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October 13, 2020

James Donchess, Mayor
City of Nashua
229 Main Street
Nashua, N.H. 03060

Re: Appeal of Citizen Flag Pole Decision - Unconstitutional Viewpoint Discrimination

Dear Mayor Donchess:

This office represents Beth Scaer, a resident of the City of Nashua who applied to the City for, and received, permission to fly a flag supporting an organization she supports called, "Save Women's Sports."

On September 1, 2020, Ms Scaer emailed Jennifer Deshaies in the risk management department asking to reserve the Nashua City Hall plaza Citizen Flag Pole for the week of October 11, to fly a 3' x 5' flag supporting the organization "Save Women's Sports." Ms. Deshaies responded that, "the citizen flag pole is available and is all yours."

On Saturday, October 10, Ms. Scaer and her husband raised the "Save Women's Sports" flag as agreed. She planned to fly the flag all week leading up to a virtual running event to be held October 17 to raise funds to benefit the mission of the Save Women's Sports organization.

On Monday, October 12, at 9:56 a.m., Ms. Scaer received a call from Ms. Deshaies informing her that you had decided that her flag was to be taken down and that she would not be permitted to fly it anymore. When Ms. Scaer pressed Ms. Deshaies for more information about why her flag had been taken down, she was merely told that she should read the ordinances and procedures and that she could file an appeal. In a follow-up call a few hours later, Ms. Deshaies advised that the flag was removed because the City had received many complaints and people thought that it represented Nashua's "official position" on women's sports, so the City took the flag down because it is "neutral" on that topic.

By all outward appearances, however, it seems that the City of Nashua bowed to complaints by people who disagreed with the content of Ms. Scaer's message. An organization calling itself "Mutual Aid & Defense NH" has a Facebook page containing posts about the flag. Messages posted on that page express opposition to the message on Ms. Scaer's flag, propose "22 weeks"

of counter-messaging by the flying of various LBGT flags, and include a post asking, “Jim Donchess why are we flying a transphobic flag in Nashua? Not cool.” See Exhibit #1.

On a different forum, “Nashua NH Civic Sounding Board,” a person identified as Brenna Connolly wrote that as word of Ms. Scaer’s flag, “spread through the community, the response was clear – this isn’t what Nashua stands for.” Her post then goes on to say, “[m]any thanks to Jim Donchess for your quick response, Jan Schmidt and Jenn Morton and Mutual Aid & Defense NH for the calls to action.” The post concluded that the author is, “looking forward to updated guidelines” to ensure that “future flag requests are vetted more carefully.” See Exhibit #2. This same individual tweeted, “Got a message from @JimDonchess late last night – flag is coming down. We need to have a serious look at the approval process for these things moving forward.” See Exhibit #3.

It is readily apparent that your decision to remove Mr. Scaer’s flag was a direct response to criticism of the content of her expressive activity. This is an illegal and unconstitutional act of censorship under the First and Fourteenth Amendments to the United States Constitution, and Part I, Article 22 of the New Hampshire Constitution. The City does not need to permit members of the public to displays flags on the Citizens Flag Pole, but once it decides to do so, it must allow members of the public to do so without being subjected to viewpoint discrimination. On behalf of Ms. Scaer, I ask that you reconsider your previous decision to remove her flag.

In *New York Times v. Sullivan*, the United States Supreme Court held that, “[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled...” 376 U.S. 254, 270 (1964). “It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)). “Those who won our independence believed...that public discussion is a political duty; and that this should be a fundamental principle of the American government.” *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375-376 (1927)).

Generally speaking, Supreme Court cases recognize three types of government-controlled spaces for First Amendment purposes: traditional public forums, designated public forums, and nonpublic forums.¹ In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.” *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1885 (U.S.2018)(citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). The same standards apply in designated public forums—spaces that have “not traditionally been regarded as a public forum,” but which the government has “intentionally opened up for that purpose.” *Id.* (citing *Pleasant Grove* at 469–470, 129 S.Ct. 1125.) To satisfy strict scrutiny, the government must prove that its laws and actions are narrowly tailored to achieve a compelling government interest. *Pleasant*

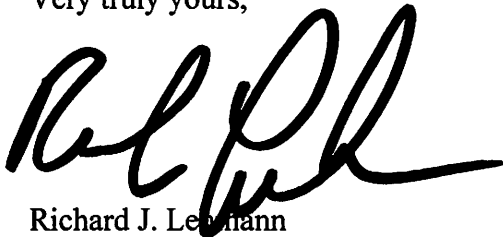
¹ There is no reason to believe that the Citizen Flag Pole is a nonpublic forum.

Grove, 555 U.S. at 469.

The Citizen Flag Pole is clearly a “designated public forum.” The City government specifically provides public property and invites citizens to provide flags to be flown on the pole. In order to justify your censorship of Ms. Scaer based on the message on her flag, you must be able to prove that your action was taken pursuant to an ordinance that is narrowly tailored to achieve a compelling government interest. Given the complete absence of an Ordinance providing any guidance whatsoever on this subject matter, there is no possible way that your actions can meet this standard. It simply appears that you, or some of your constituents, disapproved of the message advocated by Ms. Scaer and you decided to censor her expression as a result. The plainly unconstitutional actions you took in removing Ms. Scaer’s flag represents a clear constitutional violation that should not be permitted to stand.

Kindly reconsider your action and return Ms. Scaer’s flag to its rightful place atop the Citizen Flag Pole.

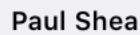
Very truly yours,

A handwritten signature in black ink, appearing to read 'Richard J. Leumann', with a stylized, cursive script.

Richard J. Leumann

Cc: Beth Scaers

EXHIBIT #1

[illegible]

Catherine Sofikitis

👍❤️🤔 3



Brenna Connolly

Just drove by, they're taking it down right now.



Brenna Connolly

👍🥲 5



Dela Marie Davis

Disappointed, but not surprised.

Like · Reply · 2d

Most Relevant is selected, so some comments may have been filtered out.

Write a comment...

EXHIBIT #2



Nashua, NH Civic Sounding Board

[Join Group](#)

Brenna Connolly

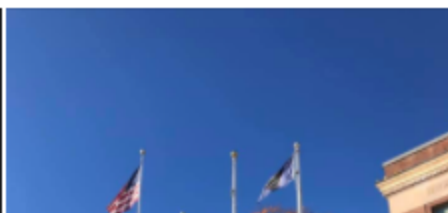
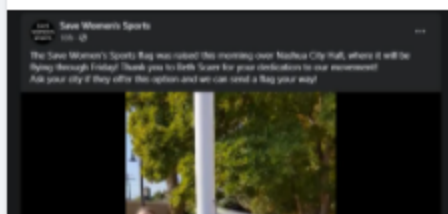
7h · 🌐



Yesterday morning, a flag was raised over Nashua City Hall in support of a transphobic organization, with the expectation that it would continue to fly until Friday. As word spread through the community, the response was clear- this isn't what Nashua stands for. Many folks reached out to Nashua government officials and city employees, others posted publicly about the issue. As of this morning at 8:30 AM, the flag is down.

Many thanks to [Jim Donchess](#) for your quick response, [Jan Schmidt](#) and [Jenn Morton](#) and [Mutual Aid & Defense NH](#) for the calls to action, and everyone else who stood up for our Trans neighbors. Hate has no home in Nashua, full stop. I'm looking forward to updated guidelines from the [The City of Nashua](#) regarding usage of the Citizens' Flag Pole to ensure that future flag requests are vetted more carefully.

EDIT: Since people have asked a couple of times how this is transphobic/hateful, and because it may not be clear from the images, I want to provide some clarification. The flag that has now been taken down had read 'Save Women's Sports' and 'Woman = Adult Human Female'. The 'Save Women's Sports' organization advocates for the exclusion of trans women from women's sports. There is no reason to do this except for transphobia, because trans women are women. Here's a link debunking some myths about trans athletes that may come up in the comments: <https://www.aclu.org/.../four-myths-about-trans-athletes.../>



a place where people can post about even... [See More](#)

Public

Anyone can see who's in the group and what they post

Visible

Anyone can find this group.

Nashua, New Hampshire

General Group

Recent Media

[See All](#)

EXHIBIT #3



Brenna Rose #BLM @brennaconno · Oct 11

Got a message from [@JimDonchess](#) late last night- flag is coming down. We need to have a serious look at the approval process for these things moving forward.



Brenna Rose #BLM @brennaconno · Oct 10

The fact that a transphobic flag is flying over Nashua city hall RIGHT NOW is unacceptable. The fact that it's supposed to stay up until FRIDAY is unimaginable. "Welcoming City" my ass. #NHPolitics

[Show this thread](#)

