



March 3, 2021

To the Ann Arbor City Council:

We have reviewed the City of Ann Arbor’s “Rules of the Council” as approved February 1, 2021. In particular, we focused on Council’s new “Redress of Grievances” rule for First Amendment compliance and are writing to express our concerns.

The rule provides that a member may be sanctioned or censured for an entire range of protected speech, including statements made outside of council meetings. The rules state:

“Redress of Grievances”

If a Member's integrity, character, or motives are assailed, questioned, or impugned by another Member, either during a Council meeting or in another public venue, the Member can seek redress through the Administration committee using the process outlined [below]. [Emphasis added]

COUNCIL ETHICS RULE 12 – COUNCIL SELF-GOVERNANCE

City Council has determined that the internal regulation of the behavior of City Councilmembers through counseling or reprimand should be done according to the following procedure.

1. **Counseling** refers to the meeting by the Council Administration Committee with a Councilmember for the purpose of discussing a Councilmember’s action or actions that are considered a violation of a law, Council Ethics Rules, or Council Administrative Rules, but considered by the Council to be not sufficiently serious to require reprimand. Matters eligible for Counseling include: A first violation of the Council ethics or administrative rules.

2. **Reprimand**. A reprimand is a formal public statement by the Council that a Councilmember’s actions are in violation of law or Council Ethics Rules or Council Administrative Rules, but considered by the Council not sufficiently serious to require removal. It is not necessary that counseling precede a reprimand depending on the nature of the violation. A reprimand may be issued based upon the Council's review and consideration of a written allegation of one or more violations. Matters eligible for reprimand include the following: Repeated violations of the Council Ethics or Administrative rules within a term of office. Failure to attend counseling when determined by the Council that counseling was warranted. [Emphasis added]

It is unclear whether a council member may ultimately face removal for serious or repeated violations. Although the “Reprimand” section refers to actions “not sufficiently serious to require removal,” Council’s rules do not otherwise address removal of a member. Regardless, we are concerned that, insofar as council members may be sanctioned based on their speech, there is a potential First Amendment violation.

Legal Summary

The U.S. Supreme Court dealt with this issue when civil rights icon Julian Bond was prohibited from taking a seat in the Georgia State House because of his controversial political statements, especially opposing the Vietnam war. That, said the Supreme Court, violated the free speech provisions of the First Amendment. *Bond v. Floyd*, 385 U.S. 116 (1966).

Later, the Supreme Court again upheld the First Amendment right of a candidate, this time one running for judge in Minnesota. He had challenged the “announce clause” where judicial candidates were prohibited from stating their views on certain subjects while campaigning. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court held that a content-based restriction of speech by candidates for public office must be narrowly tailored under the strict scrutiny test, and must demonstrate that the restriction does not unnecessarily circumscribe protected expression. The Court added, “the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.” *Id.* at 774.

This principle was affirmed in the much more recent case of *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020), involving a community college board of trustees. The court found that “a reprimand against an elected [trustee] for speech addressing a matter of public concern is an actionable First Amendment claim.” *Id.* at 498.

Analysis

When bringing this type of First Amendment claim, a litigant must show: (1) engagement in constitutionally protected conduct; (2) an adverse action was taken that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) that the adverse action was motivated at least in part by the protected conduct. Courts then apply a strict scrutiny test, requiring the government to show that the law/rule at issue is necessary to achieve a compelling governmental interest, and that the law/rule is narrowly tailored to achieve that interest.

To threaten adverse action against a member for questioning the “integrity, character, or motives” of fellow members, especially outside of a Council meeting “in another public venue,” is troubling. This is especially true because speech that relates to policy disagreements, or is part of election campaign rhetoric, often questions (or can be perceived as questioning) a political adversary’s “integrity, character, or motives.” Not only does such speech have strong First Amendment protection, but the words proscribed have so many meanings and applications that the

Rule may also be vulnerable to being void for vagueness (which is another type of First Amendment test).¹

Under these rules, a member could face sanctions merely for questioning why another member voted the way they did on a certain issue. For example, the ongoing affordable housing debate has engendered a great deal of rhetoric. Some members may be criticized for not sufficiently caring about providing low income housing; others for being unduly pressured by certain interest groups. With either scenario, the speaker may be subject to sanctions.

Even without a formal complaint, the very threat of sanctions could deter council members from continuing to speak about issues of public concern, creating an unconstitutional chilling effect on speech. Thus, the rule is also vulnerable under the First Amendment's "overbreadth doctrine," which provides that a regulation of speech can sweep too broadly and prohibit protected as well as non-protected speech. All of these judicial tests reflect the principle that free expression needs "breathing space" to survive. *City of Houston v. Hill*, 482 U.S. 451, 467 (1987).

We are mindful that the intent of the rule is to promote civility, at a time when our political landscape seems more divided than ever. We strongly condemn hate speech or targeting of historically oppressed people and groups, and agree that it is critical to build bridges. Nonetheless, we must conclude that enforcement of the new rule, and the rule itself, run afoul of the First Amendment. We urge you to reconsider this new restriction on protected speech, just as you did recently when council rebuffed an effort to limit the free speech rights of speakers who use strong language during public commentary. The new rule is similarly problematic, for the reasons we have outlined above.

Sincerely,



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¹ "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963).