

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

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BETHANY R. SCAER and STEPHEN :  
SCAER, :

Plaintiffs, :

v. :

Case No. 1:24-cv-00277-LM-TSM

CITY OF NASHUA, a municipal :  
corporation, :

Defendant. :

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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## INTRODUCTION

A case is not moot if the court can grant any form of relief. Plaintiffs Stephen and Bethany Scaer have already won important partial relief from this Court and the First Circuit. But this Court can also still grant additional relief—an award of nominal damages, a retrospective declaratory judgment, attorneys’ fees and costs, and even a permanent injunction. The Scaers’ case is not moot, and this Court has jurisdiction to scrutinize Nashua’s unconstitutional actions. This Court should deny Defendant’s motion to dismiss.

## STATEMENT OF FACTS

Because the facts of this case are well known to the Court, *see, e.g.*, Dkt. 49 at 3-11, Dkt. 32 at 3-13, Plaintiffs will only revisit facts directly relevant to the pending motion to dismiss.

In September 2024, Stephen and Bethany Scaer brought this lawsuit challenging the City of Nashua’s flag policy and practices as unconstitutional. Dkt. 1. The Scaers requested both retrospective and prospective relief—preliminary and permanent injunctions preventing the City of Nashua from discriminating among flags on the basis of viewpoint; declaratory judgments stating the Nashua’s flag policy and practices violated the First Amendment both facially and as applied in the past against the Scaers; nominal damages recompensing each Plaintiff for past injuries; attorney fees and costs pursuant to 42 U.S.C. § 1988; and any other relief deemed just and appropriate. *Id.* at 22-23. Plaintiffs promptly moved for a

preliminary injunction preventing Nashua from enforcing the challenged flag policy and practices during the litigation. *See* Dkt. 2; Dkt. 2-14.

On October 7, 2024, Nashua repealed its May 2022 Flag Policy and established a new flag policy that purportedly prohibits Nashua's flag poles from serving as "public fora open to others" so that the poles are "exclusively controlled by city government." Dkt. 22. Three days later, Nashua filed an opposition to Plaintiffs' motion for a preliminary injunction, arguing, among other things, that Plaintiffs' motion was moot because of the 2022 flag policy's repeal. Dkt. 21 at 19-20. After briefing and oral argument, this Court ruled that the preliminary injunction was not moot but denied the motion on the merits. *See* Dkt. 39; Dkt. 32 at 15-18.

On December 22, 2025, the First Circuit reversed this Court's merits decision. *See* Dkt. 44 at 10-11, 23. After remand, this Court on February 2, 2026 entered an interim declaratory judgment consistent with the First Circuit's opinion, declaring, among other things, that "[d]uring the time period between the creation of the Citizen Flag Pole program and October 7, 2024, the City of Nashua was not engaged in government speech when it allowed flags, which people had applied to fly, to be displayed" and that "[a]ny resumption of the City's policy [used] during that time would be unconstitutional." Dkt. 54. Nashua was free to "close the Citizen Flag Pole to all private expression or return to the pre-2017 historic use of its flagpoles." *Id.* at 2.

On February 20, 2026, the Nashua Board of Aldermen codified the pre-existing October 7, 2024, flag policy by passing Ordinance O-26-001. Dkt. 56-1 at 4; Dkt. 56-

2 at 2-3. Former Defendant Donchess, Nashua’s mayor, sponsored the ordinance and approved it the following day. *Id.* at 2, 4-5. As a “codifi[cation],” Dkt. 56-1 at 4, of the 2024 flag policy, Ordinance O-26-001’s language is highly similar—though not identical—to this older policy. *Compare* Dkt. 56-2 at 3 *with* Dkt. 22.

On February 25, 2026, Defendant filed a “Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1),” arguing that “the injunctive relief sought by the Plaintiffs is moot in light of the recent passage of City ordinance O-26-001.” Dkt. 56.

### ARGUMENT

#### I. NASHUA’S MOTION IS INVALID BECAUSE FEDERAL COURTS EXERCISE JURISDICTION OVER CASES OR CONTROVERSIES, NOT OVER FORMS OF RELIEF.

Despite labeling its motion a “Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1),” Nashua has failed to follow Rule 12(b)(1). This Court can and should deny this motion for this error.

A 12(b)(1) motion asks a court to dismiss a civil action for lack of “subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). Article III of the Constitution restricts the subject-matter jurisdiction of federal courts to “Cases” and “Controversies.” *In re Ruiz*, 83 F.4th 68, 73 (1st Cir. 2023) (quoting U.S. Const. art. III, § 2). As a result, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss *the action*.” Fed. R. Civ. P. 12(h)(3) (emphasis added). When “an action becomes moot,” that action “is no longer a Case or Controversy for purposes of Article III, and is outside the jurisdiction of the federal courts.” *In re Ruiz*, 83 F.4th at 73 (cleaned up).

Nashua, however, never argues that Plaintiffs' civil action as a whole is moot, nor that any of the four counts in the complaint are moot, nor even that any of the other forms of relief requested in the complaint are moot. *See* Dkt. 56; Dkt. 56-1. Instead, Nashua merely asserts that "the injunctive relief sought" is moot. Dkt. 56 at 1; Dkt. 56-1 at 1, 4, 7. But from the start of this case, Plaintiffs have requested much more than just injunctive relief, *see* Dkt. 1 at 22-23, as Nashua itself concedes, *see* Dkt. 56-1 (noting that "[t]he Plaintiffs are seeking . . . nominal damages.").

"A claim is moot only if no relief is available." *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011). Thus, a defendant's "argument that [plaintiff] is no longer entitled to [prospective] relief is beside the point. Our question is whether [plaintiff] can obtain some relief, and he can. Therefore, his claims are not moot." *Id.*

Whether a court can grant a particular form of relief is a different question than whether that court lacks subject-matter jurisdiction. A 12(b)(1) motion seeks to dismiss the entire action—not just one form of requested relief. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(3). Unless Nashua contends that *all forms* of relief (not just injunctive relief) are unavailable, then Defendant's motion must be denied as a misuse of Rule 12(b)(1). But Defendant never argues that this Court lacks subject-matter jurisdiction. For Nashua's motion focuses exclusively on the injunction, admits that Plaintiffs also seek nominal damages, and thus implicitly concedes that this Court has subject-matter jurisdiction.

If Nashua believes that its own voluntary behavior moots one form of relief that Plaintiffs seek, Nashua can argue that defense in a brief in opposition to some

future summary judgment motion about the requested permanent injunction. Nashua cannot, however, move right now on those grounds to dismiss Plaintiffs' entire action under Rule 12(b)(1).

II. THE CITY OF NASHUA BEARS THE HEAVY BURDEN OF PROVING THAT ITS VOLUNTARY BEHAVIOR HAS MOOTED THE CASE.

Since the Scaers filed their lawsuit in September 2024, Nashua has twice tried to moot this lawsuit by rewriting its flag policy. *See* Dkt. 56; Dkt. 56-2 at 3; Dkt. 22; Dkt. 21 at 19-20. These transparent attempts at avoiding judicial scrutiny cannot moot the Scaers' case.

A case is moot only when it becomes impossible for a court to grant any effectual relief. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (citation and internal quotation marks omitted)

"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) (citation and internal quotation marks omitted). A defendant seeking to escape judgment based on his voluntary cessation "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. This is a "heavy burden of persuading," *id.* at 189, because "[w]ere the rule more forgiving, a defendant might

suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off.” *FBI v. Fikre*, 601 U.S. 234, 241 (2024).

The Supreme Court has stressed that the same burden “holds for governmental defendants no less than for private ones,” so that “[i]n all cases,” defendants must satisfy this heavy burden, “whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment.” *Fikre*, 601 U.S. at 241, 243. Governments do not have a lower burden of proving mootness and overcoming the voluntary cessation doctrine than other defendants have. *Cf.* Dkt. 56-1 at 5-7 (claiming that Nashua should benefit from a “presumption of mootness” on the authority of *Thomas v. City of Memphis, Tenn.*, 996 F.3d 318, 324-25 (6th Cir. 2021)). Although a few out-of-circuit cases speak of a presumption favoring governments, this presumption “has no basis in the Supreme Court’s precedent, as the Court has consistently applied the same ‘absolutely clear’ standard to all defendants.” Joseph C. Davis & Nicholas R. Reaves, *The Point Isn’t Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 Yale L.J. Forum 325, 328, 342 (2019).

Nashua bears the formidable burden of showing that this Court cannot grant any effectual relief and that it is absolutely clear that its unconstitutional flag practices will not recur—a burden it has not met and cannot meet.

### III. THIS CASE IS NOT MOOT BECAUSE THE COURT CAN GRANT NOMINAL DAMAGES.

In their complaint, Plaintiffs requested that this Court award “nominal damages . . . to each Plaintiff in the amount of \$17.91” for their past injuries. Dkt. 1 at 23.

Even alone, this request assures that Plaintiffs' case is active, because "[a] valid claim for nominal damages avoids mootness." *Fitzgerald v. City of Portland*, No. 2:14-cv-00053-NT, 2014 U.S. Dist. LEXIS 152492, at \*13 (D. Me. Oct. 27, 2014) (citing *Kuperman*, 645 F.3d at 73 & n.5). It is "well established" that the "nominal damages . . . prevents mootness." *Brumit v. City of Granite City*, 72 F.4th 735, 737 (7th Cir. 2023) (citing *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021)); *see also* 13C Charles Allen Wright & Arthur R. Miller, *FED. PRAC. & PROCED.* § 3533.3 (3d ed. 2014).

IV. THIS CASE IS NOT MOOT BECAUSE THE COURT CAN GRANT DECLARATORY RELIEF.

Plaintiffs also seek declaratory relief, asking this Court to declare retrospectively that Nashua's flag policy and practices violated Plaintiffs' First Amendment rights "as applied." Dkt. 1 at 23.

Declaratory judgments can supply both retrospective and prospective relief, because they can both affect the relationship of parties in the future and serve as a binding determination resolving a live legal controversy about liability for a past injury. *See, e.g., Cotto v. Campbell*, 126 F.4th 761, 772 (1st Cir. 2025); *Donahue v. City of Bos.*, 304 F.3d 110, 116 (1st Cir. 2002); *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, n.2 (10th Cir. 2002). A "claim for a declaration . . . is not moot" when parties dispute liability and the claim "ask[s] the court to determine whether a past constitutional violation occurred." *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995). Even if "the need for prospective

injunctive relief may be moot, the need for retrospective declaratory relief is not.” *McBreairty v. Brewer Sch. Dep’t*, 783 F. Supp. 3d 394, 415 (D. Me. 2025).

This Court has already entered an interim declaratory judgment which provided prospective relief, by barring Nashua from resuming its past unconstitutional “practice or policy.” Dkt. 54 at 2. This judgment, however, only concerned Nashua’s policy and practice facially and did not declare if Nashua violated the rights of Stephen and Bethany Scaer specifically when Nashua denied their flag applications based on their viewpoint. *See id.* Thus, this Court still has the authority to grant declaratory relief concerning the Scaers’ past treatment.

V. THIS CASE IS NOT MOOT BECAUSE PLAINTIFFS ARE ALREADY “PREVAILING PARTIES” ENTITLED TO ATTORNEY’S FEES AND COSTS.

Plaintiffs became “prevailing parties” in this case by February 2, 2026, at the latest, when this Court entered a declaratory judgment—a “judicially sanctioned change in the legal relationship of the parties.” *Lackey v. Stinnie*, 604 U.S. 192, 202 (2025) (citation omitted). This Court held that “the City has engaged in impermissible viewpoint discrimination under the First Amendment” and that “[a]ny resumption of the City’s policy . . . would be unconstitutional.” Dkt. 54. These holdings permanently change the parties’ legal relationship and ensure Plaintiffs are entitled to collect “a reasonable attorney’s fee” pursuant to 42 U.S.C. § 1988.

This Court’s “interim” declaratory judgment, Dkt. 54 at 1, was not temporary. Courts employ the term “interim” declaratory judgment for what is also called a partial declaratory judgment. *See, e.g., Stanton v. S. Berkshire Reg’l Sch. Dist.*, 197

F.3d 574, 576-77 (1st Cir. 1999) (using the phrase “interim declaratory ruling” to refer to a “partial summary judgment from the district court declaring the existing scheme unconstitutional”); *Heartland By-Products, Inc. v. United States*, 568 F.3d 1360, 1367 (Fed. Cir. 2009); *Laufenberg v. Ne. Carpenters Pension Fund*, Civil Action No. 17-1200 (MAH), 2019 U.S. Dist. LEXIS 218140, at \*58-59 (D.N.J. Dec. 18, 2019). An interim declaratory judgment is not temporary relief, because “prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *see also Perez v. Decker*, No. 18-cv-10683 (AJN), 2019 U.S. Dist. LEXIS 170185, at \*31, \*33 (S.D.N.Y. Sep. 30, 2019) (“preliminary declaratory relief . . . defies not only this Court’s Article III powers but also the Declaratory Judgment Act.”)

Interim or partial declaratory judgments are *final* as to the issue declared but do not resolve all the claims and issues remaining in the case. *Cf.* Dkt. 49 at 22 n.12 (noting that disagreements about permanent injunctive relief remained). And “[w]hen plaintiffs clearly succeeded in obtaining the relief sought before the district court and an intervening event rendered the case moot,” plaintiffs “are still ‘prevailing parties’ for the purposes of attorney’s fees for the district court litigation” “notwithstanding the subsequent mootness.” *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir. 2009).

Here, this Court resolved some (but not all) claims, when it granted interim declaratory relief. This judgment entitles Plaintiffs to pursue fees and costs, even if events occurring after the declaratory judgment moot portions of the case.

VI. THIS CASE IS NOT MOOT BECAUSE THE COURT CAN ENJOIN NASHUA FROM RESTORING A POLICY OR PRACTICE SIMILAR TO THE ONES DECLARED UNCONSTITUTIONAL.

Even after the passage of Ordinance O-26-001, this Court can grant effectual relief by enjoining the City of Nashua from returning in the future to flag policies or practices similar to the ones that this Court declared unconstitutional. *See* Dkt. 54.

Indeed, Nashua's current argument for mootness is almost identical to its prior unsuccessful argument. *Compare* Dkt. 56-1 *with* Dkt. 21 at 2, 19-20. Nashua previously claimed that "the controversy is no longer live" because in October 2024, Nashua adopted a new policy supposedly "making it abundantly clear that none of the flagpoles are a public forum and that only the City government m[a]y use them." Dkt. 21 at 20. Nashua now claims that injunctive relief is moot because "the City's October 7, 2024, policy was codified in City ordinance O-26-001" and this codification "closes the subject flagpole to the public, and only permits the City government to use it." Dkt. 56-1 at 2, 4.

There is no difference between these two claims, except that former Defendant Donchess established the October policy on his own. Dkt. 32 at 17. The Board of Aldermen voted for O-26-001, although the mayor again was deeply involved, for he sponsored and approved (rather than vetoed) the ordinance. Dkt. 56-2 at 2, 4-5.

The context of the litigation makes clear that the creation of both the October 7, 2024, policy and Ordinance O-26-001 was tactical. Nashua promulgated the former a few days before its response brief, *see* Dkt. 21, and the latter two weeks after the First Circuit's decision, *see* Dkt. 56-2 at 4-5 (noting the ordinance was approved as

to form on January 7, 2026), with the goal of mootng the case. Unless this Court permanently enjoins Defendant, Nashua can easily pass a new ordinance, restoring its May 2022 Flag Policy or something like it as soon as this case ends.

Nashua, after all, still apparently insists that its 2022 Flag Policy is constitutional. *See* Dkt. 56-1 (“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.”); *see also generally* Dkt. 34; Dkt. 21 at 1-3, 9-11. Moreover, Defendants use a City Hall Plaza Events policy containing language nearly identical to the 2022 flag policy. *See* Dkt. 32 at 18 n.7; Dkt. 26-3; Dkt. 26-1, ¶¶ 6-7.<sup>1</sup> “The City’s decision to keep this [Plaza Event] 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.” Dkt. 32 at 19 n.7. As long as Nashua continues to use a City Hall Plaza policy that discriminates, it cannot meet its formidable burden of demonstrating that its practice of viewpoint discrimination cannot reasonably be expected to recur. *See Fikre*, 601 U.S. at 241.

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<sup>1</sup> This Court may take judicial notice that the City Hall Plaza Events policy filed as Dkt. 26-3 remains on Nashua’s website at <https://www.nashuanh.gov/543/City-Hall-Plaza-Events>, as of March 5, 2026. *See Gent v. CUNA Mut. Ins. Soc’y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of government website); *see also United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (“This court and numerous others routinely take judicial notice of information contained on state and federal government websites.”) (collecting cases).

## CONCLUSION

This Court should deny the City of Nashua's motion to dismiss, because this Court can still grant relief that Plaintiffs requested in their complaint.

Dated: March 5, 2026

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