

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

BETHANY R. SCAER and STEPHEN SCAER,

Plaintiffs,

v.

CITY OF NASHUA,

Defendant.

Civil Action No. 1:24-cv-00277-LM-TSM

**THE DEFENDANT, CITY OF NASHUA'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS**

NOW COMES the Defendant, City of Nashua ("City"), by and through counsel, and hereby submits this Memorandum of Law in support of its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). As stated in greater detail below, the injunctive relief sought by the Plaintiffs is moot in light of the recent passage of City ordinance O-26-001.

I. INTRODUCTION

The Plaintiffs, Bethany R. Scaer and Stephen Scaer (collectively the "Plaintiffs"), filed a Complaint against the City, alleging that their First Amendment rights were violated when the City refused to raise what the Plaintiffs refer to as the "Detrans Awareness Flag" and the "Pine Tree Flag" on a City owned flagpole in front of City Hall.¹ Also, the Plaintiffs allege that the City's policy for raising flags suggested by citizens, which was enacted in May 2022, was unconstitutional. The Plaintiffs are seeking injunctive relief and nominal damages.

¹ The Plaintiffs originally made these allegations against the City, as well as its Mayor, James W. Donchess, and its Risk Manager, Jennifer Deshaies. James W. Donchess and Jennifer Deshaies have since been dismissed from this matter.

On February 10, 2026, the City’s Board of Alderman passed City ordinance O-26-001, which closes the subject flagpole to the public, and only permits the City government to use it. See Ordinance, attached as Exhibit A. Now that the subject flagpole has been formally closed to the public, the injunctive relief sought by the Plaintiffs is moot.

II. BACKGROUND

Nashua City Hall has four flagpoles situated in front of the building. Dkt. 32, p. 4. In May 2022, after Shurtleff v. Boston, 596 U.S. 243 (2022) was decided by the Supreme Court of the United States, the City instituted the following flag raising policy (“2022 Policy”):

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.

Dkt. 32, p. 9. The City believed that the 2022 Policy made it clear that while citizens may be permitted to use one of the four flagpoles to raise a flag, the flagpole was still a nonpublic forum. Id. at p. 22.

On February 7, 2024, the Plaintiff, Stephen Scaer, applied to raise a flag that he refers to as the “Detrans Awareness Flag.” Id. at p. 10. According to the Plaintiff, Stephen Scaer, the “Detrans Awareness Flag” supports “Detransitioner Awareness Day.” Id. On February 14, 2024, the City denied his application to raise this flag. Id.

On May 27, 2024, the Plaintiff, Bethany R. Scaer, applied to fly a flag known as the “Pine Tree Flag.” Id. at p. 11. According to the Plaintiff, Bethany R. Scaer, the “Pine Tree

Flag” commemorates soldiers that fought at the Battle of Bunker Hill. Id. While the origin of the “Pine Tree Flag” may be associated with the Battle of Bunker Hill, in the last few years, the “Pine Tree Flag” has been misappropriated by far-right political groups. Id. On May 29, 2024, the City denied the Plaintiff, Bethany R. Scaer’s application to raise the “Pine Tree Flag.” Id.

On September 6, 2024, the Plaintiffs filed their Complaint with this Court. See Dkt 1. All four of the counts within the Plaintiffs’ Complaint stem from the City’s 2022 Policy. Id. None of the Plaintiffs’ Counts stem from the City’s policy prior to the adoption of the 2022 Policy. Id.

On October 7, 2024, the City instituted a new flag raising policy (“2024 Policy”). The 2024 Policy reads:

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.

All previous policies related to flagpoles on City Hall grounds are hereby repealed.

Dkt., p. 24-25.

On November 5, 2024, this court held a hearing regarding the Plaintiffs’ Motion for Preliminary Injunction. At this hearing, the City argued that the 2024 policy rendered the injunctive relief moot. This court disagreed, finding that the decision to put the policy into effect was the Mayor’s, and “there [was] no formal process required to effect the change.” Id., p. 17. This court did, however, determine that the City was engaged in government speech under the 2022 policy. Id., p. 35. The Plaintiffs’ appealed. On December 22, 2025, the First Circuit Court of Appeals issued an opinion reversing this court’s conclusion that the City was engaged in

government speech, and provided instructions to enter an interim declaratory judgment consistent with that opinion. However, at that hearing, the Plaintiffs conceded that the City was free to close the forum:

MR. RISTUCCIA: Correct, Your Honor. Our case is focused on the flagpole and flag raising ceremonies only, not on all events. And we do want to clarify we are not asking that this court prevent them from, Nashua, from closing the flagpole as a forum or returning to something like the pre-2017 system.

Tr. 25:2-8, attached as Exhibit B.

In response, the City's October 7, 2024 policy was codified in City ordinance O-26-001. See Exhibit A. On February 10, 2026, this Ordinance was voted upon and passed by City's Board of Alderman. Id.² Now that the flagpole in question has been closed to the public, the injunctive relief sought by the Plaintiffs is moot.

III. ARGUMENT

"The proper vehicle for challenging a court's subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1). This rule is a large umbrella, overspreading a variety of different types of challenges to subject-matter jurisdiction." Valentin v. Hospital Bella Vista, 254 F.3d 358, 362 (1st Cir. 2001). One such challenge is mootness. Id. "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." Powell v. McCormack, 395 U.S. 486, 496 (1969). The Supreme Court describes mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence

² The City requests that pursuant to Fed. R. Evid. 201(c)(2) this Court take judicial notice that City's Board of Alderman passed ordinance O-26-001. See Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir.2009) (stating that when deciding a motion to dismiss, the court "may properly take judicial notice of matters of public record.").

(mootness)."¹ United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale L.J. 1353, 1384 (1973)).

“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] 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)). “[If] a plaintiff has initial standing to bring a particular claim, a federal court is duty bound to dismiss the claim as moot if subsequent events unfold in a manner that undermines any one of the three pillars on which constitutional standing rests: injury in fact, causation, and redressability.” Ramirez v. Sanchez Ramos, 438 F.3d 92, 100 (1st Cir. 2006); see also Goodwin v. C.N.J., Inc., 436 F.3d 44, 46 (1st Cir.2006) (“A case becomes moot if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome.”); Mangual v. Rotger-Sabat, 317 F.3d 45, 60 (1st Cir.2003) (“If events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case.”).

As this court has recognized, “[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.” Dkt. 32, p. 17 (quoting

Thomas v. City of Memphis, Tenn., 996 F.3d 318, 324-25 (6th Cir. 2021)). “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.’” Id.

Here, Plaintiffs have sought injunctive relief against the City. However, in response to the First Circuit Court of Appeals finding that the City’s 2022 Policy was unconstitutional, the City’s legislative body, the Board of Alderman, passed City Ordinance O-26-001, which closed the flagpole in question to the public. This is an “intervening circumstance [that] deprive[s] the [Plaintiffs] of a personal stake in the outcome of the lawsuit.” Moore, 600 U.S. at 14. Additionally, because the closure of the subject flagpole was made through legislation, the City is entitled to a “presumption of mootness.” Thomas, 996 F.3d at 324-25. Indeed, the City will not return to the 2022 Policy.

IV. CONCLUSION

This Court should grant the City’s Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) because the injunctive relief sought by the Plaintiffs is now moot.

WHEREFORE, the Defendant, City of Nashua, respectfully requests that this Honorable Court:

- A) GRANT the City’s Motion to Dismiss and
- B) GRANT any further relief that is deemed just and proper.

Respectfully submitted,
City of Nashua, Defendant
By its Attorneys,

/s/ Jonathan A. Barnes
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Dated: February 25, 2026

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded through the Court's electronic filing system to Bethany R. Scaer and Stephen Scaer and to all counsel of record.

/s/ Jonathan A. Barnes
Jonathan A. Barnes