FIRE
Foundation for Individual Rights and Expression

May 9, 2024
Enfield Town Council
Enfield Town Hall
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Enfield, Connecticut 06082-2997

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Dear Enfield Town Council:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the Town of Enfield's Regulations for Use of Town Green and Gazebo, which as currently written infringe residents' First Amendment rights to express themselves in a traditional public forum. The nearby town of Suffield declined to adopt a nearly identical town green policy after FIRE explained it would violate the First Amendment.[2] FIRE urges Enfield to follow suit and revise its rules and regulations to eliminate the constitutional flaws.

Our concerns involve in particular the rules and regulations listed with the *Application for Individuals and Non-Profit Organizations to Reserve Use of the Town of Enfield Town Green/Gazebo* on Enfield's website, some of which also appear in the municipal code,[3] and which together raise the following serious First Amendment issues.

Permit Requirement

The rules and regulations require anyone wishing to "use" the Town Green or Joseph E. O'Connor Gazebo to obtain approval from the Town Manager's Office. The regulations require

[1] You can learn more about our mission and activities at thefire.org.

[2] Aaron Terr, *Want to hand out pamphlets on the town green? You'll need a permit.*, FIRE (Feb. 21, 2024), https://www.thefire.org/news/want-hand-out-pamphlets-town-green-youll-need-permit.

[3] *Application for Individuals and Non-Profit Organizations to Reserve Use of the Town of Enfield Town Green/Gazebo*, TOWN OF ENFIELD, https://www.enfield-ct.gov/FormCenter/Town-Manager-16/Application-for-Individuals-and-NonProfi-95; *Regulations for Use of Town Green and Gazebo*, TOWN OF ENFIELD, (Revised Aug. 6, 2002), https://www.enfield-ct.gov/DocumentCenter/View/7009/Town-Green-Gazebo-Rules-Regulations---03062012?bidId=. *See also* TOWN OF ENFIELD, CONN., CODE CH. 54, https://library.municode.com/ct/enfield/codes/code_of_ordinances?nodeId=PTIVCOOR_CH54PAREAR.

submission of most applications at least 10 days in advance. However, the regulations neither define "use" nor exempt "uses" by small groups or individuals. These failures render the regulations constitutionally infirm.

While Enfield may require permits for some events—such as those involving large groups or requests for exclusive use of the Town Green—the rules and regulations seemingly encompass an almost limitless range of expressive activity, from a lone acoustic guitarist to a book club meeting, from a 10-person protest to a lone pamphleteer. Requiring even individuals and small groups to obtain a permit to engage in expressive activity on the Town Green violates the First Amendment.

The Supreme Court has long made clear that the "public retain[s] strong free speech rights when they venture into public streets and parks, 'which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[4] The authority of government actors like the Town of Enfield to "limit expressive activity" in these quintessential public forums is "sharply circumscribed."[5]

As permit requirements impose a prior restraint on speech, there is a "heavy presumption" against their constitutionality.[6] While a municipality may create permit schemes that regulate the time, place, and manner of speech in public forums, such regulations "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication."[7]

Applying that standard, federal courts have consistently struck down permit requirements that apply to individuals or small groups wishing to use public forums.[8] To the extent Enfield may require a permit for some large gatherings, the notice period "can be no longer than

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[4] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("Time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.") (cleaned up).

[5] *Perry Educ. Ass'n*, 460 U.S. at 45.

[6] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

[7] *Id.*

[8] *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1048 (9th Cir. 2009) (*en banc*) ("[N]either we nor the Supreme Court has *ever* countenanced" a policy that "requires single individuals to inform the government of their intent to engage in expressive activity in a public forum."); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (invalidating license scheme for public parades because city's "significant interest in crowd and traffic control, property maintenance, and protection of the public welfare is not advanced by the application of the [o]rdinance to small groups," noting "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring"); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("ordinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest"); *Cox v. City of Charleston*, 416 F.3d 281, 283, 285–86 (4th Cir. 2005) (invalidating code sections barring "any person" from participating in "any parade, meeting, exhibition, assembly or procession" on public streets or sidewalks without permit because city failed to show why its application to small groups was necessary to keeping streets and sidewalks safe, orderly, and accessible).

necessary to meet" the town's "urgent and essential needs," such as taking "measures to provide for necessary traffic control and other aspects of public safety."[9] "Advance notice requirements that have been upheld by courts have most generally been of less than a week."[10] Even a five-day notice period can be unconstitutionally burdensome.[11] Importantly, any notice requirement must allow for "spontaneous free expression and assembly" in "quick response to topical events."[12] Enfield's policies stifle such spontaneous expression with an unnecessarily long 10-day notice requirement.

Differential treatment of events or displays that are "religious in nature"

In contrast to the 10-day notice requirement for all other activities, events or displays that are "religious in nature" require *60 days*' notice under Enfield's regulations. In addition to having the constitutional problems with a burdensome notice requirement, the 60-day requirement for religious events or displays is also unconstitutional as a viewpoint-based restriction on speech, which are impermissible in all public forums.

The First Amendment's Free Speech Clause makes no exception for religious speech. Although the Establishment Clause limits what the government itself may sponsor, "[w]hen the government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'"[13] For this reason, courts have held on numerous occasions not merely that government *may* allow religious speech in public forums, but that it *must*.[14]

As a recent example, when Boston allowed private groups to raise flags of their choosing on a flagpole outside Boston City Hall, the Supreme Court held the city could not decline to fly the Christian flag.[15] The Court did so even though the flagpole outside city hall is obviously closely identified with the city itself.[16] What mattered, and what was "the most salient feature of [the] case," was that Boston did not actively control the flag raisings or shape the messages the flags

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[9] *Sullivan v. City of Augusta*, 511 F.3d 16, 56 (1st Cir. 2007).

[10] *Id.*

[11] *See Douglas v. Brownell*, 88 F.3d 1511, 1523–1524 (8th Cir. 1996).

[12] *Sullivan*, 511 F.3d at 55–56.

[13] *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

[14] *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that a religious club must be allowed to use public school facilities), *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that a cross must be allowed on Ohio state capitol grounds), *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F.Supp. 2d 182 (N.D.N.Y. 2006) (holding that a school must continue to display bricks with religious speech written on them), *Flamer v. City of White Plains*, 841 F.Supp. 1365 (S.D.N.Y. 1993) (holding that a menorah must be allowed to be displayed in a public park).

[15] *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022).

[16] *See id.* at 1590–91.

sent.[17] Boston's lack of moderation of what flags were raised on the flagpole meant that the flags did not represent Boston's own speech.

Similarly, Enfield does not control the messages presented at the Town Green and Gazebo. The locations are public forums, and messages presented represent the views of private speakers who express themselves there, not those of the town. Although Enfield has not completely banned private religious speech at the Town Green or Gazebo, the 60-day notice period violates the First Amendment by placing an additional burden on such speech merely because it expresses a religious viewpoint.

Requirements to pay for law enforcement and provide a certificate of insurance

The rules also mandate that "[a]ny police needed for [an] event must be paid for by the individual or organization," which is unconstitutional to the extent it allows for a "heckler's veto" and empowers the Town to impose greater costs on those whose expression may elicit hostile reactions.[18] Similarly, they require event sponsors to provide "a Certificate of Liability Insurance, with the Town of Enfield named as an insured and in a format approved by the town, in the amount of $1,000,000"—which "may be increased at the discretion of the town manager if in his/her opinion the activity . . . has potential liability risk in excess of $1,000,000"—thereby imposing unconstitutional minimum insurance requirements that lack any connection to the actual risks of specific expressive activity.

In *Forsyth County v. Nationalist Movement*, the Supreme Court invalidated a security fee requirement for demonstrations and other uses of public property that vested unbridled discretion in government officials and authorized them to assess fees based on their "measure of the amount of hostility likely to be created by the speech based on its content."[19] Enfield may require sponsors to pay *actual* administrative expenses *unrelated* to an event's expressive content, but speech "cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[20] Any permit fees must be both based on "narrow, objective, and definite standards" unrelated to the content of speech[21] and limited to an amount the does not exceed the costs of administering the regulation.[22]

And even assuming the Town's interest in protecting itself from liability is significant, its insurance requirement is not narrowly tailored to advancing that interest.[23] Even if $1,000,000

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[17] *See id.* at 1592.

[18] *See* Zach Greenberg, *Rejecting the 'heckler's veto,'* FIRE (June 14, 2017), https://www.thefire.org/news/rejecting-hecklers-veto.

[19] 505 U.S. 123 at 134.

[20] *Id.* at 131–33.

[21] *Id.* at 131.

[22] *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943).

[23] *See E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (invalidating $750,000 insurance requirement for group seeking to protest on abandoned railway bed, as state offered no basis for amount); *see also iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014) (Utah's minimum requirement of $1,000,000 in liability insurance for parade permit violated First Amendment because it was not tied to risk of specific parades based on objective characteristics like location, duration, and number of participants).

of insurance coverage is warranted for *some* events, Enfield cannot show that amount is proportionate to the risk of *all* potential uses of the Town Green or Gazebo. Worse still, the provision unconstitutionally allows Enfield to increase the required coverage based on how third parties may respond to an applicant's expressive activity. As with security fees, Enfield must tie any insurance requirement to actual risks of an activity based on pre-established, objective, content-neutral criteria.[24]

Restrictions on uses likely to incite violence or create unsafe conditions

Enfield's rules further establish criteria assertedly related to public safety, banning Town Green and Gazebo uses that, in Enfield's judgment, would "unreasonably interfere with or detract from the promotion of public health, welfare, safety and recreation" or are "reasonably likely to cause injury to persons or property, incite violence, crime or disorderly conduct." These provisions pose two independent First Amendment problems: First, they are unconstitutionally vague. Second, they establish an unconstitutional heckler's veto.

A policy is unconstitutionally vague if people "of common intelligence must necessarily guess at its meaning."[25] Here, it is unclear what conduct "interferes" with the "promotion" of public health, welfare, safety, and recreation. Town officials could interpret this provision narrowly, such that it merely prohibits non-speech behavior that is in fact dangerous. On the other hand, Town officials could just as easily interpret the provision broadly, such that it would prohibit messages that Town officials subjectively decide are "promoting" unhealthy or dangerous life-styles. In this way, residents are denied fair notice of what is and is not allowed. It is exactly this type of unfettered discretion by state officials that the constitutional prohibition on vague speech regulations seeks to prevent.[26]

Additionally, these provisions risk facilitating an unconstitutional heckler's veto. Enfield certainly has an interest in ensuring public safety and may shut down the Town Green and Gazebo if physical conditions on the grounds render it unsafe. It may also ban expressive activity that properly falls within the narrow, unprotected category of incitement, namely speech *intended to* and *likely* to cause imminent unlawful action.[27] However, Enfield may not ban speech merely because it elicits hostile reactions.

The First Amendment protects those "wishing to express views unpopular with bottle throwers."[28] The "freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message."[29] Enfield must address crowd hostility without punishing or

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[24] *Forsyth Cnty.*, 505 U.S. at 131; *iMatter Utah*, 774 F.3d at 1269–70.

[25] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

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

[27] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[28] *Forsyth Cnty.*, 505 U.S. at 134.

[29] *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 252 (6th Cir. 2018).

silencing the speaker, which "seldom, if ever, constitute[s] the least restrictive means available" to keep the peace.[30]

Clarifying and narrowing these safety provisions to make clear they do not regulate protected speech will resolve both the regulations' vagueness and heckler's veto problems.

Restrictions on vending and engaging in activities for private profit

Enfield's rules ban "vending" except by special permission granted by the Town Manager's Office yet provide no criteria for review of such requests. At the same time, the policy *completely* bans activities, events, and displays "designed to be held for private profit." The net effect appears to be that only requests to vend for purposes other than private profit may receive approval. These provisions cannot withstand First Amendment scrutiny.

Speech does not lose constitutional protection simply because the speaker is paid to speak or solicits contributions in the course of disseminating a message.[31] Likewise, expressive materials like newspapers and artwork receive full First Amendment protection whether they are sold or given away.[32] Enfield cannot categorically ban expressive activity in a traditional public forum for the sole reason that money changes hands. And any permit scheme applicable to vending expressive materials must be content-neutral and narrowly tailored in service of significant government interest, with adequate procedural safeguards to preclude arbitrary decision-making.[33]

Ban on advertising

Enfield's rules also ban activities, events, and displays "held for the purpose of advertising any product, good, or event," which violates the First Amendment. This provision's failure to define its terms renders it unconstitutionally vague.[34] Does "advertising" refer only to speech promoting commercial availability of a product, service, or event? Or does the provision encompass the "advertising" of "events" with no commercial purpose or activity, like a flyer promoting a gathering on the Town Green to sing Christmas carols? Because the proposed

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[30] *Id.* at 248; *see also Meinecke v. City of Seattle*, No. 23-35481, 2024 U.S. App. LEXIS 9390, at *22 (9th Cir. Apr. 18, 2024) ("Curtailing speech based on the listeners' reaction is rarely—if ever—the least restrictive means to achieve the government's interest in safety.").

[31] *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) ("our cases long have protected speech even . . . in the form of a solicitation to pay or contribute money").

[32] *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *White v. City of Sparks*, 500 F.3d 953, 957 (9th Cir. 2007) (First Amendment protects artists' sale of their original paintings); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.").

[33] *Forsyth County*, 505 U.S. at 130–31.

[34] *Connally*, 269 U.S. at 391. Speech regulations must "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108.

policy does not specify its scope, residents and visitors will rationally choose to refrain from engaging in protected expressive activities on the Town Green to avoid crossing the policy's indeterminate boundaries. The resulting chill on speech violates the First Amendment.[35]

Because the regulation discriminates against speech based on content, to the extent it *does* reach noncommercial speech, it must be narrowly tailored to serve a compelling state interest in the least speech-restrictive way.[36] It is unclear what interest Enfield has in restricting this type of speech, and, in any event, a flat ban is the opposite of the narrow tailoring the First Amendment requires.

Even if the regulation is interpreted narrowly to reach *only* commercial speech, it is still unconstitutional. Outside of restricting false or deceptive speech or speech that proposes an illegal transaction, a restriction on commercial speech must be no more extensive than necessary to achieve a substantial government interest.[37] Again, Enfield's interests are unclear, and an indiscriminate ban is almost certainly unnecessarily restrictive in any case.

Conclusion

FIRE calls on Enfield to excise or revise the unconstitutional provisions in its Regulations for Use of Town Green and Gazebo to ensure its citizens are fully able to exercise their First Amendment rights in the Town's public forums. We would be happy to work with the Town of Enfield—free of charge—to ensure its regulations both protect residents' First Amendment rights and further the Town's interest in reasonably regulating the time, place, and manner of speech.

We respectfully request a substantive response to this letter no later than May 23, 2024.

Sincerely,

M. Brennen VanderVeen

M. Brennen VanderVeen
Program Officer, Public Advocacy

Cc: Thomas J. Tyler, Interim Town Attorney

[35] *See, e.g., Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (noting constitutional "prohibit[ion of] overly vague laws" serves in part to "avoid chilling the exercise of First Amendment rights").

[36] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[37] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).