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FEATURE:

First Circuit Holds Flags Flown at the Request of Private Citizens Outside Government Buildings is Not Government Speech

***Scaer v. City of Nashua*, No. 25-1356 (1st Cir. December 22, 2025)**

After the election of a new mayor in 2017, the City of Nashua (City), New Hampshire dedicated one of the four flag poles outside of it's city hall as a "citizen's flag pole", where residents of the town could "fly a flag in support of their cultural heritage, observe an anniversary or honor a special accomplishment," according to the city's website. Citizens could apply to fly their flag through the city's website.

The Plaintiffs, after receiving permission from the City to fly other flags, such as the 500th anniversary of the Protestant Reformation or commemorating the ratification of the Nineteenth Amendment, submitted another application to fly a flag that read "Save Women's Sports". The City initially approved and flew the flag for a short time, however it received various complaints that the flag was transphobic and subsequently revoked its permission to fly the flag. Plaintiffs appealed the decision and were denied, with the City sending a letter to their attorney stating that the flagpole was government speech and that this flag was outside the bounds of use for the flagpole. The court noted that since the flagpole's inception in 2017, the City had not denied a flag request until this incident. However, afterward, there were denials for pro-life flags, Palestinian flags, and a flag commemorating the battle of Bunker Hill, which was used as a calling card during the January 6th 2021 insurrection at the Capitol.

Plaintiffs filed suit alleging violations of the First and Fourteenth Amendments, and the district court denied their motion for a preliminary injunction, agreeing with the City's argument that the flagpole program constituted government speech. A few days before the City filed a response to the lawsuit, it changed its flagpole policy, stating that only the City could choose what flags flew, without input from outside sources.

Legal Questions:

1. Whether the City of Nashua's refusal to allow the plaintiffs' requests to fly certain flags on the "Citizen Flag Pole" outside City Hall constituted government speech or instead involved a forum for private expression under the First Amendment.

Holdings:

The First Circuit held that Nashua's "Citizen Flag Pole" program during the period at issue was not government speech under *Shurtleff v. City of Boston* and therefore operated as a forum for private expression; as a result, Nashua's denials based on disfavored messages constituted impermissible viewpoint discrimination in violation of the First Amendment. The court reversed the denial of preliminary relief and remanded with instructions to enter an interim declaratory judgment in the Plaintiff appellants' favor consistent with the opinion.

Analysis:

The court immediately notes that the City conceded that if the flagpole use was not government speech, it engaged in impermissible viewpoint discrimination. It also recognized that the facts and law regarding this case were analogous to *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). Importantly, *Shurtleff* acknowledges that "when the government speaks for itself, the First Amendment does not demand airtime for all views." *Id.* at 247-48. The Supreme Court cautioned in previous cases that the government speech doctrine is "susceptible to dangerous misuse" and that it risks permitting government to "silence or muffle the expression of disfavored viewpoints" by "passing off" "private speech" "as government speech." Matal v. Tam, 582 U.S. 218, 235 (2017). It also states that any inquiry into government speech "is not mechanical" but "driven by a case's context." *Shurtleff* 596 U.S. at 252.

This inquiry has three prongs: (1) the history of the expression at issue, (2) the public's likely perception as to who is speaking, and (3) the extent to which the government has actively shaped or controlled the expression. *Id.*

Nashua argued that on the first prong, the City Hall had existed since 1989 and only instituted the new flag program in 2017, so based on the history of expression at City Hall, this should constitute government speech. But the court found that alone to be unconvincing.

It then moved on to the second prong and found that an average citizen seeing a flag flying outside a government building would not necessarily think that is government speech. It had three main reasons for this. First, ceremonies often took place when the flag was raised and a bystander observing the ceremony likely wouldn't associate the ceremony with the local government, especially if no government officials were present. Second, the court likened the complaints to the "Heckler's Veto" because people were criticizing the flag, not the city's flag policy. The court declined investigate why those hecklers may have been heckling their government in the first place, however. Third, the court points to the rotating schedule of private flags on the pole as evidence that the program was not government expression, as the incoherent or inconsistent messaging by the flags week to week would lead the citizenry to assume that this wasn't actually the government speaking.

As to the third prong, the court treated the city's 2024 revision to its flag rules in that only the city could decide which flags went up without input from outside sources as an admission that the city previously did not exert any control over which flags went up and therefore, the flags could not be government speech.

For those that might be dealing with this issue I wanted to quote Justice Alito's concurrence from *Shurtleff* which outlines the two ways in his opinion that a government can speak through private citizens, "a government can speak using private assistance in only two ways: by deputizing private persons as its agents to convey a government message, or by adopting a privately created medium of expression over which the private party has alienated control to the government and then using that medium to intentionally express a government message." See id. at 270.

Scaer v. City of Nashua

SHORT SUMMARIES:

4th Circuit – FLSA – Employment Law – Salary Basis

This case involved Battalion Chiefs who sought overtime pay, contending that they were not salaried employees under the city's pay structure and practices. The lower court denied their claim, finding that they were highly compensated employees subject to exemptions under the Act. The panel on appeal found the lower court applied the wrong test, but concluded a different test that also provided an exemption applied and affirmed the result. For the previously unwary, the panel set out the two tests as follows: "The regulations set out two salary-basis tests, which appear at 29 C.F.R. § 541.602(a) and 29 C.F.R. § 541.604(b). The two tests serve the same goal: ensuring that an employer's "compensation system function[s] much like a true salary," offering "a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." Helix, 598 U.S. at 47. But they go about it differently. 602(a) applies to employees paid on a weekly (or less frequent) basis. Helix, 598 U.S. at 56–57. They are paid on a salary basis when they receive "at least part of [their] compensation through a preset weekly (or less frequent) salary" that isn't "subject to reduction because of exactly how [much they] worked." Id. at 46. 604(b) applies to employees paid on an hourly, daily, or shift basis. Id. at 56–57. They too are paid on a salary basis if the employer guarantees "the employee at least $455 each week (the minimum salary level), regardless of the number of hours, days or shifts worked," and the guarantee is "roughly equivalent to [their] usual earnings at the assigned hourly, daily or shift rate for [their] normal scheduled workweek." Id. at 47 (quoting 29 C.F.R. § 541.604(b))." For those advising on these issues, I recommend you read the decision for some clarity. However, there is a legal and factual distinction that provides an extra quirk to the case: "Our conclusion doesn't change because the City uses paid leave to reach the predetermined amount. The Department of Labor has long permitted employers to "take deductions from accrued leave accounts" without affecting their employees' exempt status—so long as employees receive a full, predetermined amount…. Of course, if a chief were to exhaust his paid leave, the City would still have to pay him his base salary equivalent to 80 or 106 hours. But during the three years at issue, no chief exhausted paid leave. In fact, City officials stated that they weren't aware of that ever happening."

Kelly vs. City of Alexandria

8th Circuit – Code Enforcement – Due Process – Takings – Condemning Dangerous Structures

This case involves an Inn that had apparently fallen into disrepair. On January 2, 2018, a 15-pound stone fell from it. The previous December, a window fell off. The building official barricaded the sidewalk below, and by January 9, 2018, the Inn appeared on the building official's "blighted list". In

May, the building official threatened to close the Inn because repairs were not made. He threatened again in August, but the Inn, with help from a city grant, made the necessary repairs and stayed open. Whereupon, in November 2019, the Fire Marshal inspected and found several violations, giving until February 13 to comply. On January 2, a fire broke out in a guest's room, and the sprinklers failed to activate. By Valentine's Day Eve, when the repairs were not made, the owners were notified that on March 9 a follow-up inspection would occur, which not only confirmed the lack of repairs but also found 8 new violations. The following day, the Building Official ordered the Inn to close.

The owner sought relief from the city council, but COVID intervened. The owner addressed the most glaring issues as required by the Building Official, and the closure order was lifted, but because the fire safety issues remained unresolved, the property remained closed for several more months. Eventually, those issues were resolved, and the Inn reopened, but closed a few months later. Suit followed, asserting the usual causes of action – breach of due process rights, an uncompensated regulatory taking, and an argument that immunity could not apply under the circumstances of the case. The panel's conclusion offers a concise basis for its conclusion that the case was properly decided in favor of the city and its officials: "Here, Fortune [the building official], acting under the Minnesota State Building Code, closed the Inn to preserve public health and safety. The Inn Owners may have been entitled to operate their retail business in the ordinary course, but they were not entitled to be free from temporary enforcement targeting well-documented safety deficiencies."

reVamped LLC, vs. City of Pipestone

4th Circuit – School Boards – Public Comment

The Plaintiffs in this case sued the Loudoun County School Board and its chairwoman, Melinda Mansfield, over the enforcement of a policy prohibiting comments that target, criticize, or attack individual students during public-comment periods. Plaintiffs argued that the policy was applied to discriminate against their viewpoint and was unconstitutionally vague. The district court denied a preliminary injunction, finding plaintiffs unlikely to succeed on the merits.

The court analyzed the nature of the forum, finding it a limited public forum in which the government may impose reasonable, viewpoint-neutral restrictions. Plaintiffs acknowledged the policy's facial validity but claimed it was discriminatorily applied to silence their criticism of the School Board's handling of safety concerns. The district court found that interruptions occurred only when plaintiffs referenced a specific student, consistent with the policy. The court noted that other speakers were also interrupted for policy violations, such as exceeding time limits.

The court rejected Plaintiffs' post-hoc rationalization argument, noting that Mansfield's interruptions were consistent with the policy, even if she did not explicitly cite it at the time. The court found no evidence of viewpoint discrimination, as plaintiffs were allowed to criticize the School Board generally. The court also dismissed the vagueness claim, stating that the terms "target, criticize, or attack" are commonly understood and provide adequate notice of prohibited conduct. The court concluded that the policy's application did not violate the First Amendment, as it was not applied in a discriminatory manner.

Platt v. Mansfield

9th Circuit – Excessive Force – Hogtied- RIPP hobble

Following a foot chase, a suspect was placed in a RIPP hobble restraint, lying face down in a police cruiser, and succumbed. After being restrained in the RIPP hobble, the suspect's body became limp, and he was lifted into the police car and laid face down. He was then transported a short distance when the police noticed that he was unresponsive. He died. The suit by his estate sought damages for excessive force. The question in this case involves only the two officers who transported the suspect, not those who put him in the RIPP restraint. The lower court denied immunity, and the panel, in a 2-1 decision, affirmed.

The gist of the court's decision concluded that the circuit had long held that using this form of restraint on a compliant prisoner should be considered excessive. The dissent agreed that the initial use of the RIPP restraint may have been reasonable and that continued use would be excessive, but as applied to the two officers transporting the prisoner, the dissent noted that no case was on point to find liability for a very short transport of an improperly restrained prisoner. A very narrow argument pursued by the officers challenged the constitutional claim by asserting that all they did was transport the already seized prisoner and that they had nothing to do with seizing him or determining how to restrain him. By noting that these two officers helped load the suspect into their patrol car, they exerted additional force on the prisoner and doing so both constituted a seizure as well as inculpated them in the liability analysis.

Gonzalez v. City of Phoenix

6th Circuit – Due Process – License Revocation - Towing

The city licensed tow companies to perform towing services for it. Among the vehicles that often needed to be towed were those that had been stolen and then recovered. The city suspected that one licensee might have an inside connection with thieves because it recovered far more stolen vehicles than other companies, often arriving on the scene shortly after a report that a vehicle had been stolen. The licensing scheme entitled a company to a pre-revocation hearing for violating the city's rules and a post-termination hearing if its license was revoked for criminal conduct. Based on suspicion and some facts, the city revoked the company's license. Because the company was enjoying a rather substantial income stream from its business, it took exception to the revocation. It sued when the city concluded that it did not need to offer a post-termination hearing.

The city's position fell within several grounds of ultra vires. Essentially, the city argued that its whole licensing process was ultra vires under Michigan law, the earlier bankruptcy proceedings from which the city emerged, and a charter violation issue. The lower court brushed these arguments aside, concluding the company was entitled to a post-deprivation hearing. After five years of litigation, the lower court concluded that a violation of the company's due process rights had taken place and awarded nominal damages of no more than $1.

On appeal, the panel affirmed. To some extent, the issue before the court was whether the revocation analysis rested on the facts at the time of termination or on facts that developed before or after termination; in other words, at the time of the hearing. To address that issue, the court wrote: "But this [the argument about post hoc rationalization] misstates the purpose of a post-termination or post-deprivation hearing. That hearing is not focused on whether the choice to terminate was correct at the time of the initial termination. Instead, its goal is to determine whether the continued termination is justified by all the evidence before the Board at the time of the hearing—i.e., before the government "finally deprives a person of his property interests." Parratt v. Taylor, 451 U.S. 527, 540 (1981), rev'd on other grounds, Daniels v. Williams, 474 U.S. 327 (1986); accord

Moody v. Mich. Gaming Control Bd., 790 F.3d 669, 677 (6th Cir. 2015). After all, newly uncovered information isn't always supportive of final termination. And just as we wouldn't demand that the Board ignore exculpatory information undermining a final termination, we don't expect them to disregard inculpatory information supporting final termination." The court's final paragraph sums up its conclusion: "Based on this record, we agree with the district court that there is no genuine issue of fact that Christian, while working for Nationwide, colluded with car thieves. This evidence of Christian's criminality and overcharging would have been presented if the Board had conducted a timely hearing and would have been sufficient grounds to terminate Nationwide's permit. All this is not to deny that the City fell short of its obligation to provide Nationwide the process it was due under the Constitution. But still, Nationwide's conduct justified the termination, meaning that the City's "failure to accord procedural due process could not properly be viewed as the cause" of any loss that the company suffered. Carey, 435 U.S. at 260. So Nationwide is only "entitled to recover nominal damages not to exceed one dollar." Id. at 267."

Nationwide Recover vs. Detroit