions de novo. *Together Emps. v. Mass Gen. Brigham*

Inc., 32 F.4th 82, 85 (1st Cir. 2022). Mixed questions of law and fact are reviewed de novo. *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 32 (1st Cir. 2008). A material error of law is necessarily an abuse of discretion. *IDC Props., Inc. v. Chi. Title Ins. Co.*, 42 F.4th 1, 12 (1st Cir. 2022).

Moreover, because First Amendment interests are implicated, this Court has an obligation to perform a more searching review and independently reexamine the whole factual record to ensure that the district court's judgment does not unlawfully intrude on free expression. *L.M. v. Town of Middleborough*, 103 F.4th 854, 866 (1st Cir. 2024); *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 (1st Cir. 2002). Thus, the district court's factual findings pertaining to Plaintiffs' First Amendment rights are not entitled to deference. *Hurley v. Irish-American Gay*, 515 U.S. 557, 567-68 (1995) (“[O]ur review of petitioners’ claim . . . of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court”).

The material facts of this case are undisputed. *See* Add.3, 37. Only the legal conclusions to be drawn from these factual findings are disputed.

II. PRELIMINARY INJUNCTION STANDARD

When assessing a request for a preliminary injunction, a court must consider: (1) the likelihood of success on the merits; (2) the likelihood of

irreparable harm; (3) the balance of equities; and (4) whether the injunction is in the public interest. *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 22 (1st Cir. 2020). “In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.” *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012).

Once Plaintiffs show that state action infringes on their First Amendment rights, the burden shifts to the government to justify its restriction on speech under the appropriate constitutional standard. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Nashua repeatedly denied Plaintiffs the right to express their sociopolitical messages on terms equal to citizens favored by Nashua officials. Thus, it is Nashua’s burden to show that its restrictions are constitutional.

III. THE DISTRICT COURT IMPROPERLY EXTENDED THE GOVERNMENT-SPEECH DOCTRINE, DESPITE THE SUPREME COURT’S WARNINGS AGAINST DOING SO.

A. The Supreme Court warned that the government-speech doctrine should not be expanded beyond *Walker*’s limits

The Supreme Court has repeatedly admonished courts not to extend the government-speech doctrine beyond the narrow limits it has established. Because the government-speech doctrine “is susceptible to dangerous misuse,” even the Supreme Court “must exercise great

caution before extending [its] government-speech precedents.” *Matal v. Tam*, 582 U.S. 218, 235 (2017).

Broad construal of the doctrine threatens to destroy free expression on government property. The Court holds a “legitimate concern” that governments might abuse “government speech doctrine . . . as a subterfuge for favoring certain private speakers over others based on viewpoint.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009). “If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.” *Tam*, 582 U.S. at 235. Thus, courts must “prevent the government-speech doctrine from being used as a cover for censorship,” which would permit governments to “surreptitiously engage[] in the regulation of private speech.” *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) (internal quotation marks omitted).

To safeguard against misuse, the Supreme Court has stated that the facts of one case, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200 (2015), “likely mark[] the outer bounds of the government-speech doctrine.” *Tam*, 582 U. S. at 239. Courts must be “[m]indful” of *Walker*’s limits and ensure “the speech at issue falls within those bounds.” *Shurtleff v. City of Bos.*, 986 F.3d 78, 88 (1st Cir. 2021), *rev’d*, 596 U.S. 243 (flagpole program beyond bounds of government-speech doctrine). Unless the evidence demonstrating that

government is speaking is at least as strong as it was in *Walker*, courts should avoid extending the government-speech doctrine and find the speech at issue private.

Walker concerned a category of “specialty” vehicle licenses, which Texas drivers could use for an annual fee and which state law distinguished from “personalized” vanity plates (also available in Texas). 576 U.S. at 204. The Supreme Court held that the designs on specialty plates were government speech, because the Texas state government “actively exercised” its “sole control over the design, typeface, color, and alphanumeric pattern” on the plates and had rejected over a dozen designs. *Id.* at 213.

Furthermore, the Court stressed that Texas acquired and maintained its property interest over these designs. Texas “own[ed]” the plates and designs on them, issued the plates, mandated drivers display them, used images and slogans in the designs to promote tourism and local industries, placed “Texas” in large letters at the top of each plate, required drivers to return unused plates to Texas, and treated the plates as “essentially, government IDs.” *Id.* at 211-13. The designs were government speech because they were part of “government-mandated, government-controlled, and government-issued IDs.” *Id.* at 214. As several justices have emphasized, *Walker*’s “expansive understanding of government speech by adoption should be confined to government-

issued IDs” and does not apply to other contexts, such as flag poles.

Shurtleff, 596 U.S. at 271 n.3 (Alito, J. concurring).

In the decade since *Walker*, federal courts have repeatedly considered the question that *Walker* left open: whether the alphanumeric text on vanity license plates is also government speech. *Overington v. Fisher*, 733 F. Supp. 3d 339, 345 (D. Del. 2024) (collecting cases). And, with one exception, every federal court has concluded that vanity plates are private speech, even though states have regulatory control and final approval authority over these plates. *See, e.g.*, *Overington*, 733 F. Supp. at 346-47; *Ogilvie v. Gordon*, No. 20-cv-01707, 2020 U.S. Dist. LEXIS 259377, at *8 (N.D. Cal. July 8, 2020); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019); *Kotler v. Webb*, No. CV 19-2682, 2019 U.S. Dist. LEXIS 161118, at *20, *24 (C.D. Cal. Aug. 29, 2019); *but see Odquina v. City & Cnty. of Honolulu*, No. 22-cv-407, 2022 U.S. Dist. LEXIS 201175, at *33 (D. Haw. Nov. 4, 2022) (“disagree[ing] with the reasoning” in these cases), *aff’d on other grounds*, No. 22-16844, 2023 U.S. App. LEXIS 16323 (9th Cir. June 28, 2023).

These courts refused to “expand the governmental speech doctrine beyond the ‘outer bounds’ set forth in *Walker*.” *Kotler*, 2019 U.S. Dist. LEXIS 161118, at *24; *see also Carroll*, 494 F. Supp. 3d at 166 (concluding that “*Walker* has no applicability here” as vanity plates are beyond its “outer bounds”). The flags here are highly analogous to

vanity license plates, as discussed below. Vanity plates as well as the flags on the Citizen Flag Pole have nothing in common with “government-mandated, government-controlled, and government-issued IDs.” *Walker*, 576 U. S. at 214. This district court ought to have followed these other courts’ example by adhering to *Walker*’s outer bounds, as the Supreme Court commanded.

- B. The district court’s decision reduces *Shurtleff*’s fact-intensive holistic test into a mechanical rule focused on a single factor

The district court held that “the flags displayed on the Citizen Flag Pole pursuant to Nashua’s 2022 Flagpole Policy constituted government speech” for “the reasons explained in the Report and Recommendation.” Add.37. The court “approve[d]” the Report and commended its application of “the factors from *Shurtleff v. City of Boston*.” Add.37.

Courts properly draw the “boundary between government speech and private expression” through “a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression.” *Shurtleff*, 596 U.S. at 252. The Supreme Court scrutinizes three main factors: “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.” *Id.* But government-speech doctrine is “not mechanical” and is “driven by a case’s context

rather than the rote application of rigid factors.” *Id.*; *see also id.* at 263 (Alito, J., concurring) (stressing that it is “a fact-bound totality-of-the-circumstances inquiry” as the three main factors are not “an exhaustive list” and “considered in isolation . . . can lead a court astray.”); *Walker*, 576 U. S., at 209-10 (using the three factors along with “other relevant considerations”).

The district court’s decision, however, exemplifies the “mechanical” application of three factors that the Supreme Court rejects. *See Shurtleff*, 596 U.S. at 252. Relevant considerations not fitting easily into these three factors—such as Plaintiffs’ Establishment Clause argument or analogy to vanity plates—were dismissed in short footnotes, virtually devoid of reasoning. *See Add.28 n.8, 33 n.10.* Indeed, the court’s analysis rests almost entirely on a single factor from *Shurtleff*: shaping and control. *See Add.29-34.*

The court expressly found that “the public perception factor favors neither party.” Add.28. As for history, the court collapsed that factor into shaping and control. The *Shurtleff* decision made it clear that the history factor looks at the “general history” of flag-flying in Boston and elsewhere, and the court “examine[d] the details of *this* flag-flying program” only when it moved on to the other two factors. *Shurtleff*, 596 U.S. at 253, 255. Defendants rejected all three flag applications at issue under Nashua’s defunct 2022 flag policy. *See Add.1-2, 10-11.* According to the Supreme Court’s instructions, then, the history factor ought to

scrutinize events *preceding* the creation of flag-flying program at issue—that is, prior to May 2022.

The district court, however, virtually equated “history” with “shaping or control” from May 2022 onward. Indeed, forms of the words “shape” or “control” appear eight times in the part of the approved Report supposedly devoted to the history factor. *See* Add.22-25. The court found that the City of Nashua ran the Citizen Flag Pole for at least five years—from 2017 until May 2022—“as a forum for private speech” and that “there is no evidence that Nashua participated in the selection of the flags displayed on the flagpole or that it intended to use the Citizen Flag Pole to promote its own messages or policies” during that time period. Add.22, 25. But the court concluded that in May 2022 Nashua changed the Citizen Flag Pole “from a vehicle for private speech into a means of conveying government-approved messages” in direct reaction to the Supreme Court’s decision in *Shurtleff*. Add.24. According to the district court’s analysis of the history factor, before May 2022 Nashua had not “made much of an effort to shape and control the nature of the speech,” but afterwards the city created a new policy and procedures “to control the messages conveyed” and “exerted increasing control over the flags.” Add.23-24.

The court’s assessment of “history” factor, then, turned upon the extent of shaping and control during the two years prior to the filing of this lawsuit—the period when Defendants operated the 2022 policy and

rejected Plaintiffs’ three flag applications at issue. The court double-counted. Because the shaping and control factor depended on the same evidence as the history factor, *see* Add.29-34, the history factor became redundant and circular reasoning. As applied by the district court, government-speech doctrine is not a holistic inquiry driven by case context but a rote application of a single factor: shaping and control.

- C. Adopting private speech requires the government to acquire a property interest, not merely to approve speech that fits criteria

This narrow and mechanical application of *Shurtleff* is erroneous. Worse still, the court’s application of the shaping and control factor extends government-speech doctrine beyond *Walker*’s bounds, even though the Supreme Court warned against this. In accepting the Report’s reasoning, the district court committed a fundamental error of law and wrongly equated the city’s “final approval authority” over a private citizen’s application to use the Citizen Flag Pole with adopting the flags on that pole as the city’s own speech. *See* Add.29, 31. Adopting speech, however, requires the government to gain a property interest or permanent possessory interest in the speech.

According to the court’s misreading, *Walker* stands for the proposition that the “state ‘effectively controlled’ the messages conveyed by specialty license plates ‘by exercising final approval authority over their selection.’” Add.29 (quoting *Walker*, 576 U.S. at 213). Although

Walker mentions final approval authority, *see* 576 U.S. at 213, it never suggested such authority suffices. Rather, it discussed final authority at the same time as describing how Texas actively exercised its “sole control over the design, typeface, color, and alphanumeric pattern for all license plates,” took “ownership of each specialty plate design,” and used the plates “as a form of government ID.” 576 U.S. at 213, 216. “These features” together demonstrated that Texas had adopted “the speech on *its* plates.” *Id.* at 216 (emphasis added). Unlike *Nashua*, Texas did not just approve the speech at issue; it altered that speech and acquired a property interest over the speech.

Approving private speech that fits some criteria without altering it does not adopt that speech as the government’s. As *Tam* expressly held, private speech cannot “be passed off as government speech by simply affixing a government seal of approval,” even if final approval requires satisfying the government’s stringent criteria. 582 U.S. at 227-28, 235 (describing the criteria for approval used by the Patent and Trademark Office). “[T]he mere fact that government authorizes, approves, or licenses certain conduct does *not* transform the speech engaged therein into government speech.” *New Hope Family Servs. v. Poole*, 966 F.3d 145, 171 (2d Cir. 2020) (citing *Tam* and other cases). “For the adopted expression to qualify as the government’s, the private party must alienate control over the medium of expression to the government” so that the government “took ownership,” and “that alienation must be

voluntary.” *Shurtleff*, 596 U.S. at 270-71 (Alito, J. concurring) (characterizing the holdings of *Tam* and *Summum*). Unless there is voluntary alienation of the medium, “the government is simply providing a forum.” *Shurtleff*, 596 U.S. at 271 (Alito, J. concurring).

Strikingly, the approved Report mentions *Tam* only once and ignores its clear holding about what is necessary to adopt speech, *see* Add.23, even though Plaintiffs’ briefing repeatedly discussed *Tam*. *See, e.g.*, Dist. Ct. ECF No. 2 (Pls.’ Br.) at 9-11; Dist. Ct. ECF No. 26 (Pls.’ Reply) at 3-5. Yet the court concluded that “the City did not take ownership of the flags, which remained the property of their owners.” Add.31. And, unlike Texas in *Walker*, Nashua does not have sole control over the flags’ design, iconography, text, and raising ceremonies, nor do the flags serve as government IDs. *See* App.35-36, 43, 64.

The flags displayed on the Citizen Flag Pole are nothing like the specialty license plates in *Walker*, although the district court failed to acknowledge this, *see* Add.29-30. Rather, the flags are similar to vanity plates, which federal courts have repeatedly held constitute private speech. *See, e.g., Overington*, 733 F. Supp. 3d at 345; *Carroll*, 494 F. Supp. 3d at 165-66; *Hart*, 422 F. Supp. 3d at 1233.

The district court never distinguished these cases or explained why the flags are not analogous to vanity license plates. *See* Add.33 n.10. In truth, they are highly analogous. Just like Nashua, states evaluate vanity plate applications using pre-existing written criteria and have

final approval authority over plates, but states do not design the plates or edit their messages. *See, e.g., Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 923-24 (N.D. Cal. 2020) (setting forth the procedure and criteria for approval); *Carroll*, 494 F. Supp. 3d at 163-64 (similar); *Hart*, 422 F. Supp. 3d at 1230 (similar).

Like drivers applying for vanity plates, flag applicants design the message, present finished designs to the government for approval or rejection only, and sometimes speak messages on the flag or during its flag-raising ceremony that are politically controversial or inappropriate for a local government. *See Add.5-6, 9, 27-28*. Indeed, Nashua exercises even less control over the flags than states do over vanity plates, because states at least own the metal of the plate itself and order drivers to physically return the plate, once the driver is done using it. *See, e.g., Ogilvie*, 540 F. Supp. at 924; *Carroll*, 494 F. Supp. 3d at 164-65. In contrast, flag applicants own the flags, provide flags to the city for short periods, and decide how to dispose of the flag once its time on the pole is over. *See Add.5-6, 9, 27-28*. The Scaers and the other applicants did not voluntarily alienate control of their flags by giving Nashua a property interest or a permanent possessory interest over these flags.

This Court should follow the Supreme Court's instruction, heed *Walker's* limits, and acknowledge that the flags on the Citizen Flag Pole are private speech.

IV. THE DISTRICT COURT MISAPPLIED *SHURTLEFF* AND SO CONFUSED GOVERNMENT SPEECH WITH THE MERE REGULATION OF PRIVATE SPEECH

A. The district court recognized that, for years, Nashua used the Citizen Flag Pole as a forum for the private speech of citizens

Even if the district court had not extended *Walker* contrary to the Supreme Court’s warning, it made a second error of law which alone necessitates reversal. The district court misapplied the three main factors in government speech analysis. The district court overvalued Nashua’s self-serving characterization in its official documents that the flags on the Citizen Flag Pole are government speech and undervalued the real workings of the flag program in practice.

First Amendment analysis “turn[s] on the substance . . . not on the presence or absence of magic words,” lest Supreme Court decisions “be rendered essentially meaningless.” *Carson v. Makin*, 596 U.S. 767, 785-84 (2022); *see also Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 53 n.27 (1st Cir. 2011). “To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker,” rather than on the language of formal policies. *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring).

As the court found, Nashua treated the Citizen Flag Pole “as a forum for private speech” for years. Add.25. Until October 2020, the city never rejected a proposed flag and, until May 2022, the city had no written

flag policy. Add.12; App.44, 48. Even the Save Women’s Sports Flag was originally approved and flew for a day, until the heckler’s veto prevailed. Add.6-7; App.45-46, 66. After Nashua removed Beth Scaer’s flag, the city justified its action by citing a now-overruled precedent that misconstrued government-speech doctrine. Add.7; App.67; *cf. Shurtleff*, 596 U.S. at 251, 259.

Until May 2022, “Nashua officials asserted almost no control over the flags displayed” and did not “use the Citizen Flag Pole to promote its own messages or policies.” Add.22. As the Report found, during the years from 2017 to 2022, “there is little evidence to suggest that the flags conveyed any government messages.” Add.22-23. Instead, like other municipalities—notably Boston, *see Shurtleff*, 596 U.S.—Nashua ran the Citizen Flag Pole in these years as a limited public forum for the speech of citizens. *See* Add.23 (calling the pole during this time “a means for private expression”).

B. Nashua’s 2022 policy did not interrupt this years-long history of private speech on the Citizen Flag Pole

Nashua’s adoption of the 2022 Flag Pole Policy in May 2022 did not alter the historical purpose of the forum. “The world is not made brand new every morning . . . reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005) (cleaned up). As a result, the Supreme Court has held

that when—as in this case—a government successively changes the policies governing a forum, earlier policies continue to affect the interpretation of later policies and the meaning of what is displayed. *Id.* at 868, 871. “[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law.” *Id.* at 874.

Far from a radical break with Nashua’s older treatment of the flag pole, the 2022 Flag Pole Policy and its accompanying Special Events Procedures altered little in practice. Although Nashua insists that all flags on the Citizen Flag Pole and all events on City Hall Plaza are government speech, Nashua merely added magic words to their policies about how the pole and the plaza are “not intended to serve as a forum for free expression by the public.” App.56, 62, 112.

Ceremonies at City Hall Plaza often accompany flag raisings, and applicants like the Scaers wishing to hold such a ceremony must provide details about both the flag and the ceremony raising it in a single Special Events Application. Add.5; *see also* App.43, 47, 64, 70. Nashua’s revised 2022 policies, thus, empowered city officials to reject applications to display flags or hold any “event in front of City Hall”—whether it featured a flag raising or not—if officials deemed that flag or event “contrary to the City’s best interest” or not “in harmony with city policies and messages that the city wishes to express and endorse.” Add.18 n.7.

Despite the presence of these magic words, the substance of the flag program did not change. Both before and after the formation of 2022 policy, Defendants and the Nashua community called this pole the “Citizen Flag Pole.” *See, e.g.*, App.42, 89, 91-92, 99, 102, 104, 117. This name enshrines the pole’s original purpose, as formerly stated on Nashua’s website: to “reserve[]” a “pole in front of City Hall . . . for the *citizens* of Nashua to fly a flag in support of *their* cultural heritage, observe an anniversary or honor a special accomplishment.” App.53 (emphasis added); *see also* Add.22. Much of this language appears unaltered in the 2022 policy. *See* App.62.

After the creation of the 2022 policy and even after that 2022 policy was replaced with Nashua’s 2024 policy, Nashua’s Event Procedures, on its website, stated that “[n]o single organization or agency shall monopolize the City flag pole” nor “shall monopolize the use of City Hall Plaza.” App.63-64. The Report never discussed this language, although Plaintiffs highlighted it in their brief. *See* Dist. Ct. ECF No. 2 (Pls.’ Br.) at 4, 11. If the flags on the pole and flag-raising events in City Hall Plaza were exclusively government speech, then by definition a single organization—the Nashua city government—monopolizes the flag pole and events on City Hall Plaza in general. As a result, this language in the city’s own procedures shows that the pole and plaza were fora for expression by non-city organizations and agencies. Nashua’s Event Procedure only has to prohibit monopolizing because flags and

ceremonies are the speech of the applicants. Such a provision would be unnecessary if they were the city's own speech.

Both before and after the formation of the 2022 policy, moreover, Nashua flew flags and permitted flag-raising ceremonies that expressed controversial messages that the city doubtless does not endorse. *See* App.45, 47-48. In May 2024, for instance, Nashua permitted a group to fly the Christian Flag during Holy Week and conduct a flag-raising ceremony in which speakers criticized Nashua and advocated reclaiming America for Jesus Christ. Add.11. Yet, according to Nashua's 2022 policies, that explicitly Christian flag and ceremony were both government speech. *See* App.56, 62.

Likewise, Nashua's counsel admitted that the city permits the display of allegedly somewhat controversial flags, such as the Progress Pride Flag, but insisted that extremely controversial flags, such as the Israeli or Palestinian flags, are not permitted. App.158:11-17, 161:7-162:13; *see also* App.44, 52, 127. Including or excluding flags based on their level of controversy is a viewpoint-based distinction—which is unconstitutional—and thus Nashua has a history of making such illegal distinctions, as it has done here.²

² As discussed below, government restrictions on speech in both limited public fora and nonpublic fora must be viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S.

Both before and after the formation of the 2022 policy, Nashua officials rejected flags whose messages they disfavored. *See, e.g.*, Add.12; App.67, 127. Nashua discriminated based on viewpoint long before May 2022, for the Report concluded that the Citizen Flag Pole served as a forum for private speech from 2017 until May 2022—the period in which Nashua first refused to fly Beth Scaer’s Save Women’s Sports Flag. *See* Add.6-7, 12, 22, 25. Thus, in accepting the Report’s reasoning, the district court implicitly found that Nashua has a history of violating people’s First Amendment rights, including Beth Scaer’s rights. *See* Add.37. Nashua’s history as an unapologetic rights violator, *see* App.67, weighs strongly in Plaintiffs’ favor.

The history of flags displayed on the Citizen Flag Pole and of flag-raising ceremonies on City Hall Plaza strongly favors Plaintiffs’ position.

C. Undisputed evidence demonstrates that the public views the Citizen Flag Pole as private speech

The district court concluded that the second main factor, the public’s likely perception as to who is speaking, favored neither party. Add.25, 37. In truth, this factor weighs heavily in support of Plaintiffs.

788, 806, 812 (1985). Prohibiting speech by both sides of a contentious issue to avoid controversy is itself a form of viewpoint discrimination against potentially offensive messages. *See Tam*, 582 U.S. at 243 (plurality opinion); *id.* at 249 (Kennedy, J., concurring); *NAACP v. City of Phila.*, 834 F.3d 435, 446-47 (3d Cir. 2016).

The Nashua community’s widespread use of the name “Citizen Flag Pole,” even in 2024 after the repeal of the 2022 policy, reveals that the public still considers the pole to be exactly that—a flag pole for private citizens to fly flags. *See, e.g.*, App.42, 89, 91-92, 99, 102, 104, 117. Defendants themselves still used the title “Citizen Flag Pole” at least as recently as December 2023.³ App.89, 92. Additionally, the “blowback from the first event held by Plaintiff shows who the public thought was speaking”—Plaintiff Beth Scaer, not the city. *Atheists v. City of Fort Worth*, Civil Action No. 4:23-cv-00736-O, 2023 U.S. Dist. LEXIS 136635, at *17 (N.D. Tex. Aug. 6, 2023). As one Nashua alderman stated, “Beth’s hate flag” was flying on the “pole in front of City Hall.” App.66; *see also* Add.6-7.

Private citizens often raise the flags on Nashua’s pole, at a flag-raising ceremony, without anyone from the city present. Add.5, 8, 11. During these ceremonies, private citizens sometime deliver controversial speeches—even ones criticizing Nashua. App.34-36, 43, 45, 47. Videos of speeches circulate online, on YouTube and other sites, where they can be watched by people who were not physically present. App.47.

³ Defendants assert that they “retired” the name “Citizen Flag Pole” in May 2022 but cite no evidence in the record showing this. Dist. Ct. ECF No. 34 (Defs.’ Resp. to Objections) at 7 n.2. Even Defendants admit that “members of local government erroneously continu[ed] to use this name” long after May 2022. *Id.*

The Supreme Court considers flag-raising ceremonies and the speeches at these ceremonies relevant to the question of who is speaking. Add.26. In *Shurtleff*, Boston’s flag pole—just like Nashua’s—stood on a city hall plaza, owned by the city, next to poles flying the American and commonwealth flags. *See* 596 U.S. at 249, 255.

Nonetheless, the Supreme Court held that the non-governmental flags on the final flag pole were private speech, partly because the flags “were raised in connection with ceremonies at the flagpoles’ base.” *Id.* at 255. “[A] pedestrian . . . might simply look down onto the plaza, see a group of private citizens conducting a ceremony without the city’s presence, and associate the new flag with them,” not with the city. *Id.* This is also true if an observer watches a privately recorded video of a flag-raising ceremony occurring on City Hall Plaza, online on a private website, where a private citizen uploaded it.

Since 2017, the pole has displayed flags with a range of perspectives, including some that would be strange or inappropriate for a city to express, such as the Porcupine Flag (associated with the Libertarian Party) or the Christian Flag. *See* Add.5-6, 11-12; App.35, 44. Even if members of the public linked some flags—those raised in ceremonies where the mayor or other officials spoke, *see* Add.27—with the city, that reveals nothing about the public’s perception of flags raised in ceremonies without anyone from the city present. Viewers likely interpret each flag as either private or governmental, based on the

iconography of that flag and the speeches given at its flag-raising ceremony (if any).

Flags expressing controversial views continued to be displayed long after May 2022. *See* App.47, 52, 161:7-162:13. If the flags on the Citizen Flag Pole are government speech, then Nashua “is babbling prodigiously and incoherently” and “expressing contradictory views.” *Tam*, 582 U.S. at 236. The flags displayed “represent[] a wide variety of cultures, events, and causes,” reflecting the diverse “backgrounds and views of Nashua’s community members.” Add.27-28. A viewer is unlikely to think, for instance, that Nashua has an official position about whether Kurdistan should be independent from Iraq; whether the Free State Project and the growth of the Libertarian Party benefits New Hampshire; whether the Protestant Reformation marked the birth of religious freedom; or whether Christians must reclaim America for Jesus Christ. *See* App.35-36, 44-45, 47-48. An objective public observer would understand that people living in Nashua have opinions about these issues—not the city itself.

D. Some messages expressed by flags and flag-raising ceremonies are forbidden to governments

Additionally, Nashua has a tradition of allowing religious flags on the Citizen Flag Pole and religious ceremonies on the City Hall Plaza that continued after the 2022 policy’s promulgation. *See* Add.6, 11. This tradition shapes public perception of the pole. *See McCreary Cnty.*, 545

U.S. at 866. For it is doubtful that Nashua could “express and endorse,” App.62, the religious message of the Christian Flag or the Luther Rose Flag in its own voice without violating the Constitution.⁴

“The Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise” through “subtle coercive pressure that interferes with an individual’s real choice.” *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 12 (1st Cir. 2010) (cleaned up). A city cannot use government speech and resources to subtly pressure citizens into supporting Protestant Christianity or Christianity in general. *See Summum*, 555 U.S. at 468 (“government speech must comport with the Establishment Clause.”). As a result, an objective viewer would perceive that the Christian and Luther Rose flags, for instance, express the viewpoints of those who applied and who gathered at the ceremony to raise them—not of the city itself.

The Report attempted to avoid this conclusion by maintaining that “the City’s approval of a flag did not necessarily constitute an endorsement of the meaning that the applicant saw in that flag.”

⁴ The Report dismissed Plaintiffs’ Establishment Clause argument in a brief footnote as “too speculative.” Add.28 n.8. But, under Supreme Court precedent, “the public perception factor . . . clearly involves a degree of speculation.” *Feldman v. Denver Pub. Sch.*, Civil Action No. 23-cv-02986-RMR-STV, 2024 U.S. Dist. LEXIS 174889, at *10 (D. Colo. Sep. 26, 2024) (citing *Shurtleff*, 596 U.S. at 255 and *Summum*, 555 U.S. at 471).

Add.34. On the contrary, Nashua’s policies explicitly address the possibility that the city and the applicant may disagree about the message of a flag, but Nashua’s policies reject this possibility.

Nashua’s 2022 policy states that the city only permits flags with messages “that the city wishes to express and endorse.” App.62. To ensure that Nashua endorses the messages, applicants must include “an explanation of the message intended to be conveyed” by the flag on their application. App.64. Likewise, ceremonies on City Hall Plaza—such as flag-raising ceremonies—are supposedly government speech that may occur only if they are in “the City’s best interest” and if the ceremony’s “message . . . is in harmony with messages that the city wishes to express and endorse.” App. 56, 58, 112.⁵

Defendants’ own policies do not permit Nashua to approve the flying of a flag or the celebration of a flag-raising ceremony without endorsing their messages that the applicants sought to convey. Either Nashua—contrary to the Establishment Clause—endorses and considers it in the best interest of the city for speakers, for instance, to criticize Nashua

⁵ Nashua states that City Hall Plaza is not a forum for private expression and that ceremonies on the plaza “will be deemed by many as City support for the sentiment thereby expressed.” App.56, 112. Yet Nashua “does not seem to think there is much risk of misattribution because it nowhere suggests that there is anything improper in [flag-raising ceremonies] conveying religious messages or employing religious rituals . . . which presumably [it] could not do if it were speaking for the State.” *Poole*, 966 F.3d at 174.

and advocate reclaiming America for Jesus Christ, see Add.11, 26, or Nashua’s 2022 policies are subterfuge attempting to repackage private religious speech as government speech.

The public, seeing such diverse flags and ceremonies, would perceive the flags on the Citizen Flag Pole to be exactly what the widely used name indicates: the flags of private citizens.

E. Nashua merely approves flags based on set criteria but does not shape or edit the messages of these flags

Lastly, Nashua’s shaping and control of the messages expressed by the flags on the Citizen Flag Pole is far less than the shaping and control in *Summum* and similar cases. The Report wrongly equated shaping and “ultimate control” with final approval authority. See Add.29, 31, 33. However, a city may not consider private speech its own speech because it “simply adopted [the speech] without alteration.” *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1081 (8th Cir. 2024). “Without more, the mere existence of a review process with approval authority is insufficient,” and a “district court’s conclusion [otherwise] runs afoul of the Supreme Court’s pronouncement in [*Tam*].” *Cajune*, 105 F.4th at 1081; see also *Shurtleff*, 596 U.S. at 264 (Alito, J., concurring) (“final approval authority” does not “in itself distinguish government speech from censorship of private speech”).

Government speech is not the approval of unaltered messages based on criteria; it is “the purposeful communication of a governmentally

determined message by a person exercising a power to speak for a government.” *Id.* at 268 (Alito, J., concurring). As a result, the third factor examines whether the government shapes speech through “editorial control,” by, for instance, giving input on designs and requesting modifications of content. *See, e.g., Summum*, 555 U.S. at 472 (government speech because editorial control over permanent monuments); *Higher Soc’y of Ind. v. Tippecanoe Cty.*, 858 F.3d 1113, 1116-18 (7th Cir. 2017) (private speech because no editorial control over speakers at sponsored event on courthouse steps); *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010) (private speech because no editorial control over officially sponsored events at city hall).

Mere approval based on criteria is insufficient because *every* limited public forum has criteria for allowing or forbidding speech on government property. Criteria are what makes it a limited public forum. *See, e.g., Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep’t of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) (limited public forum exists when expressive activity limited “to certain kinds of speakers or to the discussion of certain subjects”).

The Patent and Trademark Office, for instance, had final approval authority and written criteria for approving trademarks, but that did not turn the trademarks in *Tam* into government speech. 582 U.S. at 227-28, 235. Similarly, in *Cornelius v. NAACP Legal Defense and Education Fund*, the Supreme Court concluded that the statements

describing participating nonprofit organizations contained in government-published fundraising literature constituted the private speech of those nonprofits, even though these statements had to meet eligibility requirements and to receive the government’s prior approval to be included in the literature. 473 U.S. at 791-92, 794. And the Eighth Circuit rejected the claim that a school district’s final approval authority over classroom posters and criteria requiring that teachers only display posters with “instructional value,” constituted adopting speech—even though the posters were reviewed by a school committee that had edited the iconography of at least one poster. *Cajune*, 105 F.4th at 1081-82.

In contrast, when governments acquired a property interest or permanent possessory interest over the medium of expression after a private party voluntarily alienated control, courts have found government speech. *See Shurtleff*, 596 U.S. at 270-71 (Alito, J. concurring) (collecting cases). In *Summum*, for example, the city adopted a donated monument when it “took *ownership* of that monument and put it on *permanent* display in a park that it owns and manages” so that “[a]ll rights previously possessed by the monument’s donor have been relinquished.” 555 U.S. at 473-74 (emphasis added). When it took ownership, the city “made no effort to abridge the traditional free speech rights” of the public. *Id.* at 474; *see also Shurtleff*, 596 U.S. at 267 (Alito, J., concurring) (“government speech

occurs if—but only if—a government . . . does not rely on a means that abridges private speech”). Indeed, the Court found government speech in *Summum* partly because “public parks can accommodate only a limited number of permanent monuments” but have space for “many speakers and, over time, many parades and demonstrations,” forms of expression which the Court viewed as private. 555 U.S. at 478-79.

Flags flown for a week and flag-raising ceremonies finished in a matter of minutes are much more similar to *Summum*’s private “demonstrations” than they are to its public “permanent monuments.” And Nashua attempted to abridge the traditional free speech rights of the public, when the city created the 2022 Flag Pole Policy and declared that the Citizen Flag Pole would no longer serve as “a forum for free expression by the public” as it had for years. Add.22-23; App.56, 62. The government action in *Summum* is not similar to Nashua’s here at all. Cf. Add.30-31.

Likewise, the Eleventh Circuit found that a state agency had adopted proposed private speech as its own because the agency “entirely scripted” announcements at sporting event and limited advertisements to a small group of pre-selected sponsors who had to submit the advertisements’ text for pre-approval and integration into the script that the government itself wrote and read aloud. *Cambridge Christian Sch., Inc. v. Fla. High Sch. Ath. Ass’n, Inc.*, 115 F.4th 1266, 1290, 1293-

95 (11th Cir. 2024). The formerly private speech was adopted when it became part of a script that was the government’s intellectual property.

Here, Nashua does nothing to shape or control flag messages, beyond approving or rejecting the applications. Nashua’s connection to these flags is transitory—rarely more than a week—not permanent. Add.5. City officials merely review applications to see if flags are “worthy,” in “the City’s best interest,” and “in harmony with city policies and messages that the city wishes to express and endorse.” App.62. This policy supplies no objective criteria for evaluating applications. Indeed, just like Boston, Nashua lacks any “clear internal guidance” about “what flag groups could fly and what those flags would communicate.” *Shurtleff*, 596 U.S. at 257. The decision is left to Nashua’s officials’ subjective assessment about “best interest” and which messages might cause the city to get “inundated with angry phones, [and] e-mails.” App.161:6-15.

Nashua’s short 2022 Flag Pole Policy contrasts sharply with the detailed, three-page policy for the City of San Jose, California, which the Supreme Court approved in *Shurtleff*. 596 U.S. at 257-58. San Jose had no flag application process. Instead, the city simply “list[ed] approved flags that may be flown,” prohibited all flags not listed, and restricted who could request each pre-approved flag. *Shurtleff*, 596 U.S. at 257-58; *see also* Add.32 n.9 (providing a hyperlink to San Jose’s policy: <https://bit.ly/30tX0Fu>). For instance, San Jose allowed the flags

of the governments recognized by the United States, but only at the request of the mayor or certain city officials. Other flags, such as the flags of official sister cities to San Jose, could only be displayed in conjunction with official actions, events, or proclamations of the city council. Unlike Nashua, San Jose did not permit private civic groups such as the Lion's Club or a local ethnic community to fly that group's flag as part of a ceremony the group itself organized and conducted. *Cf.* Add.5-6.

Other than the use of some magic words, Nashua's 2022 Flag Pole Policy is not at all "[l]ike San Jose's policy." Add.33. Nashua's policy contains no list of pre-approved flags or requesters. App.62. It sets up an application process that "[a]ny group" can use. App.62. Flag applications to Nashua must include "a photograph of the flag proposed and an explanation of the message intended to be conveyed." App.64. There is no evidence of the city ever editing flag iconography. The message of the flag and its exact iconography must be fixed before Nashua even reviews the application.

Applicants do not alienate ownership or control over their flags. Anyone "wishing to fly a flag must provide the flag," App.62, which remains the applicant's property, and which the applicant may take home once its time on the pole is complete. *See* App.35, 43. Applicants often raise the flag on the pole themselves, so it is possible that no city official ever touches the flag. *See* App.36, 43, 45. Nashua's application

process parallels the one used in Boston, which also required applicants to describe in writing the flag to be flown and the flag-raising ceremony planned. *Shurtleff*, 596 U.S. at 256-57. Yet the Supreme Court held that the flags that Boston approved remained the private speech of the applicant. *Id.*

Additionally, in considering the shaping and control factor, *Shurtleff* discussed flag-raising ceremonies and “look[ed] at the extent to which [the city] actively controlled these flag raisings.” 596 U.S. at 256 (finding it “difficult to discern a connection to the city” in “a ceremony by a local community bank”). Nashua does not shape or control flag-raising ceremonies, although these ceremonies convey a flag’s meaning to the public. Nashua merely requires applicants to describe a ceremony’s basic details (such as the number of attendees and the extent to which the ceremony may occupy the sidewalk). Add.5. Even though Nashua claims that City Hall Plaza is not a forum for private expression and that entirety of “an event in front of City Hall” and the “sentiment thereby expressed” are government speech, *see* App.56, the city does not attempt to shape or control the speeches and rituals of flag raisings. Once a flag is approved, applicants often raise the flag themselves and deliver any speeches on their own, without anyone from the city present. App.43, 45, 47.

Applicants have also used flag-raising ceremonies as an opportunity to attack city policies. When Beth Scaer raised a flag honoring the

Nineteenth Amendment, for instance, she delivered a speech discussing how Mayor Donchess' gender-identity policies undermined women's sex-based rights. App.47. Likewise, when the Christian Flag was raised in March 2024, ceremony speakers urged the audience to reclaim America for Jesus Christ and criticized Nashua for allowing flags such as the Pride Flag that support progressive politics while rejecting flags with conservative messages. App.47. Nashua most certainly did not speak these messages, criticizing itself.

The City of Nashua plays no role whatsoever in crafting the iconography of the flags flown, does not control the message of flag ceremonies, and acquires no property interest or permanent possessory interest over these flags. It does not shape or control the symbolic speech on the Citizen Flag Pole and has not adopted the message of the flags on that pole. Thus, all three of the main *Shurtleff* factors show that the flags in this case are the private speech of citizens.

V. NASHUA'S POLICIES AND PRACTICES ARE VIEWPOINT DISCRIMINATORY, VAGUE, OVERBROAD, AND A PRIOR RESTRAINT ON SPEECH.

A. Nashua rejected the Scaers' applications because they disagree with Plaintiffs' viewpoints

Once this Court determines that government-speech doctrine does not shelter Nashua's actions, this Court could remand this case to the district court to consider if Nashua has unconstitutionally infringed on private speech. However, this Court could also instruct the district

court to grant the Scaers' preliminary injunction motion, as they have shown a likelihood of success on the merits. Nashua cannot justify its policies under the relevant First Amendment standards.

In both limited public fora and nonpublic fora, for instance, government restrictions must be viewpoint neutral. *See Cornelius*, 473 U.S. at 806, 811. "There is no dispute" that Nashua denied Plaintiffs' flag applications because the messages of Plaintiffs' flags were not "in harmony with the City of Nashua's policies and messages that the City of Nashua wishes to express and endorse." Add.12; *see also* App.70, 74. Refusing to permit a message that the government does not want to endorse is obvious viewpoint discrimination.

Defendants have also admitted that they denied the Scaers' flags because these flags do not "observe an anniversary . . . or support a *worthy* cause" and were "not in the City's best interest." Dist. Ct. ECF No. 21 (Defs.' Opp'n) at 11-12 (emphasis added). But the Scaers' flags supported causes and commemorated yearly dates, such as the anniversaries of Bunker Hill and of Title IX. App.47, 69-70, 73. Defendants consider these anniversaries and causes unworthy, as they might bring "controversy or unrest" and are not "longstanding charit[ies]." Dist. Ct. ECF No. 21 (Defs.' Opp'n) at 11-12. Plaintiffs' message—that is, their viewpoint—is exactly what Defendants sought to keep off the pole. However, "the First Amendment's protections" do not "belong only to speakers whose motives the government finds

worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023) (emphasis added). Nashua’s 2022 Flagpole Policy violates the First Amendment by discriminating against viewpoints both facially and as applied.

B. Nashua officials have excessive enforcement discretion over the speech allowed on the Citizen Flag Pole and at flag-raising ceremonies

Similarly, although prior restraint analysis applies differently in a limited public forum or a nonpublic forum than in a traditional public forum, speech regulations cannot grant government officials unbridled discretion to prohibit disfavored speech in any type of fora. *See, e.g., Freedom from Religion Found., Inc. v. Abbott*, 955 F.3d 417, 427-28 (5th Cir. 2020); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1226-27 (11th Cir. 2017); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006).

Defendants denied Plaintiffs’ flag applications under a 2022 policy that lacks objective criteria and grants boundless discretion to government officials. *See* App.37, 39, 48-49, 51, 62. Workers in the mayor’s office accept or prohibit flags based on their own subjective assessments, without consulting the Board of Aldermen, *see* App.71, 122, and the only avenue of appeal is to the mayor—not to the judiciary.

Moreover, vagueness and overbreadth doctrines apply to government policies limiting access to a forum just as they do to laws. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 117, 121 (2003); *Eagle Point Educ. Ass’n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1107 (9th Cir. 2018). Defendants’ 2022 flag policy contains multiple terms—“in harmony with city policies,” “messages that the city wishes to express and endorse,” “contrary to the City’s best interest,” “worthy”—whose meaning is undefined, vague, and inherently subjective. App.62. Such language supplies no notice of what flags the city will accept, and Nashua has not supplied any guidance (publicly available or not) defining these terms. Indeed, Nashua’s decisions are so unpredictable that the city has accepted and rejected the exact same flag, on different applications. *See* App.45, 48.

Defendants’ 2022 policies lack objective standards, and their language is undefined, vague, and subjective. Thus, Defendants’ policies and practices violated multiple tenets of First Amendment doctrine.

VI. IT IS IN THE PUBLIC INTEREST TO ENJOIN THE IRREPARABLE HARM THAT THE SCAERS AND OTHERS ARE SUFFERING

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020) (citation omitted); *see also Sindicato*, 699 F.3d at 10-11. Each day that the Scaers cannot exercise

their rights according to their sworn intentions is itself irreparable. *See* App.38-39, 50-51.

Moreover, “when the Government is the opposing party,” courts “merge” the “balancing of the equities and analysis of the public interest together.” *Doe v. Mills*, 16 F.4th 20, 37 (1st Cir. 2021) (cleaned up). “Plaintiffs’ interest in avoiding interference with their rights to free speech outweighs the City’s interest in enforcing an unconstitutional [policy]” because “[p]rotecting rights to free speech is ipso facto in the interest of the general public.” *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 U.S. Dist. LEXIS 17481, at *35-*36 (D. Me. Feb. 12, 2014) (citation omitted).

Denying injunctive relief would leave Defendants free to violate the rights of the Scaers and the public. In contrast, enjoining the 2022 policy and Defendants’ viewpoint discrimination would not stop Nashua from performing any legitimate city function. Until May 2022, Nashua had no written flag policy, and until October 2020, the city had never rejected a flag. Add.4, 12; App.44, 48. Nashua can return to the viewpoint-neutral practices that governed the Citizen Flag Pole prior to October 2020, without disruption. Defendants suffer no valid harm from a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order denying Plaintiffs' motion for preliminary injunction and remand this case to the district court with instructions to enter a preliminary injunction that prohibits Defendants from restoring the 2022 Flag Pole Policy or otherwise discriminating against Plaintiffs' applications on the basis of viewpoint.

Dated: June 17, 2025,

Respectfully submitted

s/ Roy S. McCandless
Roy S. McCandless
First Circuit Bar No. 23818
ROY S. MCCANDLESS, ESQ., PLLC
125 North State Street
Concord, NH 03301
Tel: (603) 841-3671, Ext. 101
Fax: (603) 513-2700
roysmccandless@gmail.com

s/ Nathan J. Ristuccia
Nathan J. Ristuccia⁶
First Circuit Bar No. 1216360
Endel Kolde
First Circuit Bar No. 1216389
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, DC 20036
Tel: (202) 301-1664
Fax: (202) 301-3399
nrstuccia@ifs.org
dkolde@ifs.org

Counsel for Plaintiffs-Appellants

⁶ Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).

CERTIFICATE OF COMPLIANCE

Pursuant to 1st Cir. R. 32(g)(1), I certify that this brief complies with the length limits permitted by Fed. R. App. P. 32(a)(7)(B) because it contains 11,181 words, as calculated by Microsoft Word, excluding the portions exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced serifed typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: June 17, 2025

s/Nathan J. Ristuccia
Nathan J. Ristuccia
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed this brief with this Court using the appellate CM/ECF system, that all participants are registered CM/ECF users, and that service will be effectuated on the following via the Court's ECF/electronic notification system.

Dated: June 17, 2025

s/Nathan J Ristuccia
Nathan J. Ristuccia
Counsel for Plaintiffs-Appellants

ADDENDUM TABLE OF CONTENTS

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Bethany R. Scaer and Stephen
Scaer

v.

Civil No. 24-cv-00277-LM-TSM

City of Nashua, a municipal
Corporation; James W. Donchess,
Mayor, City of Nashua, in his official
and individual capacities; Jennifer L.
Deshaies, Risk Manager, City of Nashua,
in her official and individual capacities

**REPORT AND RECOMMENDATION ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This case involves a flagpole in front of City Hall in Nashua, New Hampshire (“City” or “Nashua”), which was known as the “Citizen Flag Pole” and was reserved for community members who obtained City approval to fly a flag to support their cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause.¹ In May 2022, Nashua adopted a written flagpole policy (the “2022 Flagpole Policy”) under which the City expressly reserved the right to deny permission to fly any flag on the Citizen Flag Pole that was not in harmony with City policies or was contrary to the City’s best interest. Plaintiffs Bethany R. Scaer and Stephen Scaer are residents of Nashua who were denied permission to fly certain flags on the Citizen Flag Pole. They contend that the City, in refusing their requests to fly those flags, discriminated against the viewpoints expressed by the flags and violated their constitutional right to free speech. On

¹ For ease of reference, this court refers to the flagpole at issue as the “Citizen Flag Pole” even though Nashua abandoned that description. However, the court’s use of this term is not intended to express an opinion as to whether the public’s use of the flagpole during the relevant time period constituted private speech or government speech.

September 6, 2024, the Scaers brought this civil rights action, pursuant to 42 U.S.C. § 1983, against Nashua, its Risk Manager, Jennifer L. Deshaies (“Deshaies”), and its Mayor, James W. Donchess (“Donchess”). In their complaint, the Scaers challenge Nashua’s 2022 Flagpole Policy under the First and Fourteen Amendments. They also seek injunctive relief, declaratory relief, and nominal damages, as well as attorney’s fees and costs pursuant to 42 U.S.C. § 1988.

The matter is before the undersigned magistrate judge for a report and recommendation on Plaintiffs’ Motion for Preliminary Injunction (Doc. No. 2). Initially, the Scaers requested an order enjoining the City, in relevant part, from denying flag applications and preventing flags from being flown on the Citizen Flag Pole on the basis of viewpoint, including any viewpoint that “is deemed to be offensive by city officials[.]” and from enforcing certain portions of the 2022 Flagpole Policy. However, on October 7, 2024, before defendants filed their opposition to the preliminary injunction motion, Nashua adopted a new flagpole policy (the “2024 Flagpole Policy”), which repealed “[a]ll previous policies related to flagpoles on city hall grounds” and provides in significant part that all flagpoles on the grounds of Nashua’s City Hall “are not public fora open to others for expression but are solely for city government to convey messages it chooses.” Defendants argue that the change in policy renders the proposed injunctive relief moot. Plaintiffs disagree and argue that defendants fail to satisfy their burden of establishing mootness. Accordingly, plaintiffs urge the court to issue a preliminary injunction “enjoining Defendants from denying Plaintiffs’ applications under their City Hall Plaza Events policy, from restoring their 2022 flagpole policy, or from closing the Citizen Flag Pole as a forum entirely[.]”

After consideration of the parties’ written submissions and the oral arguments presented during the November 5, 2024 hearing, the court concludes that the motion for a preliminary injunction is not moot. The court also concludes, however, that the Scaers failed to show that they are likely to succeed on the merits of their claims because the undisputed facts indicate that the

flags displayed on the Citizen Flag Pole under the 2022 Flagpole Policy were government speech that is not regulated by the First Amendment. Accordingly, and for all the reasons set forth herein, this court recommends that the District Judge deny the Scaers' motion for a preliminary injunction.

BACKGROUND²

The Parties

Plaintiff Bethany R. Scaer ("Beth") resides in Nashua, where she has lived for three decades. Beth Decl. at ¶ 1. She is active in state and local politics, and writes for the *GraniteGrok*, a political website that advocates for limited government and the defense of liberty. *Id.* at ¶ 2. Beth describes herself as a proponent of various political positions, including "gender-critical feminism, parental rights, women's sex-based rights, legislation restricting pediatric gender medicine, the Pro-Life movement, and the freedoms protected in the Bill of Rights." *Id.* at ¶ 3. She has repeatedly expressed criticism of Nashua's mayor, defendant James Donchess. *Id.*

Plaintiff Stephen Scaer ("Stephen") is Beth's spouse. Stephen Decl. at ¶ 1. Like Beth, Stephen has resided in Nashua for three decades and is active in both state and local politics. *Id.* at ¶¶ 1-2. He writes for the *GraniteGrok* and engages in political rallies, government meetings, and sidewalk demonstrations, among other political activities. *Id.* at ¶ 3. Additionally, Stephen ran for state senate in 2022 and again in the recent 2024 election. *Id.* at ¶ 2. Stephen describes his platform as "defending First Amendment rights, protecting children from experimental gender

² The facts, which are undisputed, are drawn from the complaint (Doc. No. 1) ("Compl.") and from the following materials that were filed by the parties in connection with the motion for a preliminary injunction: (1) the Declaration of Stephen Scaer (Doc. No. 2-1) ("Stephen Decl."); (2) the Declaration of Bethany R. Scaer (Doc. No. 2-2) ("Beth Decl."); (3) Exhibits A-P filed in support of Plaintiff's Motion for Preliminary Injunction (Doc. Nos. 2-3 through 2-13, 26-2 through 26-4, and 28-1 through 28-2) ("Pl. Ex."); (4) Exhibit A filed in support of Defendants' Opposition to the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 22) ("Def. Ex. A"); and (5) the Supplemental Declaration of Bethany R. Scaer (Doc. No. 26-1) ("Supp. Beth Decl.").

medicine, and ensuring women can have restrooms, locker rooms, sports teams, and prisons reserved exclusively for those of their biological sex.” Id.

In addition to Nashua, the defendants include Donchess, who served as the City’s Mayor at all times relevant to the events giving rise to this litigation, and Deshaies, who served as Nashua’s Risk Manager throughout the relevant time period. Compl. at ¶¶ 4-5. The Scaers originally sued Donchess and Deshaies in both their official and individual capacities, but they subsequently dismissed the individual capacity claims. Doc. No. 23. Accordingly, plaintiffs’ claims against the individual defendants are essentially claims against the City. See [Kentucky v. Graham](#), 473 U.S. 159, 165-66 (1985) (explaining that official capacity suits “generally represent only another way of pleading an action against an entity of which [a defendant] is an agent.” (quoting [Monell v. New York City Dep’t of Soc. Servs.](#), 436 U.S. 658, 690 n. 55 (1978))); [Traudt v. Lebanon Police Dep’t](#), --- F. Supp. 3d ---, 2024 WL 4226915, at *3 (D.N.H. Sept. 18, 2024) (ruling that plaintiff’s claims against police officer and Chief of Police in their official capacities were “indistinguishable from his claims against the City.”).

Establishment of Nashua’s Flagpole Program

Nashua maintains four flagpoles of varying heights that are located on City property outside City Hall. Compl. at ¶ 8. The City uses three of those flagpoles to display government flags such as the American flag and the New Hampshire state flag. Id. This litigation arises from the use of the fourth flagpole, which Nashua previously referred to as the “Citizen Flag Pole.” See id. at ¶ 9; Pl. Ex. A.

In 2017, Nashua established a program under which area residents could apply for approval to fly flags on the Citizen Flag Pole. See Beth Decl. at ¶ 7. Although the City had no written policy describing the program prior to 2022, as of October 2020, Nashua’s website contained the following information:

Citizen Flag Pole

Fly a Flag

A pole in front of City Hall is reserved for the citizens of Nashua to fly a flag in support of their cultural heritage, observe an anniversary or honor a special accomplishment. Any group wishing to fly a flag must provide the flag.

Id. at ¶ 6; Pl. Ex. A. The website directed the public to contact the City's Risk Management office for further information. Pl. Ex. A.

Individuals and groups wishing to use the Citizen Flag Pole were required to submit a Special Events Application to the Risk Manager, who checked to ensure that no other applicant reserved the Citizen Flag Pole for the same time period. Beth Decl. at ¶ 8. Applicants had to confirm that they would abide by local ordinances and indemnify the City for any damages caused by their event. Id. Unless the City owned the flag that an applicant wished to fly, the applicant was responsible for providing the flag, which remained the applicant's property. Id. Applicants who obtained approval to fly a flag often raised the flag themselves, using a tool borrowed from the City. Id. at ¶ 10. Ordinarily, Nashua allowed approved flags to remain on the Citizen Flag Pole for approximately one week, after which time flag owners were free to retrieve their flags and take them home. Id. at ¶¶ 8-9.

Flag raisings on the Citizen Flag Pole were often, but not always, accompanied by short ceremonies at City Hall Plaza. Id. at ¶ 10. Applicants who wished to hold a ceremony were required to provide certain details on their Special Events Application, such as the expected number of attendees and the extent to which the event would obstruct the sidewalk. Id. Local politicians sometimes attended or even spoke at the ceremonies, which gave them an opportunity to interact with voters and constituents. Id. Over the years since the program began, groups of area residents have regularly flown flags in honor of Pride Month, Indian Independence Day, Brazilian Independence Day, Greek Independence Day, International Francophonie Day, and the

anniversary of the founding of Nashua's Lion's Club. Id. at ¶ 11; Stephen Decl. at ¶ 9. Other flags, which area residents have flown once or on occasion, include the Kurdistan flag, the Christian flag, the Lutheran flag, the Porcupine Party flag, and flags supporting National Recovery Month and organ donation. Beth Decl. at ¶ 12. Throughout the time period when the program remained in place, approximately ten flags were flown on the Citizen Flag Pole each year. Id. at ¶ 9.

Plaintiffs' Early Applications to Use the Citizen Flag Pole

Beth first applied to use the Citizen Flag Pole in October 2017, when she sought to fly the Luther Rose flag to honor the 500th anniversary of the Protestant Reformation. Id. at ¶ 19. Nashua approved her application and the Scaers held a small flag-raising ceremony with approximately six attendees, none of whom represented the City. See id.; Stephen Decl. at ¶ 10. Beth provided the flag and raised it herself using a tool she borrowed from Nashua. Beth Decl. at ¶ 19.

In 2020, Beth applied for permission to fly another flag, which she describes as the "Save Women's Sports" flag. Beth Decl. at ¶ 21. The flag consisted of the words, "Save Women's Sports" and "Woman = Adult Human Female." See id. at ¶ 41; Pl. Ex. K. According to the Scaers, the flag expressed their belief "that women have inalienable rights based on their biological sex that governments have a duty to protect and that allowing biological males to compete against women in sports denies women their rights and the equality due them under both the U.S. Constitution and Title IX." Id. at ¶ 45; Stephen Decl. at ¶ 25. The City approved Beth's application and granted her permission to fly the flag from October 10, 2020 to October 16, 2020. Beth Decl. at ¶ 21.

On October 10, 2020, Beth and Stephen raised the Save Women's Sports flag on the Citizen Flag Pole, without a ceremony but with two other people attending and holding signs. Id.; Stephen Decl. at ¶ 12. Later that day, a Nashua City Alderwoman posted on her Facebook page that "Beth's hate flag" did not fit Nashua's requirements for flying a flag on the Citizen Flag Pole. Beth Decl.

at ¶ 24; Pl. Ex. F. An unknown number of unidentified individuals also complained that the flag was transphobic. Beth Decl. at ¶ 22; Stephen Decl. at ¶ 13. One day later, on October 11, 2020, Nashua revoked its permission to fly the flag and removed it from the pole. Id. Beth appealed the removal to Donchess, who denied her appeal. Beth Decl. at ¶ 23; Stephen Decl. at ¶ 13. In a statement issued on October 14, 2020, Donchess explained that the flag was taken down because it “contain[ed] a discriminatory message toward the transgender community[.]” Beth Decl. at ¶ 23. He further stated that “Nashua is a welcoming community, in which we embrace all people and the contributions of all are celebrated and valued.” Id.

Subsequently, the City conducted an investigation regarding Beth’s application to fly the Save Women’s Sports flag on the Citizen Flag Pole. See Pl. Ex. G. In a letter to Beth’s attorney dated November 11, 2020, Nashua’s Corporation Counsel stated that, upon investigation, the City determined that the flag “was outside of the parameters established for use of the citizen flag pole.” Id. He also stated in relevant part as follows:

You have attempted to apply a public forum analysis to the City’s actions. It is the City’s position that the proper approach is to view the use of the flag pole as “government speech” where the City has reserved the right to determine the message that will be attributed to it. See, Shurtleff v. Boston, 928 F.3d 166 (1st Cir. 2019).³ Accordingly, your request for reconsideration on behalf of Ms. Scaer is denied.

Id. (footnote added).

During 2021, the City granted Beth’s applications to use the Citizen Flag Pole on two separate occasions. In April 2021, Nashua allowed Beth to fly her Lutheran flag to commemorate

³ In Shurtleff, the First Circuit Court of Appeals affirmed the district court’s denial of plaintiffs’ motion for a preliminary injunction to prevent the City of Boston, Massachusetts from denying them a permit to raise a “Christian flag” on a government-owned flagpole outside Boston’s City Hall. The First Circuit concluded, in relevant part, that because Boston’s choice of which flags could be flown on its flagpole “likely convey[ed] government speech” rather than a limitation on private speech, the plaintiffs failed to establish a likelihood of success on their claim for violation of free speech against the City. Shurtleff, 928 F.3d at 176.

the 500th anniversary of the Diet of Worms, an event relating to the history of the Protestant Reformation. Beth Decl. at ¶ 20; Stephen Decl. at ¶ 11. In August 2021, the City granted her permission to fly a flag in honor of the ratification of the Nineteenth Amendment. Beth Decl. at ¶ 28; Stephen Decl. at ¶ 14. The Scaers held flag-raising ceremonies on both occasions. Beth Decl. at ¶¶ 20, 28; Stephen Decl. at ¶¶ 11, 14. Fewer than twelve people, none of whom represented the City, attended the April 2021 ceremony, and no one other than the Scaers attended the August 2021 ceremony. Id.

Nashua's Adoption of the 2022 Flagpole Policy

On May 2, 2022, the Supreme Court issued a decision in Shurtleff reversing the First Circuit Court of Appeals' ruling that the City of Boston did not violate the Constitution by refusing to allow a private group to raise a religious flag on a flagpole outside City Hall. Shurtleff v. City of Boston, Mass., 596 U.S. 243, 259 (2022). The Supreme Court determined that under the specific facts of the case, "Boston's flag-raising program does not express government speech" and as a result, "the city's refusal to let [a Christian organization] fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment." Id. In reaching its decision that Boston's flag-raising program involved private rather than government speech, the Court found it significant that Boston "had nothing – no written policies or clear internal guidance – about what flags groups could fly and what those flags would communicate." Id. at 257. The Court also emphasized that "Boston could easily have done more to make clear it wished to speak for itself by raising flags[.]" and it cited as an example, the City of San Jose, California's flag-flying program, which "provides in writing that its 'flagpoles are not intended to serve as a forum for free expression by the public,' and lists approved flags that may be flown 'as an expression of the City's official sentiments.'" Id. at 257-58 (additional quotations marks omitted) (quoting Brief for Commonwealth of Massachusetts et al. as *Amici Curiae* 18). The Supreme Court determined,

however, that Boston’s “lack of meaningful involvement in the selection of flags or the crafting of their messages” led it to “classify the flag raisings as private, not government, speech[.]” Id. at 258.

On May 11, 2022, nine days after the Shurtleff decision, Nashua adopted the 2022 Flagpole Policy and posted it on its website. Compl. at ¶ 15; Pl. Ex. D. The Policy, which was signed by Donchess and Deshaies on behalf of the City, provided in substance as follows:

A flag pole in front of City Hall may be provided for use by persons to fly a flag in support of cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause. Any group wishing to fly a flag must provide the flag. This potential use of a City flag pole is not intended to serve as a forum for free expression by the public. Any message sought to be permitted will be allowed only if it is in harmony with city policies and messages that the city wishes to express and endorse. This policy recognizes that a flag flown in front of City Hall will be deemed by many as City support for the sentiment thereby expressed, city administration reserves the right to deny permission or remove any flag it considers contrary to the City’s best interest.

Pl. Exs. B and D. Thus, the 2022 Flagpole Policy incorporated language that was used by San Jose, California, and highlighted by the Supreme Court in Shurtleff. See [Shurtleff](#), 596 U.S. at 257-58.

On or about the same time as it posted the 2022 Flagpole Policy, the City revised its “Special Events Procedures” to include a section entitled, “Request[s] for Use of the City Flag Pole.” Beth Decl. at ¶ 17. That section provided in significant part that “[r]equests to fly a flag shall be made to the Risk Manager or designee and will be evaluated in accordance with the City’s flag pole policy.” Pl. Ex. E at 2. It also provided that “[a]pplications shall include a photograph of the flag proposed and an explanation of the message intended to be conveyed.” Id. Although the Special Event Procedures contained no specific details regarding the types of flags that were permissible, they further stated that applications to fly a flag “shall be subject to review and approval of the [City’s] Risk Manager.” Id.

Plaintiffs’ Applications to Fly Flags Under the 2022 Flagpole Policy

In May 2022, the same month in which Nashua posted its 2022 Flagpole Policy, Beth applied for permission to fly the Save Women’s Sports flag on the Citizen Flag Pole to commemorate the 50th anniversary of Title IX. Beth Decl. at ¶ 30. The application was denied. Id. Beth appealed to Nashua’s Mayor and Donchess upheld the denial. Id. Later that month, one of Beth’s friends, Laurie Ortolano, applied for permission to fly a Save Women’s Sports flag, which differed from Beth’s flag because it did not include the words, “Woman = Adult Human Female.” Id. at ¶ 31. Deshaies denied that application as well. Id.

The Scaers’ next attempts to use the Citizen Flag Pole occurred in 2024. On February 7, 2024, Stephen applied for permission to fly a “Detransitioner Awareness” flag to commemorate “Detrans Awareness Day” on March 12, and to host a small flag-raising ceremony consisting of about five attendees. Stephen Decl. at ¶ 16; Pl. Ex. J at 1. According to Stephen, the Detransitioner Awareness flag was designed by an individual who underwent a gender detransition. Stephen Decl. at ¶ 17. It depicts a blue-green lizard against a black background and includes the words, “De-Trans Awareness” at the bottom of the flag. Id. The lizard was chosen due to the ability of some lizards to survive the loss of certain body parts and grow them back. Id. Stephen maintains that raising awareness about gender detransitioners and the difficulties they face are important to him, both personally and politically, and that “supporting detransitioners does not hurt transgender-identifying persons[.]” Id. at ¶ 18.

On February 14, 2024, Stephen received a letter from Deshaies denying his application to fly the Detransitioner Awareness flag. Id. at ¶ 19; Pl. Ex. J at 2. Therein, Deshaies informed Stephen that “[t]he flag is not in harmony with the message that the City wishes to express and endorse. Therefore, we must deny your request as the flag poles are not intended to serve as a forum for free expression by the public.” Pl. Ex. J at 2. Stephen appealed the denial of his application on

February 22, 2024, and on March 4, 2024, Donchess upheld Deshaies' decision without further explanation. Id. at 3-4; Stephen Decl. at ¶ 19.

Subsequently, the Scaers were part of a group that flew the Christian flag and attended a small flag-raising ceremony during Holy Week 2024. Stephen Decl. at ¶ 15; Beth Decl. at ¶ 29. During the ceremony, two speakers, including the plaintiff in the Shurtleff litigation and a local pastor, expressed their views on “the need to reclaim America for Jesus Christ” and criticized Nashua for “flying flags that support progressive politics such as the Pride Flag while rejecting flags with conservative messages such as the Pro-Life Flag.” Id. No one representing the City participated in or was present at this event. Id.

In late May 2024, Beth submitted an application to fly the “Pine Tree” flag on June 15, 2024, to commemorate the 249th anniversary of the Battle of Bunker Hill and to honor the soldiers from Nashua who fought and died during that conflict. Beth Decl. at ¶ 34; Pl. Ex. H at 3. The Pine Tree flag depicts a pine tree against a white background and contains the words, “An Appeal to Heaven” across the top of the flag. Pl. Ex. K at 2. According to Beth, the Pine Tree flag was carried by New England troops during the Battle of Bunker Hill and “is a key symbol of natural rights and resistance to tyranny.” Beth Decl. at ¶ 36. The record also indicates that the flag was used during the January 6, 2020 attack on the United States Capitol Building in Washington, D.C. See Pl. Ex. O at 1.

On May 29, 2024, Deshaies sent Beth a letter denying her application. Pl. Ex. H at 3. As grounds for the denial, Deshaies stated that “[t]he flag is not in harmony with the message that the City wishes to express and endorse. Therefore, we must deny your request as the flag poles are not intended to serve as a forum for free expression by the public.” Id. On June 3, 2024, Beth appealed the denial of her application, and on June 4, 2024, Donchess upheld Deshaies' decision.

Id. at 1-2; Beth Decl. at ¶ 37. Although Donchess provided Beth with a copy of the 2022 Flagpole Policy, he provided no further explanation for the City’s decision. See Pl. Ex. H at 1.

Nashua’s records relating to the use of the Citizen Flag Pole show that prior to the adoption of the 2022 Flagpole Policy, Nashua refused to allow only two flags to fly on the Citizen Flag Pole: the Save Women’s Sports flag and a “Porcupine” flag that was associated with both the Free State Project and the Libertarian Party.⁴ Beth Decl. at ¶ 32. The records also show that after Nashua adopted the 2022 Flagpole Policy, the City refused to allow the following flags to fly on the Citizen Flag Pole: the Save Women’s Sports flag, the Pine Tree flag, the Detransitioner Awareness flag, a “Pro-Life” flag, and the Palestinian flag. See id. at ¶¶ 31, 33; Pl. Ex. H at 1-3. There is no dispute that Nashua’s decisions regarding which flags could be flown on the Citizen Flag Pole under the 2022 Flagpole Policy were based on whether those messages “were in harmony with the City of Nashua’s policies and messages that the City of Nashua wishes to express and endorse.” See Doc. No. 21 at 3.

Nashua’s Adoption of the 2024 Flagpole Policy

On September 6, 2024, the Scaers initiated this action challenging the constitutionality of the 2022 Flagpole Policy and defendants’ application of that Policy. Doc. No. 1. They also filed the instant motion for preliminary injunction. Doc. No. 2. On October 7, 2024, three days before Nashua filed its opposition to plaintiffs’ motion, Nashua’s Mayor, Donchess, adopted a new flagpole policy – the 2024 Flagpole Policy – which reads in substance as follows:

The flagpoles on city hall grounds shall henceforth be exclusively controlled by city government. The city shall determine what flags will be flown and during what time periods and does not seek input from other sources. The flagpoles are not public fora open to others for expression but are solely for city government to convey messages it chooses.

⁴ Although Nashua allowed the Porcupine flag to fly on the Citizen Flag Pole in 2018, 2019 and 2020, it denied a February 2021 application to fly that flag. Beth Decl. at ¶ 32.

All previous policies related to flagpoles on city hall grounds are hereby repealed.

Def. Ex. A. Nashua announced the change in policy on its website, as part of the section entitled, “City Hall Plaza Events.” Supp. Beth Decl. at ¶¶ 6-7; Pl. Ex. M. The parties dispute whether the new policy renders plaintiffs’ motion for a preliminary injunction moot or whether plaintiffs are still entitled to pursue injunctive relief.

Plaintiffs’ Future Plans

Plaintiffs claim that if permitted, they will continue to fly flags expressing their views on the Citizen Flag Pole. Beth Decl. at ¶ 42; Stephen Decl. at ¶ 22. This would include the Pine Tree flag, the Save Women’s Sports flag, the Detransitioner Awareness flag, and the Pro-Life flag, as well as other flags expressing their views on such issues as “gender-critical feminism, parental rights, women’s sex-based rights, pediatric gender medicine, abortion, and the freedoms protected in the Bill of Rights.” Beth Decl. at ¶¶ 43-46; Stephen Decl. at ¶¶ 23-24. Furthermore, Beth asserts that even if Nashua no longer allows members of the public to fly flags on the Citizen Flag Pole, she intends to apply to hold ceremonies at City Hall Plaza in support of the causes that are important to her. Supp. Beth Decl. at ¶ 10. Accordingly, she argues that a preliminary injunction remains necessary to protect her right to engage in free speech.

The Proposed Injunction

The Scaers originally moved for a preliminary injunction enjoining the City, in essence, from denying flag applications and preventing flags from being flown on the Citizen Flag Pole on the basis of viewpoint, including any viewpoint that “is deemed to be offensive by city officials[.]” and from enforcing certain portions of the 2022 Flagpole Policy. See Doc. No. 2-14 (proposed Order). However, after Nashua adopted the 2024 Flagpole Policy and repealed the 2022 Flagpole Policy, plaintiffs altered their requested relief. They now seek a preliminary injunction “enjoining Defendants from denying Plaintiffs’ applications under their City Hall Plaza Events policy, from

restoring their 2022 [F]lagpole [P]olicy, or from closing the Citizen Flag Pole as a forum entirely.”
Doc. No. 26 at 8.

LEGAL STANDARD

“A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.” [Peoples Fed. Sav. Bank v. Peoples United Bank](#), 672 F.3d 1, 8-9 (1st Cir. 2012) (quoting [Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.](#), 645 F.3d 26, 32 (1st Cir. 2011)). In determining whether to grant a preliminary injunction, the district court must weigh the following four factors: “(1) the plaintiff’s likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing the injunction will burden the defendants less than denying an injunction would burden the plaintiffs and (4) the effect, if any, on the public interest.” [Sindicato Puertorriqueño de Trabajadores v. Fortuño](#), 699 F.3d 1, 10 (1st Cir. 2012) (per curiam) (quoting [Jean v. Mass. State Police](#), 492 F.3d 24, 26-27 (1st Cir. 2007)). “The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor.” [Esso Standard Oil. Co. \(Puerto Rico\) v. Monroig-Zayas](#), 445 F.3d 13, 18 (1st Cir. 2006).

The four factors “are not of equal prominence in the preliminary injunction calculus. The most important is whether the movant has demonstrated a likelihood of success on the merits – an element that [the First Circuit has] described as the ‘sine qua non’ of the preliminary injunction inquiry.” [Akebia Therapeutics, Inc. v. Azar](#), 976 F.3d 86, 92 (1st Cir. 2020) (quoting [Ryan v. U.S. Immigr. & Customs Enf’t](#), 974 F.3d 9, 18-19 (1st Cir. 2020)). “If the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence.” *Id.* Consequently, the court “need not address the other elements of the preliminary injunction framework” where a plaintiff “fail[s] to carry its burden of showing that it is likely to succeed on the merits of its claims[.]” *Id.* at 100.

DISCUSSION

I. Mootness

Defendants assert that Nashua’s adoption of the 2024 Flagpole Policy and repeal of the 2022 Flagpole Policy render plaintiffs’ motion for a preliminary injunction moot. Defendants argue that under the new policy, none of the City’s flagpoles constitute a public forum and only the City government has the right to use them. Doc. No. 21 at 20. Therefore, they reason that the relief plaintiffs seek is no longer available and the motion for a preliminary injunction should be denied as moot. *See id.* The Scaers argue that their motion is not moot because defendants cannot satisfy their burden of showing that the allegedly unlawful behavior is not reasonably expected to recur and because the court is capable of granting them meaningful relief. Doc. No. 26 at 7-10. For the reasons that follow, this court finds that the motion is not moot and that plaintiffs’ request for a preliminary injunction must be addressed on the merits.

“Article III of the Constitution restricts [the federal court’s] jurisdiction to ‘Cases’ and ‘Controversies.’” [In re Ruiz](#), 83 F.4th 68, 73 (1st Cir. 2023) (quoting U.S. Const. art. III, § 2). This constitutional limitation “ensures that the parties before [the court] retain a ‘personal stake’ in the litigation.” [Moore v. Harper](#), 600 U.S. 1, 14 (2023) (quoting [Baker v. Carr](#), 369 U.S. 186, 204 (1962)). “As [a] corollary to this case-or-controversy requirement,’ there must exist a dispute ‘at all stages of review, not merely at the time the complaint is filed.’” *Id.* (quoting [Genesis HealthCare Corp. v. Symczyk](#), 569 U.S. 66, 71 (2013)). The “[m]ootness doctrine ‘addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit.’” *Id.* (quoting [West Virginia v. EPA](#), 597 U.S. 697, 719 (2022)).

“Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” [D.H.L. Assocs. v. O’Gorman](#), 199 F.3d 50, 54 (1st Cir. 1999) (quoting [Powell v. McCormack](#), 395 U.S. 486, 496 (1969)). Defendants argue that

plaintiffs’ motion is no longer live in the instant case due to the City’s adoption of the 2024 Flagpole Policy. Doc. No. [21](#) at 20. The Complaint shows that each of plaintiffs’ claims in this action is based on Nashua’s 2022 Flagpole Policy, which was repealed and replaced by the 2024 Flagpole Policy.⁵ Ordinarily, a court lacks power to grant injunctive relief where the challenged policy no longer exists. See D.H.L. Assocs., 199 F.3d at 54-55 (ruling that court was without power to grant injunctive and declaratory relief where municipal ordinances at issue no longer existed). However, the Scaers rely on an exception to the mootness doctrine that applies where the defendant voluntarily ceases the challenged practice or repeals the challenged policy. See Doc. No. [26](#) at 7-8. They argue that this exception applies here because defendants failed to show that they will not restore the 2022 Flagpole Policy in the absence of a preliminary injunction. See id. at 10.

“It is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 289 (1982)). In other words, it “does not make the case moot.” Towle v. N.H. Dep’t of Corr., Comm’r, No. 06-cv-464-JL, 2008 WL 2080782, at *3

⁵ The Complaint consists of four Counts challenging the constitutionality of the 2022 Flagpole Policy. In Count One, plaintiffs allege that the 2022 Flagpole Policy “facially discriminates against speech that is not ‘in harmony with city policies and messages that the city wishes to express and endorse’ or that officials ‘consider[] contrary to the City’s best interest.’” Compl. at ¶ 59. They further allege that defendants’ implementation of the 2022 Flagpole Policy is “neither reasonable nor viewpoint neutral.” Id. In Count Two, plaintiffs allege that defendants’ implementation of the 2022 Flagpole Policy constitutes an unconstitutional prior restraint on the Scaers’ free speech, and in Count Three they challenge the 2022 Flagpole Policy “as unconstitutionally vague” because it allows “arbitrary censorship of speech” defendants dislike and “gives excessive enforcement discretion to [C]ity leaders.” Id. at ¶¶ 62-65, 68. Finally, in Count Four, plaintiffs allege that the 2022 Flagpole Policy is unconstitutionally overbroad because it allows City administrators to bar “vast amounts of protected political expression” by empowering them “to deny permission or remove any flag [they] consider[] contrary to the City’s best interest.” Id. at ¶ 72.

(D.N.H. May 14, 2008) (quoting [United States v. W.T. Grant Co.](#), 345 U.S. 629, 632 (1953)). This is because a dismissal on mootness grounds would “leave the defendant free to return to his old ways.” [Friends of the Earth](#), 528 U.S. at 189 (quotations, alteration, citation and punctuation omitted). On the other hand, “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” [Id.](#) (quoting [United States v. Concentrated Phosphate Export Ass’n](#), 393 U.S. 199, 203 (1968)). In such cases, “[t]he heavy burden of persua[ding]’ the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” [Id.](#) (second alteration in original) (quoting [Concentrated Phosphate Export Ass’n](#), 393 U.S. at 203). Defendants in the instant case fail to satisfy that burden.

A governmental entity such as the City may be entitled “to a presumption of mootness” where a policy change eliminating the allegedly improper behavior is made through legislation or legislative-like procedures. [Thomas v. City of Memphis, Tenn.](#), 996 F.3d 318, 324-25 (6th Cir. 2021); see also [Towle](#), 2008 WL 2080782, at *4 (concluding that Department of Corrections’ administrative overhaul to its regulations rendered plaintiff’s request for an injunction moot). Where such a presumption applies, the governmental entity “need not do much more than simply represent that it would not return to the challenged policies.” [Thomas](#), 996 F.3d at 324 (quoting [Speech First, Inc. v. Schlissel](#), 939 F.3d 756, 768 (6th Cir. 2019)). However, no such presumption applies when “the discretion to effect the changes lies with one agency or individual, or there are no formal processes required to effect the change[.]” [Id.](#) (quoting [Speech First](#), 939 F.3d at 768). Here, it is undisputed that the decision to repeal Nashua’s 2022 Flagpole Policy and replace it with the 2024 Flagpole Policy was made by one individual – defendant Donchess. To render the motion moot, therefore, defendants must make it “absolutely clear” that the 2022 Flag Pole Policy will not

be reinstated. [Friends of the Earth](#), 528 U.S. at 189 (quoting [Concentrated Phosphate Export Ass’n](#), 393 U.S. at 203).

Defendants present no specific evidence showing that Nashua has no intention of reinstating the 2022 Flagpole Policy or that the adoption of a similar policy cannot reasonably be expected to occur.⁶ For instance, defendants provide no information indicating that Donchess has no plans to revive the 2022 Flagpole Policy or that he lacks discretion to reinstate it. Nor do they present facts showing that there are other limitations in place to prevent him from using such discretion. Additionally, defendants do not concede that the challenged Policy was improper. Rather, Nashua maintains that the 2022 Flagpole Policy was constitutional and that the 2024 Flagpole Policy merely clarifies the City’s position that since 2022, the Citizen Flag Pole has served as a forum for government speech rather than a public forum for private speech. See Pl. Ex. P; Doc. No. 21 at 1-3, 9-11. These assertions undermine any suggestion that in the absence of a preliminary injunction, it is absolutely clear that the City will not revert to its prior policy or implement a similar policy at some point in the future.⁷ Accordingly, plaintiffs’ motion is not moot and the court must turn to the merits of their request for a preliminary injunction.

⁶ During oral argument on the motion for preliminary injunction, Nashua’s counsel argued that the City has no incentive to reinstate the 2022 Flagpole Policy. However, there is no evidentiary support for counsel’s assertion, which is insufficient to meet defendants’ burden of proof on the question whether the allegedly unconstitutional behavior is reasonably expected to recur.

⁷ Although Nashua repealed its 2022 Flagpole Policy in October 2024, it maintained a policy regarding events at City Hall Plaza that contains nearly identical language as the 2022 Flagpole Policy. See Pl. Ex. M. That policy provides:

The plaza in front of City Hall may be provided for use by persons or group[s] to have an event. This potential use of the City Hall Plaza is not intended to serve as a forum for free expression by the public. Any message sought to be permitted will be allowed only if it is in harmony with city policies and messages that the city wishes to express and endorse. This policy recognizes that an event in front of City Hall will be deemed by many as City support for the sentiment thereby expressed, city administration reserves the right to deny permission it considers contrary to the

II. Likelihood of Success on the Merits

“In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.” [Sindicato Puertorriqueño de Trabajadores](#), 699 F.3d at 10. Thus, the court must consider this factor “before moving on to the remaining prongs of its analysis.” *Id.* at 11. “To demonstrate likelihood of success on the merits, plaintiffs must show ‘more than mere possibility’ of success – rather, they must establish a ‘strong likelihood’ that they will ultimately prevail.” *Id.* at 10 (quoting [Respect Maine PAC v. McKee](#), 622 F.3d 13, 15 (1st Cir. 2010)). In this case, the Scaers have not made the requisite showing, and therefore, the District Judge should deny their motion for preliminary injunctive relief.

A. The nature of the speech at issue.

The critical issue in determining whether the Scaers are likely to succeed on the merits of their claims is whether the display of flags on the Citizen Flag Pole under the 2022 Flagpole Policy constituted government speech or private speech. The Free Speech Clause of the First Amendment “restricts government regulation of private speech; it does not regulate government speech.” [Pleasant Grove City, Utah v. Summum](#), 555 U.S. 460, 467 (2009). Therefore, “[w]hen the government encourages diverse expression – say, by creating a forum for debate – the First Amendment prevents it from discriminating against speakers based on their viewpoint. But when the government speaks for itself, the First Amendment does not demand airtime for all views” and the government is free to control the nature of its speech. [Shurtleff](#), 596 U.S. at 247-48 (internal citation omitted). In the instant case, defendants argue that the 2022 Flagpole Policy and the City’s

City’s best interest. All City Hall Plaza Events must be submitted for approval and follow all guidelines and procedures provided below.

Id. The City’s decision to keep this policy in place, even after plaintiffs challenged its similarly worded flagpole policy, undermines the conclusion that Nashua will not reinstate the 2022 Flagpole Policy at some point in the future.

implementation of that Policy cannot be deemed unconstitutional, and plaintiffs cannot establish a likelihood of success on the merits of any of their claims, because the speech in question was government speech. See Doc. No. [21](#) at 4-8. Plaintiffs contend, however, that “the flags displayed on the Citizen Flag Pole [were] private speech” and that Nashua’s ability to reject their proposed flags, based on the viewpoints the flags expressed, rendered the 2022 Flagpole Policy unconstitutional. Doc. No. [2](#) at 1-2, 8-10; Doc. No. [26](#) at 5-7.

The fact that Nashua invited members of the public to apply for permission to fly their own flags on the Citizen Flag Pole does not resolve the issue whether flags flown pursuant to the 2022 Flagpole Policy constituted government or private speech. See [Shurtleff](#), 596 U.S. at 254 (“The flying of a flag other than a government’s own can also convey a governmental message.”). To answer this question, the court must “conduct a holistic inquiry designed to determine whether [Nashua] intend[ed] to speak for itself or to regulate private expression.” Id. at 252. In [Shurtleff](#), where the Supreme Court addressed this precise question, the Court relied on the following factors to guide its analysis: “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.” Id. This court concludes that these factors, taken together, indicate that the flags displayed on the Citizen Flag Pole pursuant to 2022 Flagpole Policy constituted government speech.

B. The history of the Citizen Flag Pole.

“In evaluating the history factor, courts look to the medium of speech used and its historical ties to government.” [Metroplex Atheists v. City of Forth Worth](#), No. 4:23-cv-00736-O, 2023 WL 5025020, at *3 (N.D. Tex. Aug. 6, 2023). See also [Shurtleff](#), 596 U.S. at 253-55 (considering “the history of flag flying, particularly at the seat of government.”); [Walker v. Texas Div., Sons of Confederate Veterans, Inc.](#), 576 U.S. 200, 210-12 (describing states’ historical use of license plates

to convey messages); [Sumnum](#), 555 U.S. at 470-72 (describing governments’ historical use of monuments on government land). Where, as in this case, the speech involves a flag display, it is appropriate to consider both the general history of flag displays, “particularly at the seat of government[,]” and the specific flag flying program at issue. [See Shurtleff](#), 596 U.S. at 253-55 (considering both “the history of flag-flying, particularly at the seat of government” and “the details of *this* flag-flying program” (emphasis in original)). Although the general history of flag flying on government property favors Nashua, the specific history of the Citizen Flag Pole is somewhat more nuanced because the City’s policy changed over time.

As the Supreme Court explained in [Shurtleff](#), throughout the course of history, governments have used flags to represent their communities and convey government messages. [See Shurtleff](#), 596 U.S. at 253-55. Indeed, municipalities often use flags to symbolize their cities and communicate with the surrounding community. [See id.](#) at 254-55 (describing Boston’s use of flags on City Hall Plaza to convey the city’s messages). This is especially true where, as in this case, flags are displayed at the seat of municipal, state, or federal government. [See id.](#) (discussing history of flag flying, “particularly at the seat of government[,]” as a means of conveying the government’s message). Here, the undisputed evidence shows that Nashua uses the flagpoles located outside City Hall to display government flags such as the American flag and the New Hampshire flag. Compl. at ¶ 8. Therefore, the City follows a long tradition of using its flagpoles to engage in government speech.

With respect to the history of the specific flagpole at issue in this case, there is no indication that anyone other than the City selected the flags that were flown on the Citizen Flag Pole prior to 2017. It was only at that time, when Nashua established a program to allow members of the public to apply for approval to fly flags on the Citizen Flag Pole, that the City created a means for citizen input regarding the flags displayed on City Hall property. [See Beth Decl.](#) at ¶ 7. The Scaers rely

on this program to argue that “historically, the Citizen Flag Pole was a forum for citizen speech[.]” Doc. 2 at 10. However, defendants contend that “Plaintiffs conspicuously focus only on the history of the flagpole *before* [the Supreme Court’s decision in] Shurtleff was decided in 2022 and *before* the City adopted the 2022 Flagpole Policy at the heart of this matter.” Doc. No. 21 at 6 (emphasis in original). They argue that the 2022 Flagpole Policy “marked a change in the characteristics of the flags flown outside City Hall” and “if the flags flown were once private speech, as of 2022, the City clearly claimed them as its own speech.” Id.

The record supports defendants’ argument regarding the full history of the Citizen Flag Pole. In 2017, when the City initiated its flag program, Nashua officials asserted almost no control over the flags displayed on the Citizen Flag Pole. Although the City established some limitations by reserving the Citizen Flag Pole “for the citizens of Nashua to fly a flag in support of their cultural heritage, observe an anniversary or honor a special accomplishment[.]” there is no evidence that Nashua participated in the selection of the flags displayed on the flagpole or that it intended to use the Citizen Flag Pole to promote its own messages or policies. See Pl. Ex. A. The only other requirements were unrelated to the messages or viewpoints that the flags were intended to convey. See id. (requiring any group seeking to fly a flag to provide the flag); Beth Decl. at ¶ 8 (requiring applicants to submit a Special Events Application to the Risk Manager, who determined whether the flagpole was available, and to confirm that they would abide by local ordinances and indemnify the City for any damages caused by their event). Furthermore, during the period between the establishment of the flag program in 2017 and the adoption of the 2022 Flagpole Policy, Nashua refused to fly a citizen’s flag on only two occasions – on October 11, 2020, when it revoked its approval of Beth’s application to fly the Save Women’s Sports flag following complaints that it was transphobic, and in February 2021, when it rejected a request to fly the Porcupine flag. See Beth Decl. at ¶¶ 22-23, 32. Accordingly, there is little evidence to

suggest that the flags conveyed any government messages or that Nashua made much of an effort to shape and control the nature of the speech. See [Matal v. Tam](#), 582 U.S. 218, 235-37 (2017) (finding it “far-fetched” to suggest that registration of a trademark makes the mark government speech where the government does not create or edit the marks, does not evaluate whether the viewpoint conveyed by the mark is consistent with government policy, and does not endorse the mark when it issues a trademark registration). It appears, therefore, that the Citizen Flag Pole initially served as a means for private expression.

However, the evidence demonstrates that Nashua’s approach to the Citizen Flag Pole changed significantly with the adoption of the 2022 Flagpole Policy. In addition to limiting the display of flags to those used to signify “cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause[.]” the 2022 Flagpole Policy expressly disclaimed the City’s intent to create “a forum for free expression by the public.” Pl. Exs. B and D. By adding this language, Nashua manifested an intent to comply with the Supreme Court’s decision in [Shurtleff](#) and to use the Citizen Flag Pole to convey government speech. See [Shurtleff](#), 596 U.S. at 257 (describing San Jose, California’s flag policy, which “provides in writing that its ‘flagpoles are not intended to serve as a forum for free expression by the public[.]’” as an example of government speech (quotations and citation omitted)). The 2022 Flagpole Policy also provided that “[a]ny message sought to be permitted will be allowed only if it is in harmony with [C]ity policies and messages that the [C]ity wishes to express and endorse[.]” and it reserved Nashua’s “right to deny permission or remove any flag it consider[ed] contrary to the City’s best interest.” Pl. Exs. B and D. Thus, the City indicated that it would review applications to ensure that the viewpoints expressed by the applicants’ flags, and the messages they conveyed to the public, were consistent with those of the City.

Nashua’s 2022 revisions to its Special Events Procedures further illustrate the City’s efforts to control the messages conveyed under its 2022 Flagpole Policy. By requiring applicants who wished to use the Citizen Flag Pole to “include a photograph of the flag proposed and an explanation of the message intended to be conveyed[.]” Nashua established a procedure for ensuring that the flags reflected its own viewpoints. See Pl. Ex. E at 2. Further, by declaring that applications to fly a flag “shall be subject to review and approval of the [City’s] Risk Manager[.]” Nashua made it clear that the City, rather than the applicants, would have final authority over the nature of the flags displayed on its flagpole. See id. Therefore, the record indicates that in 2022, Nashua converted the Citizen Flag Pole from a vehicle for private speech into a means of conveying government-approved messages. See Summum, 555 U.S. at 472-73 (finding that privately financed and donated monuments that city accepted and displayed to the public in municipal park represented government speech where the city “effectively controlled the messages sent by the monuments in the Park by exercising final approval authority over their selection.” (internal quotations and citation omitted)); Feldman v. Denver Pub. Schools, No. 23-cv-02986-RMR-STV, 2024 WL 4308189, at *3 (D. Colo. Sept. 26, 2024) (evidence showing that school officials retained authority over which flags could hang on public school walls supported a determination that historical use of the forum weighed in favor of government speech); Metroplex Atheists, 2023 WL 5025020, at *5 (concluding that history of city banner policy supported a finding that challenged banners were government speech where city retained sole authority to approve banner applications, city maintained exclusive control over the areas where banners were hung, and city had exclusive oversight of the municipal banner program).

It is undisputed that Nashua has exerted increasing control over the flags displayed on the Citizen Flag Pole since 2022. The record demonstrates that the 2022 Flagpole Policy remained in force until October 7, 2024, when Nashua eliminated the Citizen Flag Pole program altogether

with the adoption of the 2024 Flagpole Policy. See Def. Ex. A. Therein, the City declared that all the flagpoles on city hall grounds “shall henceforth be exclusively controlled by city government[,]” that the City alone would “determine what flags will be flown[,]” and that it would not seek input from the public or any other sources. Id. Moreover, Nashua specified that “[t]he flagpoles are not public fora open to others for expression but are solely for city government to convey messages it chooses.” Id. Under the terms of the 2024 Flag Pole Policy, therefore, flags displayed on the Citizen Flag Pole convey government speech.

Although plaintiffs’ characterization of the Citizen Flag Pole as a forum for private speech accurately describes the history of Nashua’s flag policy in the earlier portion of its existence, the record demonstrates that the City changed course in 2022. Since its adoption of the 2022 Flagpole Policy at issue in this case, the City has allowed only those flags “that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent [City Hall.]” See Summum, 555 U.S. at 473. Therefore, this court concludes that under the circumstances presented in this case, the Scaers have not demonstrated that they are likely to prevail in showing that the historic factor weighs in favor of private speech.

C. The public’s likely perception of who is speaking.

The next factor the court considers is “whether the public would tend to view the speech at issue as the government’s.” Shurtleff, 596 U.S. at 255. Plaintiffs argue that Nashua’s residents “likely perceive the flags on the Citizen Flag Pole as private speech – as the pole’s name implies.” Doc. No. 2 at 11. Defendants argue that common sense dictates otherwise, especially because “any flag flown in front of City Hall is on City property.” Doc. No. 21 at 7. This court concludes that at this early stage in the litigation, the public perception factor favors neither party, and therefore, plaintiffs have not shown that they are likely to prevail with respect to this factor.

The parties agree that the Citizen Flag Pole is one of four flagpoles located at Nashua's City Hall, just outside the entrance to the City's seat of government, and that Nashua uses the remaining flagpoles to display government flags. Compl. at ¶ 8. In this context, the flags displayed on the City's flagpoles may reasonably be perceived as helping to "defin[e] the identity that [the] city projects to its own residents and to the outside world." [Shurtleff](#), 596 U.S. at 255 (second alteration in original) (quoting [Summum](#), 555 U.S. at 472)). Consequently, "the public seems likely to see the flags as 'conveying some message' on the government's 'behalf.'" *Id.* (quoting [Walker](#), 576 U.S. at 212 (additional quotations and citation omitted)). Nashua specifically acknowledged this likelihood when it stated in its 2022 Flagpole Policy "that a flag flown in front of City Hall will be deemed by many as City support for the sentiment thereby expressed[.]" Pl. Exs. B and D.

The Scaers disagree that members of the public were likely to view the flags on the Citizen Flag Pole as government speech during the time period when the City's flag program was in place. They argue that since 2017, the Citizen Flag Pole has displayed flags conveying a range of viewpoints, "including some that would be strange or inappropriate for a city to express" such as religious and libertarian flags. Doc. No. 2 at 11. They also argue that the flags displayed on the Citizen Flag Pole were raised by private citizens who often accompanied flag-raising events with private ceremonies, without any City representatives present, during which attendees sometimes expressed controversial views. *Id.* Thus, they contend that an objective observer would have viewed the flags on the Citizen Flag Pole as expressing private speech.

[Shurtleff](#) provides some support for plaintiffs' argument. In that case, the Supreme Court considered evidence showing that private citizens often accompanied flag raisings with ceremonies that they conducted at the base of the city's flagpole. See [Shurtleff](#), 596 U.S. at 255. The Court agreed that "a pedestrian glimpsing a flag other than Boston's" on the flagpole in question "might

simply look down onto the [City Hall] plaza, see a group of private citizens conducting a ceremony without the city's presence, and associate the new flag with them, not Boston.” Id. Therefore, the Court concluded that “even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here.” Id. The same may reasonably be said about the flags on Nashua's Citizen Flag Pole.

Nevertheless, the evidence presented here could also support the conclusion that the public was likely to associate the flags with the views and sentiments of the City. Although flag raisings on the Citizen Flag Pole were often accompanied by ceremonies at City Hall Plaza, flags were sometimes raised without any accompanying ceremony or event. See Stephen Decl. at ¶ 7; Beth Decl. at ¶ 10. In the latter scenario, an observer might have reasonably viewed the Citizen Flag Pole, like the other flagpoles at City Hall, as expressing the City's views. Notably, it is also undisputed that local politicians sometimes attended and spoke at the flag-raising ceremonies, and when local ethnic communities raised a flag on the Citizen's Flag Pole, defendant Donchess usually attended the event to show his support for the community and strengthen his political network. Stephen Decl. at ¶¶ 7-8. Members of the public who observed those events may have reasonably associated those flag raisings with the views of the City and its mayor. Therefore, the circumstances surrounding the ceremonies favor neither party.

The fact that the flags on the Citizen Flag Pole reflected a range of perspectives similarly supports neither party. On the one hand, as plaintiffs argue, “[a] viewer is unlikely to think, for instance, that Nashua has an official position about whether Kurdistan should be independent from Iraq; whether the Free State Project and the growth of the Libertarian Party benefits New Hampshire; or whether the Protestant Reformation marked the birth of religious freedom.” Doc. No. 2 at 11. Similarly, a viewer might reasonably have concluded that flags raised on the “Citizen” flagpole and representing a wide variety of cultures, events, and causes reflected the backgrounds

and views of Nashua’s community members rather than the City’s views or policies. On the other hand, a viewer may have just as easily concluded that “[t]he City . . . selected those [flags] that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent [City Hall.]” Summum, 555 U.S. at 473. For example, the public may have viewed the flags on the Citizen Flag Pole as a means by which the City celebrated its diverse community. It might also have viewed the flags as a way for Nashua to portray itself as a welcoming community for individuals of various backgrounds and beliefs.⁸ As the Supreme Court observed in Summum, “[i]t certainly is not common for property owners to open up their property . . . [to] convey a message with which they do not wish to be associated.” Id. at 471. Given the Citizen Flag Pole’s location at City Hall, especially when combined with its proximity to three other flagpoles belonging to and controlled by the City, viewers could reasonably interpret the flags “as conveying some message on the [City’s] behalf” and therefore reflecting government speech. See id.; see also Metroplex Atheists, 2023 WL 5025020, at *6 (finding that organizations’ use of city poles to display banners under municipal banner policy “clearly implies” the city’s endorsement of the messages conveyed by the banners “to anyone walking down the street.”). In short, this court finds that at this stage in the litigation, the public perception factor favors neither party. Consequently, the Scaers failed to show a likelihood of success in this regard.

⁸ Plaintiffs argue that members of the public who viewed the Christian or Luther Rose flags on the Citizen Flag Pole likely associated those flags with private speech rather than government speech because, under the Establishment Clause of the First Amendment, “[a] city cannot use government speech and resources to subtly pressure citizens into supporting Protestant Christianity or Christianity in general.” Doc. 2 at 12. However, this court finds that it is too speculative to conclude that individuals who viewed those flags performed any such analysis or that their concerns about the Establishment Clause led them to draw any conclusions about the nature of the speech conveyed by the flags.

D. Nashua’s control over the messaging.

The final factor the court must evaluate is “the extent to which the government . . . actively shaped or controlled the expression.” [Shurtleff, 596 U.S. at 252](#). Thus, the court must “look at the extent to which [Nashua] actively controlled these flag raisings and shaped the messages the flags sent.” [Id.](#) at 256. The critical issue for purposes of evaluating this factor is whether or not the City exerted the type of control that “would indicate that [Nashua] meant to convey the flags’ messages.” [Id.](#) The court concludes, based on the evidence presented to date, that this factor weighs in favor of the City.

During the time period when the 2022 Flagpole Policy was in effect, Nashua required anyone wishing to fly a flag on the Citizen Flag Pole to submit an application that included a photograph of the proposed flag “and an explanation of the message intended to be conveyed.” Pl. Ex. E at 2. Applications were then “subject to review and approval of the [City’s] Risk Manager[.]” who evaluated the flags in accordance with the 2022 Flagpole Policy. [Id.](#) Pursuant to that Policy, the City expressly disclaimed the use of the Citizen Flag Pole “as a forum for free expression by the public.” Pl. Exs. B and D. Additionally, the City retained sole authority to review the proposed flags, approve or reject flags based on whether the viewpoints they reflected were consistent with the City’s own “policies and messages that the [C]ity wishe[d] to express and endorse[.]” and remove any flags that it determined were not in the City’s “best interest.” [Id.](#) During the approximately 29-month period when the 2022 Flagpole Policy was in effect, Nashua denied applications for five different flags to fly on the Citizen Flag Pole. [See](#) Beth Decl. at ¶¶ 31-37. Therefore, the control factor weighs toward a finding of government speech. [See e.g., Walker, 576 U.S. at 213](#) (concluding that state “effectively controlled” the messages conveyed by specialty license plates “by exercising final approval authority over their selection.” (quotations and citations omitted)).

The Scaers argue that the evidence relating to this factor is insufficient to support a showing of government speech because the City had no role in crafting or editing the flags and never took ownership of the flags. See Doc. No. [2](#) at 12-13; Doc. No. [26](#) at 3-5. This court disagrees and finds that under the relevant Supreme Court authority, Nashua exercised sufficient control to make such a showing. For example, in Summum, the Supreme Court considered a city’s denial of a religious organization’s request to erect a stone monument reflecting the organization’s religious views in a 2.5-acre public park located in the city’s historic district. Summum, 555 U.S. at 464-65. The park contained 15 permanent displays, at least 11 of which – including a historic granary, a wishing well, the city’s first fire station, and a Ten Commandments monument – had been donated by private groups or individuals. Id. The religious organization, respondent Summum, claimed that the city and various local officials violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting Summum’s proposed stone monument. Id. at 466. However, the Supreme Court determined that no such violation occurred because “the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.” Id. at 464.

In reaching its conclusion that the monuments in the city’s park were government speech, the Court considered the same three factors that apply in this case. See id. at 470-73. With respect to the control factor, the Court “rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own park.” Walker, 576 U.S. at 210 (describing Summum, 555 U.S. at 470-71). The Supreme Court found it significant that although many of the monuments in the park “were donated in completed form by private entities, the [c]ity decided to accept those

donations and to display them in the Park.” Summum, 555 U.S. at 472. The Court further reasoned in relevant part as follows:

Respondent does not claim that the [c]ity ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the [c]ity has “effectively controlled” the messages sent by the monuments in the Park by exercising “final approval authority” over their selection. The [c]ity has selected those monuments that it wants to display for the purpose of presenting the image of the [c]ity that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent’s concern; and the [c]ity has now expressly set forth the criteria it will use in making future selections.

Id. at 472-73 (internal citation omitted).

The evidence before this court establishes a similar level of control by the City in this case. Under the 2022 Flag Pole Policy, Nashua established criteria for selecting flags to fly flags on the Citizen Flag Pole. See Pl. Exs. B and D (requiring proposed flags to “support . . . cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause,” and allowing only messages that were “in harmony with the city policies and messages that the city wish[ed] to express and endorse.”). It also maintained direct control over the messages conveyed by the flags by requiring applicants to submit photographs of the proposed flags and explanations of their intended messages, and by screening applications for conformance with the 2022 Flagpole Policy. See Pl. Ex. E at 2. Additionally, Nashua exercised final approval authority over the flag applications by subjecting them to the “review and approval of the [City’s] Risk Manager[,]” and it further controlled the messages conveyed by the flags on the Citizen Flag Pole by reserving “the right to deny permission or remove any flag that it consider[ed] contrary to the City’s best interest.” See id.; Pl. Exs. B and D. Although the City did not take ownership of the flags, which remained the property of their owners, it “selected those [flags] that it want[ed] to display for the purpose of presenting an image of the City that it wish[ed] to project” to all who visited City Hall. See

Summum, 555 U.S. at 473. Under Summum, the control factor weighs heavily in favor of Nashua in this case.

The Supreme Court’s discussion of the control factor in Shurtleff is also instructive. In that case, the Court considered the extent to which the city of Boston “actively controlled” flag raisings by private groups at City Hall and “shaped the messages the flags sent.” Shurtleff, 596 U.S. at 256. The Court determined that Boston lacked any “meaningful involvement” in selecting the flags or in “the crafting of their messages[.]” Id. at 258. As a result, it concluded that the flag raisings were private, rather than government, speech. Id.

In connection with its analysis of the control factor in Shurtleff, the Supreme Court considered evidence showing that “Boston told the public that it sought ‘to accommodate all applicants’ who wished to hold events at Boston’s ‘public forums,’ including on City Hall Plaza.” Id. at 256 (citation omitted). It also noted that the application to fly a flag sought no information regarding the nature of the flag or its meaning, and that the city employee who reviewed the applications never sought to review the flags, and never even saw the flags, before they were raised on the city’s flagpole. Id. at 256-57. Additionally, the Court found it significant that Boston’s regular practice “was to approve flag raisings, without exception” and that the city “had nothing – no written policies or clear internal guidance – about what flags groups could fly and what those flags would communicate.” Id. at 257. Importantly, the Supreme Court noted that Boston “could easily have done more to make clear it wished to speak for itself by raising flags[.]” and it referred to the written policy of San Jose, California, as an example of a flagpole policy that would support government speech.⁹ Id. at 257-58. According to the Court, that policy “provides in writing that its ‘flagpoles are not intended to serve as a forum for free expression by the public,’ and lists

⁹ San Jose, California’s flag policy, which the Supreme Court discussed in Shurtleff, can be found at the following online address: <https://bit.ly/30tX0Fu>.

approved flags that may be flown ‘as an expression of the City’s official sentiments.’” Id. (additional quotations and citation omitted).

The facts presented here are easily distinguishable from the circumstances described in Shurtleff. During the time period relevant to the Scaers’ claims, Nashua maintained a written flagpole policy with identifiable guidelines of what it wished to communicate through the flags displayed on the Citizen Flag Pole. Like San Jose’s policy, but in contrast to Boston’s policy, the 2022 Flagpole Policy stated that the “potential use of a City flag pole is not intended to serve as a forum for free expression by the public.” Pl. Exs. B and D. Moreover, Nashua maintained the right to exert ultimate control over the Citizen Flag Pole by reserving for itself “the right to deny permission or remove any flag it consider[ed] contrary to the City’s best interest.” Id.

Unlike the city in Shurtleff, Nashua also established procedures for the review and approval of proposed flags. Pursuant to those procedures, anyone seeking to raise a flag on Nashua’s Citizen Flag Pole was required to submit an application to the City Risk Manager that included a photograph of the proposed flag and “an explanation of the message intended to be conveyed.” Pl. Ex. E at 2. The City Risk Manager then evaluated the application “in accordance with the City’s flag pole policy” and decided whether or not to approve the application. Id. In contrast to Boston’s practice in Shurtleff, the record in this case demonstrates that following the adoption of its 2022 Flagpole Policy, Nashua refused to display five different flags. See Beth Decl. at ¶¶ 31-37. Therefore, Shurtleff also supports the conclusion that the control factor weighs in the City’s favor.¹⁰

Nevertheless, plaintiffs assert that the evidence undermines this conclusion because it shows that Nashua exercised no control over the flag-raising ceremonies, which conveyed the

¹⁰ Plaintiffs argue that the flags displayed on the Citizen Flag Pole under the 2022 Flagpole Policy are comparable to vanity license plates, “which courts have repeatedly held constitute private speech.” Doc. No. 2 at 14. This court disagrees. As described above, the relevant factors, analyzed in accordance with the circumstances presented in this case, weigh in favor of government speech.

meaning of the flags to the public. Doc. No. 2 at 13. The Scaers note that some applicants used those ceremonies as an opportunity to criticize City policies, and they point to the raising of the Christian flag, during Holy Week 2024, as an example of a ceremony at which speakers criticized the City. Id. Plaintiffs argue that such speech cannot reasonably constitute government speech, and therefore, the flags must have conveyed private speech. See id.

Plaintiffs' argument is insufficient to show that the control factor supports a finding of private speech. As an initial matter, plaintiffs' constitutional claims in this action are directed at the City's 2022 Flagpole Policy, not the Special Event Procedures that applied to events at City Hall Plaza. Furthermore, as detailed above, the evidence shows that the City's Risk Manager relied on a written application, including "a photograph of the flag proposed and an explanation of the message intended to be conveyed[,]" to determine whether a proposed flag complied with the City's 2022 Flagpole Policy. See Pl. Ex. E at 2. To the extent applicants subsequently used a flag-raising ceremony to criticize the City and its policies, that did not diminish the control that the City exerted over the flag approval process. Finally, the City was not required to adopt the message that an applicant associated with a flag in order to rely on the flag to express the City's viewpoint. See Summum, 555 U.S. at 474 (rejecting respondent's suggestion that a monument can convey only one message, and if the government does not embrace the message intended by the monument's donor, it has not engaged in expressive conduct). The record demonstrates that flags can have more than one meaning. Compare Pl. Ex. H at 2 (describing the Pine Tree flag as a means to commemorate Nashua's soldiers who fought and died at the Battle of Bunker Hill) with Pl. Ex. O at 1 (describing the Pine Tree flag as a symbol of the January 6, 2020 attack on the United States Capitol Building). Therefore, the City's approval of a flag did not necessarily constitute an endorsement of the meaning that the applicant saw in that flag. See Summum, 555 U.S. at 476-77 (by accepting a privately donated monument and placing it on city property, "a government entity

does not necessarily endorse the specific meaning that any particular donor sees in the monument.”). In short, the Scaers’ arguments regarding the flag-raising ceremonies do not alter this court’s conclusion that the control factor weighs in favor of Nashua.


E. Summary.

Because the three factors, taken together, support the conclusion that the flags displayed on the Citizen Flag Pole under the 2022 Flagpole Policy constituted government speech, the Scaers failed to establish a strong likelihood that they will ultimately prevail on their claims against defendants and there is no need to address the parties’ arguments regarding the merits of plaintiffs’ constitutional claims. See Sumnum, 555 U.S. at 467 (“The Free Speech Clause . . . does not regulate government speech.”). Nor is it necessary to address the remaining elements of the preliminary injunction analysis. See Akebia Therapeutics, 976 F.3d at 92 (“If the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence.”). Therefore, this court recommends that plaintiffs’ motion for a preliminary injunction be denied.

CONCLUSION

For all the reasons detailed herein, this court recommends that the District Judge deny Plaintiffs’ Motion for Preliminary Injunction (Doc. No. 2). Any objections to this Report and Recommendation must be filed within fourteen (14) days of receipt of this notice. The fourteen day period may be extended upon motion. Failure to file any objection within the specified time waives the right to appeal the district court’s Order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016). Only those issues raised in the objection(s) to this Report and Recommendation “are subject to review in the district court” and any issues “not preserved by such objection are precluded on appeal.” Sch. Union No. 37 v. United Nat’l Ins. Co., 617 F.3d

554, 564 (1st Cir. 2010) (quoting Keating v. Sec’y of Health & Hum. Servs., 848 F.2d 271, 275 (1st Cir. 1988)).



Talesha L. Saint-Marc
United States Magistrate Judge

December 16, 2024

cc: Counsel of record

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Scaer et al.

v.

Case No. 24-cv-277-LM-TSM

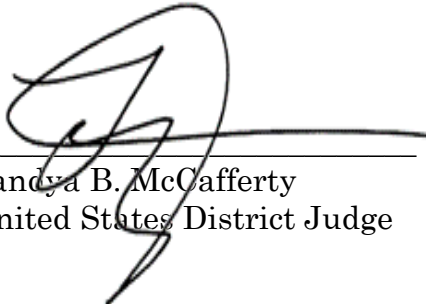
Nashua, NH, City of et al

ORDER

After due consideration of the objection and reply filed, I herewith approve the Report and Recommendation of Magistrate Judge Talesha L. Saint-Marc dated December 16, 2024. Doc. no. 32. For the reasons explained in the Report and Recommendation, the Scaers failed to show that they are likely to succeed on the merits of their claims. Applying the factors from Shurtleff v. City of Boston, 596 U.S. 243, 254 (2022), the Magistrate Judge correctly found that the undisputed facts indicate that the flags displayed on the Citizen Flag Pole pursuant to Nashua's 2022 Flagpole Policy constituted government speech not regulated by the First Amendment.

The plaintiffs' motion for preliminary injunction (doc. no. 2) is denied.

SO ORDERED.



Landya B. McCafferty
United States District Judge

Date: March 28, 2025

cc: Counsel of Record

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