

Roxanne Maher

From: Daniel Pealer <danieljpealer@gmail.com>
Sent: Tuesday, March 11, 2025 9:09 PM
To: Roxanne Maher
Subject: Regarding the Third Party Flag issue.

Dear Members of the Ledyard Town Council,

I am writing to express my concerns regarding the proposed ordinance governing the flying of flags on town flagpoles. I believe that the ordinance, as currently written, raises several significant legal and constitutional issues that warrant reconsideration. As my prior email covered *Shurtleff v. City of Boston* (2022) and this proposed draft ordinance has been written in a manner so as to attempt to avoid the issues in that case, I shall focus the other problems that this proposal runs into.

Attribution and Public Perception

Government speech must be attributed to the government in a way that is clear to the public. If a private group proposes a flag and it is displayed on a town flagpole, there is a risk that observers might attribute the message of the flag to the private group rather than the government. This creates ambiguity about whether the speech represents the government's message or that of a private entity. Courts have been cautious in cases where the line between government and private speech is blurred, as seen in *Matal v. Tam* (582 U.S. 2017), where trademarks were held to be private, not government, speech due to the role of private parties in creating the message.

Additionally, it is important to recognize that the town cannot unilaterally declare a flag to be government speech simply by approving its display. Government speech, by its nature, must clearly convey a message attributable to the government itself. The involvement of private groups in proposing flags, coupled with the temporary and rotational nature of flag displays, undermines the claim that these displays constitute government speech.

Temporary and Rotational Nature

The nature of the expression matters. Permanent monuments, like those discussed in *Pleasant Grove City v. Summum* (555 U.S. 2009), are inherently government speech because of their enduring presence and the government's long-term commitment to their message. Flags, on the other hand, are temporary and rotational symbols that often reflect the sentiments or causes of the moment. This transient nature makes it less likely for flags to be perceived as embodying a consistent, long-term government message. The lack of permanence undermines the argument that these displays are purely government speech.

The proposed ordinance in Ledyard differs significantly from the situation in *Summum*. The ordinance seeks to govern the display of flags, which are inherently temporary and rotational in nature, unlike permanent monuments. Flags, being transient symbols, are often perceived as expressions of current sentiments, events, or causes. This transient nature differentiates flags from the permanent and enduring nature of monuments, which are meant to convey long-term messages and values.

The distinction between temporary flag displays and permanent monuments is crucial. While the government may exercise control over permanent monuments without violating the First Amendment, the temporary nature of flag displays requires a different legal consideration. The broad discretion granted to the Town Council to approve or deny flag displays based on their subjective determination of "official sentiments" raises the potential for viewpoint discrimination. This could result in arbitrary and inconsistent decisions, which are not permissible under the First Amendment's requirement for viewpoint neutrality.

The flags flown on the flagpole are more akin to the long-winded speaker that Justice Alito described in *Sumnum*, rather than the permanent monument covered by the case. As Justice Alito wrote, "Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space." Flags, being temporary and rotational, do not monopolize space in the same way that permanent monuments do. Just as a public park can serve as a platform for many orators over time, flagpoles can accommodate a variety of flags, reflecting diverse sentiments without permanently claiming the space.

Insufficient Standards and Guidelines

For the ordinance to credibly establish flag displays as government speech, it must include detailed, objective, and consistent criteria for approving flags. The current ordinance uses language open to subjective interpretation such as "flags that promote or may encourage", specifically in section 2, functionally giving the Town Council broad discretion to determine what flags to approve. This inherently subjective guidelines weakens the claim of government speech and opens the door to claims of viewpoint discrimination, as private speech could be selectively excluded under the guise of government speech.

In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Supreme Court struck down a Chicago ordinance that prohibited all picketing near schools, except for labor picketing. The Court held that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated based on the content of speech. Justice Marshall, writing for the Court, emphasized that "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." The ordinance's selective exclusion of non-labor picketing failed to meet this requirement, as it did not serve a compelling government interest in a narrowly tailored manner. This case illustrates the importance of ensuring that any regulation affecting First Amendment rights must be both justified by a legitimate objective and crafted in a way that does not unduly restrict free expression. Similarly, the Ledyard ordinance's broad discretion in approving flags without clear guidelines poses a risk of content-based discrimination, which is impermissible under the principles established in *Mosley*.

Risk of Viewpoint Discrimination

The ordinance's declaration that flagpoles are non-public forums for government speech does not absolve the Council from adhering to constitutional principles. Even if the government controls the forum, it cannot engage in viewpoint discrimination. By allowing private individuals and groups to propose flags but retaining discretionary power to approve or deny them, the ordinance risks being a mechanism for suppressing certain viewpoints, rather than a legitimate exercise of government speech. This is inconsistent with the First Amendment's protections. Further the explicit prohibition of the use of

the flagpole to fly religious flags runs afoul of other court decisions such as *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) where the court decided that such restrictions are prohibited viewpoint discrimination.

A pertinent case illustrating the importance of viewpoint neutrality in government regulations is *Frederick Douglass Foundation, Inc. v. DC*, No. 21-7108 (D.C. Cir. 2023). In this case, a federal appeals court found that the city of Washington, D.C., engaged in viewpoint discrimination by selectively enforcing laws prohibiting defacement of public property. The city allowed Black Lives Matter protesters to paint messages on public streets and sidewalks but arrested pro-life advocates for similar actions. The court held that "The First Amendment prohibits the government from favoring some speakers over others. Access to public fora must be open to everyone and to every message on the same terms." This case underscores the need for government regulations to be applied uniformly and without favoritism towards any particular viewpoint.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court ruled that a school district violated the First Amendment by denying a church access to school facilities to show a religious film series while allowing other community groups to use the facilities for various purposes. The Court held that the exclusion of the church's religious viewpoint, via rule 7 a clause functionally identical to the prohibition in the proposed policy, constituted viewpoint discrimination. Similarly, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Supreme Court held that a public school district's refusal to allow a religious club to meet on school premises after hours, while allowing other community groups to do so, constituted viewpoint discrimination. The Court emphasized that the government cannot exclude speech based on its viewpoint, even in limited public forums. These cases reinforce the principle that viewpoint discrimination is impermissible in any forum where the government allows speech, highlighting the need for the Town Council to ensure that its regulations are applied in a viewpoint-neutral manner.

In conclusion, the proposed ordinance raises significant legal and constitutional issues that must be addressed. By enshrining the current unofficial "no third party flag" policy into an official ordinance, the Council can ensure clarity, transparency, and legal certainty while avoiding the potential for viewpoint discrimination and other constitutional issues.

Thank you for your attention on this matter

Sincerely,

Daniel Pealer



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