FIRE
Foundation for Individual Rights and Expression

July 25, 2023

Mayor Bob Joslin
Arab City Hall
740 North Main Street
Arab, Alabama 35016

Sent via U.S. Mail and Electronic Mail (bjoslin@arabcity.org)

Dear Mayor Joslin:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the City of Arab's sign regulations prohibiting "signs that contain vulgar, threatening, hate speech, lewd or indecent content."[2] While Arab may lawfully restrict true threats, properly defined, the remaining restrictions violate the First Amendment and must be rescinded.

Supreme Court precedent is clear: A "government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[3] Regulations that "target speech based on its communicative content . . . are presumptively unconstitutional."[4] In *Reed*, the Supreme Court invalidated an ordinance that regulated signs differently based on the messages they conveyed.[5]

Arab's sign ordinance claims the city is "trying to maintain content-neutrality." But the restrictions are, in fact, anything but. They are content-based because they "cannot be 'justified without reference to the content of the regulated speech.'"[6] It is, for example, impossible to judge whether a sign is "vulgar" without reading and interpreting what it says.

Arab may regulate "threatening" signs to the extent this restriction applies only to "true threats," as true threats are one of the few, narrowly defined categories of speech that fall

[1] You can learn more about FIRE's mission and activities at thefire.org.
[2] ARAB, ALA. CODE OF ORDINANCES, ART. VII, § 701.01(3), *available at* https://library.municode.com/al/arab/codes/code_of_ordinances?nodeId=COOR_APXAZO_ARTVIISIRE.
[3] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (cleaned up).
[4] *Id.*
[5] *Id.* at 159.
[6] *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)).

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outside the First Amendment's protection.[7] The First Amendment makes no such categorical exceptions, however, for "hate speech," nor speech that is "vulgar," "lewd," or "indecent."

In *Cohen v. California*, the Supreme Court cleared a man convicted of disturbing the peace for wearing a "Fuck the Draft" jacket in a public courthouse, even though the applicable criminal statute prohibited "offensive conduct" and even though there were "women and children present."[8] The Court emphasized that "so long as the means are peaceful, the communication need not meet standards of acceptability," noting the danger of the government wielding a power to ban particular words "as a convenient guise for banning the expression of unpopular views."[9]

The only context in which the government may restrict "indecent" speech is in the broadcast medium, in part because of its once "uniquely pervasive presence" including in private homes.[10] Even then, the government may not restrict "indecent" content at times of day when children are unlikely to be in the audience.[11] The Supreme Court has invalidated indecency regulations every other time it has considered them.[12]

The sign ordinance's prohibition on "hate speech" is likewise unconstitutional. The First Amendment makes no categorical exception for expression others view as hateful or offensive.[13] In *R.A.V. v. City of St. Paul*, for example, the Supreme Court struck down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[14] In holding the First Amendment protects protesters holding insulting signs outside soldiers' funerals, the Court reiterated the broad constitutional protection for expression, recognizing that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[15]

By purporting to ban "hate speech," Arab's regulation is not only content-based, but also discriminates based on viewpoint—an "egregious" form of censorship.[16] Viewpoint

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[7] A "true threat" is a statement through which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[8] *Cohen v. California*, 403 U.S. 15, 16–17 (1971).

[9] *Id.* at 25–26 (cleaned up).

[10] *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

[11] *Id.*; *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

[12] *See United States v. Playboy Ent. Grp.*, 529 U.S. 803 (regulation requiring cable television operators to restrict channels primarily dedicated to sexually oriented programming violated First Amendment); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act's limitations on "indecent" online speech were unconstitutional); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 117 (1989) (ban on indecent commercial telephone communications violated First Amendment).

[13] *Matal v. Tam*, 582 U.S. 218, 246 (2017).

[14] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *see also 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.").

[15] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[16] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

discrimination is "censorship in its purest form," and government action "that discriminates among viewpoints threatens the continued vitality of free speech."[17] As the Supreme Court made clear in *Matal v. Tam*, "[g]iving offense is a viewpoint."[18] Even a 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.[19]

Even setting aside the fatal flaws of content discrimination, viewpoint discrimination, and overbreadth, Arab must rescind or amend its sign regulations for the independent reason that they are unconstitutionally vague, lacking requisite specificity regarding what speech qualifies as "vulgar," "lewd," "indecent," or "hate speech." These undefined terms are capable of capturing a wide range of protected speech depending on the subjective judgment and biases of city officials enforcing them. As such, they fail to provide persons of ordinary intelligence reasonable notice what speech is prohibited and give city officials undue discretion to decide what may be said.[20]

FIRE calls on the City of Arab to rescind or amend Section 701.01(3) to eliminate its unconstitutional defects. FIRE would be pleased to work with the city to ensure its laws and regulations comply with the First Amendment.

We appreciate your attention to this matter and respectfully request a substantive response no later than August 8, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Johnny Hart, Arab City Council
Mitch Stone, Arab City Council
Mark Gullion, Arab City Council
Mike Allen, Arab City Council
Alan Miller, Arab City Council

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[17] *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (cleaned up).
[18] 582 U.S. at 243.
[19] *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").
[20] *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).