No. 25-1356

In the United States Court of Appeals for the First Circuit

STEPHEN SCAER and BETHANY R. SCAER,
Plaintiffs-Appellants,

v.

CITY OF NASHUA, NEW HAMPSHIRE, JAMES W. DONCHESS, Mayor of the City of the City of Nashua, New Hampshire, in his official and individual capacity, and JENNIFER L. DESHAIES, Risk Manager for the City of Nashua, New Hampshire, in her official and individual capacity,
Defendants-Appellees.[1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR DEFENDANTS-APPELLEE, CITY OF NASHUA, NEW HAMPSHIRE

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July 21, 2025

[1] The Plaintiffs-Appellants voluntarily withdrew their claims against Mayor Donchess and Deshaies in their individual capacities. App. 82-83. The Defendants-Appellees subsequently filed a Motion to Dismiss Mayor Donchess and Deshaies in their official capacities because such claims were redundant due to the City also being a party to the case. App. 169. The Plaintiffs-Appellants offered no objection, provided that any decision against the City would be binding on all City departments and that the previously agreed upon scope of discovery would remain unchanged. Id. The lower court then granted the Defendants-Appellees' Motion to Dismiss. Id. Despite the dismissal of the claims against Mayor Donchess and Deshaies, they are still referred to as "Defendants" in the Plaintiffs-Appellants' brief.

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Defendant-Appellee, the City of Nashua states that it is a municipal corporation, with no parent corporations, stock holders, or subsidiaries.

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REASONS ORAL ARGUMENT IS UNNECSSARY

Pursuant to Fed. R. App. P. 34, the Defendant-Appellee, City of Nashua, New Hampshire states that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE ISSUES

1. Whether the United States District Court for the District of New Hampshire erred in denying the Plaintiffs-Appellants' Motion for Preliminary Injunction.

STATEMENT OF THE CASE

The Plaintiffs-Appellants, Bethany R. Scaer and Stephen Scaer (the "Plaintiffs-Appellants") filed a Complaint against the Defendants-Appellees, the City of Nashua (the "City"), James W. Donchess, the Mayor for the City of Nashua in his official and individual capacity ("Mayor Donchess"), and Jennifer L. Deshaies, the Risk Manager for the City of Nashua in her official and individual capacity ("Deshaies") (collectively the "Defendants-Appellees") in the United States District Court for the District of New Hampshire. App. 9-32. In the Plaintiffs-Appellants' Complaint, they allege that the Defendants-Appellees violated their First Amendment rights by not permitting them to raise two flags on a flagpole situated in front of Nashua City Hall. Id. The Plaintiffs-Appellants also moved for a preliminary injunction, asking the United States District Court for the District of New Hampshire to order the Defendants-Appellees to raise their flags and any other flags of their choosing. App. 3, 9-32. The lower court denied the Plaintiffs-Appellants' Motion for Preliminary Injunction on the grounds that the Defendants-Appellees' decision on what flags to raise constitutes government speech. Add. 1-37. The Plaintiffs-Appellants now appeal the lower court's decision.

STATEMENT OF THE FACTS

In Shurtleff v. City of Boston, 596 U.S. 243 (2022), the plaintiff sued the City of Boston because it refused to allow the plaintiff to fly a Christian flag on a flagpole in front of Boston City Hall. In finding that the City of Boston violated the plaintiff's First Amendment rights, the Supreme Court of the United States was critical of the City of Boston's criteria for raising a flag, finding that the criteria "do not suggest purposeful communication of a government message." Id. at 274, n.4. The Shurtleff Court cited in support of its conclusion the written policy of the City of San Jose, California which made clear that it wished to speak for itself by raising flags, by specifying 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 258-59.

In response to the Supreme Court of the United States deciding Shurtleff, the City crafted a written policy with criteria that made it clear that the City was speaking for itself by raising flags ("the 2022 Flagpole Policy"). App. 62. This policy stated 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.

Id.

After the 2022 Flagpole Policy went into effect, and was posted on the City's website, the Plaintiffs-Appellants applied to have a "De-trans Awareness Flag" flown on March 12, 2024, and the "Appeal to Heaven Flag" on June 17, 2024. App. 70, 73. Both applications were denied because the flags did not convey messages that were in harmony with the City of Nashua's policies and messages that the City of Nashua wishes to express and endorse. App. 70, 74. The Plaintiffs-Appellants appealed the denials, but their appeals were denied. App. 68-69, 75-76. Approximately three months later, the Plaintiffs-Appellants filed a Complaint and Motion for Preliminary Injunction. App. 3, 9-32.

On October 7, 2024, during the pendency of this action, Mayor Donchess repealed the 2022 Flagpole Policy and any other previous policies related to the flagpoles outside City Hall. App. 81. In place of these policies, Mayor Donchess signed a new policy (the "2024 Flagpole Policy") stating,

> 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.

Id.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of New Hampshire correctly considered the undisputed facts and determined that the Defendants-Appellees did not violate the Plaintiffs-Appellants' Constitutional rights when they refused to raise certain flags on a flagpole in front of City Hall because the City's flag-raising policy, and the decisions made regarding what flags could be raised constitutes government speech. Add. 1-37.

In Shurtleff the Supreme Court articulated three factors that had to be weighed when considering whether particular expression constituted government speech. 596, U.S. at 253-255. These factors are (1) the history of raising flags; (2) control over messaging; and (3) and the public's perception of who is speaking. Id. The lower court concluded that the history and control factors weighed in favor of the Defendant-Appellees, and that the public perception factor did not weigh in favor of either party. The Plaintiffs-Appellants now invite this Court to adopt a tortured reading of the factors for government speech that have not been adopted by any court since Shurtleff was decided.

ARGUMENT

I. STANDARD OF REVIEW

On appeal, this court will review the lower court's denial of a preliminary injunction for abuse of discretion. Boston Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1, 11 (1st Cir. 2008). "Within that framework, findings of fact are reviewed for clear error and issues of law are reviewed de novo." Id. "Abuse of discretion is a highly deferential standard, and the district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (citations omitted). "A material error of law constitutes an abuse of discretion." González-Fuentes v. Molina, 607 F.3d 864, 875 (1st Cir. 2010), cert. denied, 131 S.Ct. 1568 (2011).

II. PRELIMINARY INJUNCTION STANDARD

The Plaintiffs-Appellants sought an injunction to prevent the City from (1) denying flag applications on the basis of viewpoint; (2) enforcing certain portions of the 2022 Flagpole Policy; and (3) denying and removing flags because of citizen complaint or because deemed offensive. App. 3, 9-32. "A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right." Peoples Fed. Sav. Bank v. People's United Bank, 672 F.3d 1, 8-9 (1st Cir. 2012). Typically, the purpose of a preliminary injunction is to "preserve the status quo,

freezing an existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs." CMM Cable Rep. Inc. v. Ocean Coast Props., Inc., 48 F.3d 618, 620 (1st Cir. 1995). But here, instead of a "traditional, prohibitory preliminary injunction," Plaintiffs-Appellants seek a "mandatory preliminary injunction" that "alters rather than preserves the status quo" by forcing the City to change its actions. Braintree Labs., Inc. v. Citigroup Global Mkts. Inc., 622 F.3d 36, 40-41 (1st Cir. 2010). "[M]andatory injunctions are disfavored," and so the Plaintiffs-Appellants "must make an even stronger showing of entitlement to relief than is typically required." Thomas v. Warden, 596 F. Supp. 3d 331, 336-37 (D.N.H. 2022) (cleaned up).

To obtain a preliminary injunction, the Plaintiffs-Appellants must establish (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of hardships tips in their favor; and (4) public interest favors an injunction. Winter v. Nat. Res. Def. Cncl., Inc., 555 U.S. 7, 20 (2008). "Of these, likelihood of success on the merits and irreparable injury are the most important factors." Tirrell v. Edelblut, 748 F. Supp. 3d 19, 25 (D.N.H. Sept. 10, 2024) (citing Gonzalez-Droz v. Gonzalez-Colon, 573 F.3d 75, 79 (1st Cir. 2009)). "Likelihood of success on the merits is the *sine qua non* of the preliminary injunction analysis." US Ghost Adventures, LLC v. Miss Lizzie's Coffee, LLC, 121 F.4th 339, 347 (2024) (citation omitted).

"If the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence." 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)). Consequently, courts "need not address the other elements of the preliminary injunction framework" when a party "fail[s] to carry its burden of showing that it is likely to succeed on the merits of its claims[.]" Id. at 100. Additionally, when preliminary injunctions are sought against government entities or officials in their official capacities, the balance of equities and the public interest factors merge. Tirrell, 748 F. Supp. 3d at 25.

A plaintiff moving for preliminary injunction "must show not that it is merely theoretically possible that he prevails, but that there is a 'strong likelihood' he does so." Id. Just because claims "are sufficient to proceed beyond the motion to dismiss stage, it does not inevitably follow . . . [that these claims have] a strong likelihood of success." Id. (citing Billups v. City of Charleston, 194, F.Supp.3d 452, 478 (D.S.C. 2016)).

III. THE DEFENDANT-APPELLEES WERE ENGAGED IN GOVERNMENT SPEECH UNDER THE 2022 FLAGPOLE POLICY.

> When 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. After all, the government must be able to

> promote a program or espouse a policy in order to function.

Shurtleff, 596 U.S. at 248. As a part of its policy, "the government can 'adop[t]' a medium of expression created by a private party and use it to express a government message." Id. at 270 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 473-474 (2009). "In that circumstance, private parties generate[] a medium of expression and transfers it to the government." Id. (citing Summum at 472-474). An expression is adopted by the government when the private party alienates control over the medium of expression to the government, and government actors put the medium to use to intentionally express a government message. Id. Such messages are "exempt from First Amendment scrutiny." Carroll v. Craddock, 494 F.Supp.3d 158, 165 (D.R.I. 2020) (citing Matal v. Tam, 582 U.S. 218, 234 (2017)) ("[T]he Free Speech Clause . . . does not regulate government speech."). In order to determine whether the government is speaking for itself, courts engage in "a holistic inquiry" scrutinizing three main factors: "the history of the expression at issue; the public's likely perception as to who is speaking; and the extent to which the government has actively shaped or controlled the expression." Id. at 252.

In the present matter, a "holistic inquiry" of the three factors articulated in Shurtleff demonstrates that the Plaintiffs-Appellants cannot establish a "strong likelihood" that the speech at issue is private, not governmental. Accordingly, all of Plaintiff's First Amendment claims must fail.

A. The history of the flagpole in front of City Hall favors the Defendants-Appellees.

"In evaluating the history factor, courts look to the medium of speech used and its historical ties to government." Atheists v. City of Fort Worth, 2023 U.S. Dist. LEXIS 136635, *8 (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 (2015) (describing the historical use of license plates by states to convey messages); Summum, 555 U.S. at 470-472 (describing the historical use of monuments by governments on government-owned land). Governments, including municipalities, have historically used flags to convey government messages. See Shurtleff, 596 U.S. at 253-55. However, courts should also consider the government's specific flag flying program. Id. (considering both "the history of flag-flying, particularly at the seat of government" and "the details of *this* flag-flying program" (emphasis in original)).

Prior to Shurtleff being decided, the state of the law regarding whether flags flown in front of a government building constitute government speech was unclear. In Shurtleff, the Supreme Court clarified that in order for government speech to be applicable, a written policy with criteria needed to be implemented. Id. at 258. In response, the City promptly enacted the 2022 Flagpole Policy. App. 62. The lower court correctly concluded that this change in policy reflects that the City

intended to exercise more control over the flagpoles than it had in the past, and make it clear that any flag raised was its own speech. Add. 23. This intention is further underscored by the fact that as of October 7, 2024, private citizens are no longer allowed to participate at all in flying flags. App. 81; Add. 24-25. The speech at issue here is purely governmental.

The Plaintiffs-Appellants state that the City's "adoption of the 2022 Flagpole Policy in May 2022 did not alter the historical purpose of the forum." Plf. Brief, p. 27. In support of this assertion, the Plaintiffs-Appellants rely on McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005). This reliance is misplaced.

McCreary County concerned whether the placement of the ten commandments at the McCreary County Courthouse violated the Establishment Clause of the First Amendment. The Supreme Court utilized a three-prong test, first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971), to determine whether the display served a secular purpose. The Supreme Court determined that the "Purpose Prong" had to consider the evolutionary purpose of the display. McCreary County 545 U.S. at 865. The present matter does not involve the Establishment Clause, and therefore the Plaintiffs-Appellants' use of selective

quotations concerning the "Lemon Test" are inapposite.[2] While the City's fourth flagpole may have been a forum for private speech prior to the City's enaction of its 2022 Flagpole Policy, the record demonstrates that since its enaction, the City has only displayed 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; App. 53-59, 62, 68-70, 73-77, 81, 111; Add. 22-25.

To the extent that this Court finds McCreary County persuasive, it should be noted that the Supreme Court recognized that "precedents sensibly forbid an observer 'to turn a blind eye *to the context* in which [the] policy arose.'" Id. at 866 (citing Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 315 (2000)). Here, the 2022 Flagpole Policy arose out of the Supreme Court's decision and opinion in Shurtleff. App. 62; Add. 9. Indeed, it would be wholly illogical for a government entity to be forever bound by a policy that can no longer serve its intended purpose due to a recent development in the law.

The lower court was correct when it concluded that the Plaintiffs-Appellants failed to demonstrate that they were likely to prevail in showing that the historic factor weighs in favor of private speech. Add. 20-25. Therefore, this Court should affirm the lower court's decision on this point.

[2] It is also worth noting that in Shurtleff, Justice Gorsuch and Justice Thomas issued a concurrence wherein they were highly critical of the "Lemon Test." 596 U.S. at 276-287.

B. The public perception of the City's flagpole policy does not favor the Plaintiffs-Appellants.

In addition to history, courts "consider whether the public would tend to view the speech at issue as the government's [speech]." Shurtleff, 596 U.S. at 255. In the present matter, the parties agree that there are four flagpoles located in front of City Hall. The parties also agree that the City uses three of its flagpoles to display government flags. App. 12. What the parties dispute is how a flag raised on the fourth flagpole would be perceived by the public. It is the Defendants-Appellees' position that between the enaction of the 2022 Flagpole Policy and the fact that the flags flown on three of the flagpoles are obviously government speech in nature, that any flag displayed on the City's fourth flagpole may reasonably be perceived as helping to "defin[e] the identity that [Nashua] projects to its own residents and to the outside world." Shurtleff, 596 U.S. at 255 (quoting Summum, 555 U.S. at 472)). Thus, it stands to reason that the public would perceive the flag on the fourth flagpole as "'conveying some message' on the government's 'behalf.'" Id. (quoting Walker, 576 U.S. at 212) (additional quotations and citation omitted). Indeed, common sense would dictate that any flag flown in front of City Hall is on City property and is therefore government speech.

The Plaintiffs-Appellants argue that the public perceives flags flown on the fourth flagpole as private speech. To support this argument, they assert that when Bethany Scaer raised a flag bearing the slogan *Save Women's Sports*, "one Nashua

[A]lderman stated, 'Beth's hate flag' was flying on the 'pole in front of City Hall.'" Plf. Brief, p. 32. This is an abbreviated version of the statement made by former Nashua Alderman, Jan Schmidt, in an effort to frame their legal argument in a favorable light. App. 66. The statement was made on Alderman Schmidt's Facebook page on October 10, 2020. Id. The statement in full reads:

> Nashua: 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. Beth's hate flag does not fit any of these requirements.

Id. This statement was made prior to the Supreme Court issuing its decision in Shurtleff, and prior to the City enacting its 2022 Flagpole Policy. Compare App. 62 with Shurtleff, 596 U.S. 243 and App. 66. Thus, it really has no application to the flags at issue in this case. Even if Alderman Schmidt's statement were made after the enactment of the 2022 Flagpole Policy, the statement in and of itself does not indicate how someone *outside* of Alderman Schmidt, a member of the City's government, perceived the flag. Furthermore, it stands to reason that the only reason Alderman Schmidt made this statement is because she had received feedback from her constituents regarding the flag, which would suggest that the public perceived the flag to be the City's speech. See Atheists, 2023 U.S. Dist. LEXIS 136635, *17 ("Angry citizens did not call Plaintiff to voice concern-they called the City.").

In addition to Alderman Schmidt's statement, the Plaintiffs-Appellants argue that because some members of the City's government still refer to the fourth flagpole in front of City Hall as the "Citizen Flagpole," the name it was ascribed prior to the passage of the 2022 Flagpole Policy, that the public at large perceives flags raised on said flagpole as private speech. Plf. Brief, p. 29. The Plaintiffs-Appellants overemphasize the importance of this term. In its denial of the Plaintiffs-Appellants' Motion for Preliminary Injunction, the lower court refers to the fourth flagpole as "the Citizen Flagpole" for "ease of reference." Add. 1, n.1. The lower court certainly did not put any stock in the continued use of this term by some government members. Id. Indeed, old habits die hard. Moreover, it is a stretch to impute a colloquialism used by some government members to the public at large.

Citing to Tam, the Plaintiffs-Appellants argue that because the flags raised on the City's fourth flagpole "present a wide variety of cultures, events, and causes" that the City could not be engaged in government speech, otherwise it would be "babbling prodigiously and incoherently" and "expressing contradictory views." Plf. Brief, p. 34. The lower court rightly rejected this nonsensical argument when it concluded that these flags could be perceived by the public as the City celebrating its diverse community. Add. 28. Indeed, this case is nothing like Tam. Had the Supreme Court in Tam held that all trademarked content was

government speech, the government would be endorsing millions of messages—many of them corporate promotions or wildly controversial—without evaluating the marks' message first. See Tam, 582 U.S. at 235 (a PTO examiner "does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy"). The City's flying of many flags serves the purposes of the 2022 Flagpole Policy, which is to "support cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause." App. 62.

As to the public perception factor, this case more closely resembles Walker, 576 U.S. 200. In that matter, the Supreme Court concluded that "Texas's desire to communicate numerous messages [on specialty license plates] does not mean that the messages conveyed are not Texas's own." Id. at 217. To the contrary, through the license plate program, Texas was able to "cho[ose] how to present itself and its constituency." Id. at 214. For that reason, "Texas offers plates celebrating," for example, educational institutions, professional organizations, various causes, and even commercial products like Dr. Pepper. See Id. at 213, 236. Similar to the license plates in Walker, here, the messages approved under the 2022 Flagpole Policy are characteristically governmental.

Furthermore, the Plaintiffs-Appellants argue that flags raised on the fourth flagpole must be private speech because if they were government speech, the City

would have violated the Establishment Clause when it raised a Christian flag. Plf. Brief, p. 34-37. As the lower court correctly observed, 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." Add. 28, n.8. Also, flying a Christian flag outside of City Hall would not constitute an Establishment Clause violation because the City flies a diverse array of flags associated with different community groups "in support of cultural heritage, observ[ing] an anniversary, honor[ing] a special accomplishment, or support[ing] a worthy cause." App. 62. There is ample precedent that actions in support of respect and tolerance, such as the City raising the Christian flag, do not violate the Establishment Clause. See, e.g., Van Orden v. Perry, 545 U.S. 677, 683, 701 (2005) (finding a monument at the Texas State Capital inscribed with the Ten Commandments constitutional because "[t]he circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended [the] nonreligious aspects of the tablets' message to predominate."); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (finding inclusion of Christian creche in holiday display on public land not violative of the Establishment Clause). Here, the Plaintiffs-Appellants' invocation of the Establishment Clause is nothing more than a desperate attempt to convince this

Court that the City raising flags pursuant to its 2022 Flagpole Policy is private speech. In truth, the City can endorse the Christian flag for secular purposes, and the Plaintiffs-Appellants have cited to no evidence to support the that the City raised the Christian flag for solely religious purposes.

Finally, the Plaintiffs-Appellants argue that the flags raised on the fourth flagpole constitute private speech because sometimes they are accompanied by speeches that are critical of the City. Plf. Brief, p. 36-37. This argument is simple deflection. Under the 2022 Flagpole Policy, a citizen had to fill out an application to raise a flag, which included a photograph of the flag to be raised and why the citizen wanted the City to raise it. App. 64. This iconography and the reason provided in the application is the message conveyed by the City, not the accompanying speech made by the citizen. Also, it is undisputed that local politicians sometimes attended and spoke at the flag-raising ceremonies, and when local ethnic communities raised a flag on the fourth flagpole, Mayor Donchess, usually attended the event to show his support for the community and strengthen his political network. App. 35. Certainly, citizens that observed these ceremonies viewed the flags raised in conjunction with these speeches as government speech.

The lower court was correct when it concluded that the Plaintiffs-Appellants failed to demonstrate that they were likely to prevail in showing that the public perception factor weighs in favor of private speech. Add. 25-28. Therefore, this

Court should either affirm the lower court's conclusion that the public perception factor favors neither party, or find that this factor actually weights in favor of the Defendants-Appellees.

C. The government control over the flagpole favors the Defendants-Appellees.

The final factor this Court must evaluate is "the extent to which the government . . . actively shaped or controlled the expression." Shurtleff, 596 U.S. at 252. Thus, this Court must "look at the extent to which [Nashua] actively controlled these flag raisings and shaped the messages the flags sent." Id. at 256. In its evaluation of this factor, the Court must determine whether or not the City exerted the type of control that "would indicate that [Nashua] meant to convey the flags' messages." Id.

Since the City's implementation of its 2022 Flagpole Policy, it has controlled what flags are flown in front of City Hall. App. 55-59, 62-65, 68-70, 73-77. By doing so, the City imposed exacting requirements on applicants, and the City, through Mayor Donchess and Deshaies, could and did reject applications that did not meet these requirements or the criteria set forth in the 2022 Flagpole Policy. App. 70, 74, 92, 127.

The Plaintiffs-Appellants argue that the evidence relating to this factor does not 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. Plf. Brief, p.

37-44. They all but argue that unless the Mayor himself sews the flag, any flag raised on the fourth flagpole is private speech. Contrary to the Plaintiffs-Appellants' assertions, control over speech does not require that the government edit or alter the speech, or that the speech be permanently alienated to the government's possession or control once its approved. So long as the government retains "final approval authority," and exercises "receptive selectivity," it is sufficient for the government to adopt speech as its own. Walker, 576 U.S. at 210; see also Summum, 555 U.S. at 473.

Since Shurtleff, Federal courts have decided cases similar to the present matter utilizing the history, public perception, and control factors articulated by the Supreme Court. In Atheist, the City of Fort Worth had "Banner Program" where citizens and organizations could apply to fly banners on light posts in its downtown area. 2023 U.S. Dist. LEXIS 1336635, *2-3. Utilizing the three factors articulated in Shurtleff, the United States District Court for the Northern District of Texas determined that the "Banner Program" was government speech. Id. at *8-27. With respect to the control factor, the court determined that it weighed in favor of the City of Forth Worth because, among other things,

> Like the plaintiff in Walker, that had the option to convey its message in other forms, here Plaintiff can post flyers, posters, purchase a billboard, or pursue any other avenue of marketing. The "advertising" through the Banner Program is not free as organizations still must bear the cost of printing hundreds of specialized banners and go through

> the approval process. The motivation for choosing this avenue of advertising resembles choosing a license plate over a bumper sticker because the government property and prominence at issue lends an event an air of legitimacy and approval from the City.

Id. at *18 (cleaned up).

In Feldman v. Denver Pub. Sch., the defendant school district had a policy that permitted teachers to display the pride flag on the doors of their classrooms. 2024 U.S. Dist. LEXIS 17858 *2 (D. Colo. Aug. 1, 2024). The plaintiff sued the defendant school district on behalf of his minor children for, among other things, unconstitutional viewpoint discrimination. Upon a Motion to Dismiss filed by the defendant, the Magistrate Judge recommended that the matter be dismissed. Id. at *26. The plaintiff objected, arguing that the Magistrate Judge's recommendation failed to apply the correct standard to a motion to dismiss, and failed to apply the Shurtleff factors correctly. Feldman v. Denver Pub. Sch., 2024 U.S. Dist. LEXIS 174889 *5 (D. Colo. Sep. 26, 2024). In overruling the plaintiff's objection, the United States District Court for the District of Colorado reviewed the Shurtleff factors. Id. at *5-13. In regard to the control factor, the court noted that "[i]n Shurtleff, the Supreme Court found no government control because the city of Boston's practice was to approve the flag raising without exception and "hadn't spent a lot of time really thinking about its flag-raising practices until this case."

Id. at *11 (quoting Shurtleff. 596 U.S. at 256-57). With this in mind, the court reviewed the defendant's flag display policy, which read:

> [T]he District supports the right of its employees to post in their classrooms, offices, or halls a rainbow flag or other sign of support for LGBTQIA+ students or staff, because these are symbols consistent with the District's equity-based curriculum.

Id. at 12. The Feldman court determined that, unlike the City of Boston in Shurtleff, which had no policy in place, that this policy shaped and controlled the defendant's flag displays. Id.

Just like the defendants in Atheists and Feldman retained "final approval authority," and exercised "receptive selectivity," so did the City in the present matter. Walker, 576 U.S. at 210; see also Summum, 555 U.S. at 473. The City's 2022 Flagpole Policy was sufficient for it to adopt the speech of any flags raised on the fourth flagpole as its own.

The lower court was correct when it concluded that the Plaintiffs-Appellants failed to demonstrate that they were likely to prevail in showing that the control factor weighed in favor of private speech. Add. 29-35. Therefore, this Court should affirm the lower court's conclusion on this point.

CONCLUSION

In summary, the facts demonstrate that the 2022 Flagpole Policy made any flag that the City agrees to raise on its flagpole government speech. The character

of the flags outside City Hall as governmental has been further cemented by the 2024 Flagpole policy. The lower court's finding that the City was engaged in government speech and its denial of the Plaintiffs-Appellants Motion for Preliminary Injunction was proper. This Court should affirm.

Respectfully submitted,
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Dated: July 21, 2025

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 5,130 words, as calculated by Microsoft Word, excluding the portions exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the format requirements articulated in Fed. R. App. P. 32(a)(5) and (6) because the brief is written in 14-point Times New Roman font, a proportionally spaced serif typeface.

Dated: July 21, 2025

/s/ Jonathan A. Barnes
Jonathan A. Barnes
Counsel for the Defendant-Appellee,
City of Nashua

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: July 21, 2025

/s/ Jonathan A. Barnes
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