August 14, 2024

Salt Lake City Council
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Dear Council Members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned by the Salt Lake City Council's unconstitutional censorship of a speaker alleged to have violated "decorum" rules during the public comment portion of a recent Council meeting. The First Amendment prohibits public bodies from adopting or enforcing vague, overbroad, or viewpoint-discriminatory rules that infringe the rights of citizens to speak freely and to criticize government officials. Accordingly, FIRE calls on the Council to revise its decorum rules and to ensure their constitutional enforcement going forward.

Our concerns arise from the public comment period of the Council's May 7 meeting, during which the Council cut off a speaker's microphone audio and had security escort her from the premises for allegedly violating the meeting's decorum rules. The incident occurred when Jenna Martin, who attended the meeting wearing a keffiyeh and sought to convey discontent with how Salt Lake City had recently handled pro-Palestinian activists on college campuses, appeared to turn her attention to Mayor Erin Mendenhall to ask, "What the hell is wrong with you?" After a council member interjected to ask Martin to remember the decorum rules, she continued, "You think you're winning here. You send West Valley City P.D. to the University of Utah campus, and then you had Michael Valentine arrested not once but twice for the most bullshit reasons . . . ." At that point the Council disconnected the microphone and security escorted Martin off the premises.[1]

The decorum policy posted on the Council's website, which the council member appears to have invoked to have Martin ejected, states in relevant part:

> Council meetings are a place for people to feel safe and comfortable participating in their government. A respectful and safe environment allows a

[1] Salt Lake City, *Salt Lake City LBA, RDA, and City Council Formal Meeting - 05/07/2024*, at 2:05:08, YouTube, https://www.youtube.com/watch?v=4DuwY-onihc&t=7494s.

> meeting to be conducted in an orderly, efficient, effective, and dignified fashion, free from distraction, intimidation, and threats to safety. We welcome everyone, so please be mindful and keep comments free of discriminatory language referring to a person or group based on their religion, ethnicity, nationality, race, color, descent, gender, sexual orientation, disability, age, or other identity factor.
>
> To support a respectful meeting, actions that disrupt the meeting, intimidate other participants, or may cause safety concerns are not allowed. For example: . . . Jeering, cheering, clapping, and waving signs may intimidate other speakers and cause a disruption, so please refrain from such activities.[2]

This policy and its enforcement violate the First Amendment rights that Salt Lake City citizens possess when they publicly comment at city meetings.[3]

A municipal meeting that allows the public to comment is, at a minimum, a limited public forum, such that the Council may restrict the content of constituents' speech only if restrictions are viewpoint-neutral *and* reasonable in light of the forum's purpose.[4] The Council may, for example, limit the amount of time reserved for each public comment. But the Council may not, among other things, restrict criticism of government officials or other speech based on the viewpoint it expresses. As held by the U.S. Court of Appeals for the Tenth Circuit, the decisions of which bind Salt Lake City, viewpoint-based restrictions receive the most stringent First Amendment scrutiny and are "presumed impermissible when directed against speech otherwise within the forum's limitations."[5]

Neither may Salt Lake City promulgate or enforce vague or overbroad restrictions on speech. Regulations are unconstitutionally vague if they fail to provide persons of ordinary intelligence reasonable notice of what speech is prohibited and/or afford city officials too much discretion to decide what speech to allow.6 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."7

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[2] Salt Lake City, *Council Public Meeting Rules*, (last updated Feb. 2024), https://www.slcdocs.com/council/WebDoc/PublicMeetingRules.pdf.

[3] *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").

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

[5] *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (quoting *Rosenberger*, 515 U.S. at 830); *see also Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (viewpoint discrimination is "censorship in its purest form," and government action "that discriminates among viewpoints threatens the continued vitality of free speech") (cleaned up).

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

[7] *United States v. Williams*, 553 U.S. 285, 292 (2008). 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. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989).

Salt Lake City's policy and its actions under it violate all these prohibitions, rendering the censorship of Martin 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."[8]

I. Mandating "Respectful" Discourse Is Viewpoint Discrimination

While the Council may have found Martin's criticism harsh, offensive, or disrespectful, restricting it on that basis violates the First Amendment's bar against viewpoint discrimination. As the Supreme Court has made clear, "[g]iving offense is a viewpoint."[9] While the Council may encourage commenters to be respectful, a rule *mandating* "respectful" commentary is inherently viewpoint discriminatory, as it favors noncritical comments over critical ones.[10] Critical speech directed at the government, in particular, 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."[11]

To the extent the Council cut Martin's microphone because she cursed, this is not a permissible basis for censoring her. As the Supreme Court recognized in its landmark *Cohen v. California* decision, "words are often chosen as much for their emotive as their cognitive force."[12] In that case, the Court held the First Amendment protected the right to wear a jacket emblazoned with "Fuck the Draft" in a county courthouse, recognizing that the emotion behind words "may often be the more important element of the overall message" compared to the purely "cognitive content."[13] The Court also noted that if governments were allowed to "forbid particular words," they "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[14] If the government cannot ban profanity in a courthouse, it follows that it cannot ban profanity at a city council meeting opened for public comment. Martin used her comment time to express her opinion that the arrest of a local activist was premised on false grounds. When Martin asked, "What the hell is wrong with you?" and described Salt Lake City's actions as "bullshit," she expressed a level of discontent she felt could not be adequately expressed with more polite language. The First Amendment protects that choice.

II. The "Respectful" Discourse Requirement Is Unconstitutionally Vague

The Council's apparent ban on insufficiently "respectful" speech is also unconstitutionally vague. The decorum rules lack specificity regarding what speech is disrespectful. When does a comment

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

[9] *Matal v. Tam*, 582 U.S. 218, 243 (2017); *see also Iancu v. Brunetti*, (restriction on "immoral" and "scandalous" speech was viewpoint-based and unconstitutional); 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.").

[10] *See Iancu v. Brunetti*, 588 U.S. 388, 394 (2019).

[11] *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.").

[12] 403 U.S. 15, 26 (1971).

[13] *Id.* at 16, 26.

[14] *Id.* at 26.

directed at a government official cross the line from merely critical to "disrespectful"? 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."[15] No attendee at a Salt Lake City meeting can reasonably anticipate when their criticism will be within the bounds of "respect."[16] The Council rules chill protected speech.

It is all too easy to envision the Council enforcing a vague "respect" requirement to suppress criticism of city officials, as happened at the May 7 meeting, while giving the public free rein to praise the city and its leaders. That is exactly what happened in a lawsuit FIRE brought against Eastpointe, Michigan, whose mayor shut down critical comments repeatedly at city council meetings but had no issue with constituents praising her. The mayor's disregard of constitutional standards compelled the city to enter a consent decree that, among other concessions, prohibits it from enforcing a limitation on public comments "directed at" elected officials, requires it to allow members of the public to criticize elected officials, and has resulted in an apology to its citizens whose rights the mayor violated.[17]

III. Unqualified Bans on "Discriminatory" Language Are Viewpoint-Discriminatory and Vague

Lastly, the flat ban "discriminatory language referring to a person or group based on their religion, ethnicity, nationality, race, . . . gender, . . . or other identity factor" is both viewpoint-discriminatory and vague. 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.[18] The rule is also unconstitutionally vague because the undefined term "discriminatory language" fails to give speakers fair notice of what speech is and is not forbidden. Would criticism of Israelis for supporting the war in Gaza violate the rule? What about criticism of Palestinians for supporting Hamas? Would a statement that men and women have different physical abilities be "discriminatory" based on gender? Would criticism of a Christian government official for directing public schools to teach the Bible be "discriminatory" based on religion?[19] The answers to these questions are unclear, yet all of these statements would be protected speech.

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

[16] *See* Eugene Volokh, *School Policy Requiring Students to "Respect" "a Student's Gender Identity" Is Unconstitutionally Vague*, REASON (Oct. 10, 2023), https://reason.com/volokh/2023/10/10/school-policy-requiring-students-to-respect-a-students-gender-identity-is-unconstitutionally-vague/.

[17] *See VICTORY: Michigan town declares Sept. 6 'First Amendment Day' after FIRE sues its mayor for shouting down residents*, FIRE (Apr. 17, 2024), https://www.thefire.org/news/victory-michigan-town-declares-sept-6-first-amendment-day-after-fire-sues-its-mayor-shouting-0.

[18] *Matal*, 582 U.S. at 243 ("Giving offense is a viewpoint"); *see also Iancu v. Brunetti*, 588 U.S. at 394 (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").

[19] *See* Sarah Mervosh and Elizabeth Dias, *Oklahoma's State Superintendent Requires Public Schools to Teach the Bible*, N.Y. TIMES (June 27, 2024), https://www.nytimes.com/2024/06/27/us/oklahoma-public-schools-bible.html.

The Council can proscribe conduct that *actually* disrupts a meeting or that falls into a category of unprotected speech like true threats and intimidation, whether or not the speech refers to a protected identity characteristic, but it must adhere to those terms' precise legal meanings.[20] The Council cannot, for example, ban speech as "intimidating" simply because it is harsh, unpleasant, or uses profanity. Nor can it censor speech as "discriminatory" simply because it refers to a protected characteristic like race, religion, or nationality in a way that might cause offense. Similarly, "[j]eering, cheering, clapping, and waving signs" can only be banned to the extent that they are actually disruptive and not on the premise that they *may* be disruptive.

There is, significantly, no credible argument on which the Council may constitutionally defend Martin's silencing and ejection as necessary to combat "disruption" under the policy. She did not make any threats, speak on topics unrelated to the city, talk out of turn, exceed the time limit on public comments, or use any props, let alone in a disruptive manner. The Council may not lawfully stretch the meaning of "disruptive" to include what it perceives to be harsh or disrespectful criticism.[21]

For all these reasons, FIRE calls on the Salt Lake City Council to amend its public comment rules to eliminate their unconstitutional defects and affirm that it will refrain from infringing on speakers' First Amendment rights going forward. FIRE would be pleased to work with the Council free of charge to ensure its laws and regulations comply with the First Amendment.

We respectfully request a substantive response to this letter no later than August 28.

Sincerely,

Tyler Coward

Tyler Coward
Lead Counsel, Government Affairs

Cc: Erin Mendenhall, Mayor
Victoria Petro, District 1, Chair
Alejandro Puy, District 2, RDA Chair
Chris Wharton, District 3, Vice Chair
Eva Lopez Chavez, District 4
Darin Mano, District 5, RDA Vice Chair
Dan Dugan, District 6
Sarah Young, District 7

[20] The Supreme Court has held that 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). True threats include intimidation, defined as speech that "directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. True threats do not include speech which amounts to a joke or rhetorical hyperbole. *See*, e.g., *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

[21] *See Matal*, 582 U.S. at 243; *Church on the Rock*, 84 F.3d at 1279.