FIRE
Foundation for Individual Rights and Expression

June 16, 2023

Mayor Kathleen L. Newsham
City of Bay City
301 Washington Avenue
Bay City, Michigan 48708

Sent via U.S. Mail and Electronic Mail (KNewsham@baycitymi.org)

Dear Mayor Newsham:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by Bay City's ordinances restricting public comment at City Commission meetings. The First Amendment prohibits Bay City from adopting vague, overbroad, or viewpoint-discriminatory regulations that infringe upon its citizens' right to speak freely and criticize government officials. For that and the reasons that follow, FIRE calls on Bay City to repeal or amend the ordinances to harmonize them with the First Amendment.

The City Commission's website states: "The mayor and commissioners encourage the interest, attendance and participation of the public at commission meetings. The public is invited to speak on issues during public hearings and general audience participation."[2] Section 2-26 of the Bay City Code of Ordinances sets forth rules governing Commission meetings and organization. Commission Rule 12 governs public participation and states that "[d]erogatory comments directed at another person are prohibited."[3] Ordinance 2023-6, passed recently, amends Commission Rule 17 to read: "The mayor, president, acting mayor or acting president may call to order any person who is being disorderly by speaking out of order or otherwise disrupting the proceeding, failing to be germane, speaking longer that [*sic*] the allotted time, using vulgarities, or by demeaning city officials, officers, or employees."[4] The rule's reference

[1] You can learn more about FIRE's mission and activities at thefire.org.

[2] *Mayor & City Commission*, Bay City Mich., https://www.baycitymi.org/373/Mayor-City-Commission [https://perma.cc/BCE5-83VR].

[3] City of Bay City Code of Ordinances, Art. II, Sec. 2-26(12), *available at* https://bit.ly/3J1gkg7 [https://perma.cc/3UDF-WSVT].

[4] City of Bay City Code of Ordinances, Art. II, Sec. 2-26(17), *available at* https://bit.ly/3X0nLKv [https://perma.cc/Z26R-4D28].

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 Fax: 215-717-3440
thefire.org

to "any person" means it could be enforced not only against Commissioners, but members of the public.

The First Amendment protects Bay City citizens when they speak during public comment periods at Commission meetings.[5] A Commission meeting is, at a minimum, a limited public forum, which means Bay City may restrict the content of its constituents' speech only when those restrictions are viewpoint-neutral *and* reasonable in light of the forum's purpose.[6] Bay City may, for example, limit the amount of time reserved for each public comment. In no case, however, may officials prohibit speech based on the viewpoint it expresses, including criticism of government officials. "Viewpoint discrimination is censorship in its purest form," and government action "that discriminates among viewpoints threatens the continued vitality of free speech."[7]

Additionally, Bay City may not promulgate vague or overbroad restrictions on speech. Regulations are unconstitutionally vague when they fail to provide persons of ordinary intelligence reasonable notice of what speech is prohibited or afford city officials too much discretion to decide what speech is allowed.[8] A regulation is overbroad if it "prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[9] The overbreadth doctrine "is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear" of violating the law.[10]

Commission Rules 12 and 17 fail all these tests.

First, the prohibitions on "demeaning city officials, officers, or employees" and making "[d]erogatory comments directed at another person" are viewpoint discriminatory. The Supreme Court has made clear that even a speech restriction that "evenhandedly prohibits disparagement of all groups" is viewpoint discriminatory because the determination of whether speech is disparaging requires the government to consider the viewpoint expressed.[11]

The First Amendment makes no exception for speech that others subjectively find offensive or objectionable.[12] This core principle applies with special force to critical speech directed at the

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[5] *See, e.g.*, *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167, 174–76 (1976) (recognizing the public's right to speak at school board meetings "when the board sits in public meetings to conduct public business and hear the views of citizens").

[6] *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

[7] *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (cleaned up).

[8] *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

[9] *United States v. Williams*, 553 U.S. 285, 292 (2008).

[10] *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989).

[11] *Matal v. Tam*, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019) (holding that the determination of whether something is "immoral" or "scandalous" is viewpoint-based because it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation").

[12] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

government, which must be viewed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[13] Indeed, "[t]he First Amendment right to criticize public officials is well-established and supported by ample case law."[14]

In *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, the U.S. Court of Appeals for the Sixth Circuit—the decisions of which bind Bay City—invalidated as unconstitutional a school board decorum policy similar to the one in place in Bay City.[15] The case involved a school board's "restrictions on 'abusive,' 'personally directed,' and 'antagonist[ic]' statements," and their use of these restrictions to cut off a community member's statements at a public school board meeting.[16] The Sixth Circuit noted "[t]he antagonistic restriction, by definition, prohibits speech opposing the Board"; that the limit on "abusive" speech "prohibits 'insulting' language"; and that "personally directed" speech was construed by the Board to mean "simply abusive speech directed at one person."[17] The Sixth Circuit held all the restrictions imposed "impermissible viewpoint discrimination" that prohibited speech "purely because it disparages or offends."[18]

Like the unconstitutional restrictions in *Ison*, Bay City's bans on "demeaning city officials, officers, or employees" and "[d]erogatory comments directed at another person" fail First Amendment scrutiny because they selectively target speech based on viewpoint. These regulations are incompatible with the "free flow of ideas and opinions on matters of public interest and concern" that lies at "the heart of the First Amendment."[19]

Second, Bay City's flat ban on "using vulgarities" also violates the First Amendment because it is not "reasonable" content discrimination in light of the purpose served by the public comment period.[20] Under this policy, a speaker could not even quote a germane "vulgarity" mentioned in a news report or uttered by a government official. In the landmark case *Cohen v. California*, the Supreme Court cleared a man convicted of disturbing the peace for wearing a jacket emblazoned with "Fuck the Draft" in a public courthouse.[21] The Court stated that "so long as the means are peaceful, the communication need not meet standards of acceptability."[22] It also noted that if governments were allowed to "forbid particular words,"

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[13] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").

[14] *Barrett v. Harrington*, 130 F.3d 246, 264 (6th Cir. 1997).

[15] 3 F.4th 887 (6th Cir. 2021).

[16] *Id.* at 893.

[17] *Id.* at 894.

[18] *Id.*

[19] *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 50 (1988).

[20] *Cornelius v. NAACP Legal Def. Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985).

[21] 403 U.S. 15 (1971).

[22] *Id.* at 25.

they "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[23]

Third, the rules at issue are unconstitutionally overbroad. While *some* speech that may be labeled "demeaning," "derogatory," or "vulgar" could fall into one of the few, narrowly defined categories of expression that receive no First Amendment protection—such as defamation or true threats[24]—the vast majority of such speech is protected.

Finally, even setting aside the fatal flaws of viewpoint discrimination and overbreadth, the rules must be amended for the independent reason that they are unconstitutionally vague—they lack specificity regarding what speech is "demeaning," "derogatory," or "vulgar." When does a comment directed at a government official cross the line from merely critical to "demeaning" or "derogatory"? Making this determination is an unavoidably subjective exercise. There is no clear answer. Yet, laws and regulations "must provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[25]

It is all too easy to envision the Commission enforcing the rules to suppress criticism of commissioners and other city officials while giving the public free rein to praise the city and its leaders. FIRE has seen it happen before.[26] This double standard contravenes the First Amendment and our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[27]

FIRE calls on Bay City to repeal or amend Commission Rules 12 and 17 to eliminate their unconstitutional defects. FIRE would be pleased to work with Bay City to ensure its laws and regulations comply with the First Amendment.

We respectfully request a substantive response to this letter no later than June 30, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Jesse Dockett, Commission President, 1st Ward
Joseph Rivet, Commissioner, 2nd Ward
Andrea E. Burney, Commissioner, 3rd Ward
Brentt A. Brunner, Commission Vice President, 4th Ward

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[23] *Id.* at 26.

[24] *See United States v. Alvarez*, 567 U.S. 709, 717 (2012).

[25] *Grayned*, 408 U.S. at 108.

[26] *See, e.g.*, Press Release, FIRE, *FIRE sues Michigan mayor who abused power, shouted down constituents at city council meeting* (Nov. 10, 2022), https://www.thefire.org/news/fire-sues-michigan-mayor-who-abused-power-shouted-down-constituents-city-council-meeting.

[27] *Sullivan*, 376 U.S. at 270; *see also Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion.").

Rachelle Hilliker, Commission Sgt-at-Arms, 5th Ward
Christopher Girard, Commissioner, 6th Ward
Shelley Ann Niedzwiecki, Commissioner, 7th Ward
Ed Clements, Commissioner, 8th Ward
Cordal D. Morris, Commissioner, 9th Ward