



March 27, 2025

**CONFIDENTIAL CORRESPONDENCE
ATTORNEY-CLIENT PRIVILEGE**

Mayor Fischer and City Council
City of Novi
45175 Ten Mile Road
Novi, MI 48375

RE: Letter from the Foundation for Individual Rights and Expression (“FIRE”) Alleging That Novi’s Council Rules Violate the First Amendment

Dear Mayor Fischer and Council Members:

The City Council received a letter dated February 6, 2025,¹ from FIRE alleging that the City Council’s Rules violate the First Amendment. The letter indicates that the prohibition of “inappropriate, profane, vulgar, or abusive language and personal attacks . . .” during audience comment is impermissible under the Constitution.

The Council Rules provision at issue currently states:

- C. Remarks shall be limited to those pertaining to matters before the Council, to City business or policy, or to issues of community concern or interest. While comment upon the action, inaction, or performance of the Council and the City of Novi commissions, boards, employees and consultants is allowed, inappropriate, profane, vulgar or abusive language and personal attacks will not be tolerated.

First Amendment Requirements for Speech before a Public Body

A Council meeting is considered a “limited public forum” under the First Amendment, meaning that it is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”² In a limited public forum, the government may “regulate features of speech *unrelated to its content*” through “time, place, or manner” restrictions.³ A restriction on the number of minutes a person can speak is an example of a permissible time restriction.

¹ It actually was only received a couple weeks ago, despite the date.

² *Pleasant Grove City v. Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

³ *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

A government may only impose *content-based* restrictions for certain groups if they “are reasonable in light of the purpose served by the forum and are viewpoint neutral.”⁴ Content-based restrictions are subject to intense scrutiny, and should be rare.

However, the government may not engage at all in a more troubling kind of content discrimination called *viewpoint* discrimination.⁵ When the government engages in content discrimination, it is restricting speech on a given subject matter. When it engages in viewpoint discrimination, it is singling out a particular opinion or perspective on that subject matter for treatment unlike that given to other viewpoints.

For example, if a government banned all speech on the War in Ukraine, it would be a content-based regulation. If the government banned only speech that criticized the war, it would be a viewpoint-based regulation. Because the government is essentially taking sides in a debate when it engages in viewpoint discrimination, the Supreme Court has held viewpoint-based restrictions to be especially offensive. The government may not prohibit the expression of an idea simply because it finds the idea to be offensive or disagreeable.⁶

***Ison* Opinion of the U. S. District Court for the 6th Circuit**

In *Ison v Madison Local School District Board of Education*⁷—the case the FIRE letter cites to—individuals challenged a school board policy that allowed the presiding officer to interrupt or terminate a participant’s statement when it was “abusive, antagonistic or obscene.” An individual speaking vociferously about gun violence made accusatory statements about the school board, causing the chairperson of the board to interrupt the speaker and ask to have the speaker escorted out of the room after he finished speaking.

The United States Court of Appeals for the Sixth Circuit, which includes Michigan, Ohio, Kentucky and Tennessee, held that restrictions on “abusive, personally directed, and antagonistic speech, facially and as-applied, *violate the First Amendment*.” The Court found these restrictions to be impermissible viewpoint discrimination. The Court indicated the policy prohibited speech purely because it disparages or offends.⁸ The Court came to this conclusion in large part based on a U.S. Supreme Court case, *Matal v Tam*,⁹ which held that the Lanham Act’s restriction on registering “immoral and scandalous” trademarks was an impermissible censorship of speech merely because it was offensive to some. In that case, the U.S. Patent & Trademark Office had refused to register the trademark “The Slants” for an Asian American band. The Court indicated the refusal to register was viewpoint discrimination and was an impermissible restriction on commercial speech.

⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

⁵ *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 978 F.3d 481, 491 (6th Cir. 2020) (quoting *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510); see also *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019).

⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Coates v. Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

⁷ *Ison v Madison Local School District Board of Education* 3 F 4th 887 (2021).

⁸ *Id.* at 894.

⁹ *Matal v Tam*, 582 US 218 (2017).

Importantly, however, the Court in *Ison* also found that the policy allowing the presiding officer to request an individual to leave the meeting “when that person does not observe reasonable decorum” did *not* violate the constitution. The policy in *Ison* also allowed the presiding officer to request law enforcement to remove a *disorderly* person when that person’s conduct interfered with the orderly progress of the meeting.¹⁰

FIRE is primarily relying on the decision in *Ison* for its position that the words questioned in your Rules should be removed. FIRE sued the City of Eastpointe when its mayor prohibited individuals from criticizing her during public comment. The City of Novi policy does not prohibit criticism of the Council, and to my knowledge this rule cited here about comment generally has never actually been invoked before.

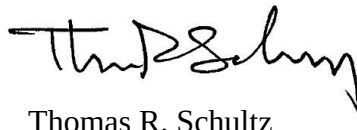
Recommendation

Rulings of the Sixth Circuit Court of Appeals are binding on Novi and other communities in Michigan. Although there are no instances that FIRE can point to where the City Council excluded a speaker for violation of the rule being challenged, addressing the challenge to the policy makes sense here. We have made some possible changes in the attached. They are in part intended to take advantage of the “disruption” and “decorum” language of *Ison*—focusing on the effect of speech on the meeting as opposed to the words. (Some other minor edits on other topics have also been added.) Our suggestion is for the Rules Committee to meet and discuss these changes and make a recommendation to the full Council for action.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC



Thomas R. Schultz

TRS/jah

cc: Victor Cardenas, City Manager
Cortney Hanson, City Clerk

¹⁰ For what it’s worth, a U.S. District Court in Florida concluded that the Court in *Ison* incorrectly interpreted *Matal* (the trademark registration case) and held the opposite of *Ison*. The Court, relying on precedent from the U.S. Court of Appeals for the Eleventh Circuit, concluded that “prohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption, preserve “reasonable decorum” and facilitate an orderly meeting and is permissible. *Moms for Liberty-Brevard County, FL v Brevard Public Schools*, 582 F Supp 32 1214, footnote 8 (2022).

8. COMMENT RULES

- A. All members of the Audience addressing the meeting (hereinafter speaker) shall direct their remarks to the Mayor.
- B. No speaker shall address the meeting unless recognized by the Mayor for that purpose. No person shall interrupt Council members or staff while they are speaking during a meeting or otherwise disrupt a Council meeting.
- C. Remarks ~~shall be limited to those~~^{should} pertaining to matters before the Council, to City business or policy, or to issues of community concern or interest. While comment upon the action, inaction, or performance of the Council and the City of Novi commissions, boards, employees and consultants is allowed, speakers are requested to refrain from inappropriate, profane, vulgar or abusive language and personal attacks ~~will not be tolerated.~~ Additionally, City Council prohibits the use of any obscene, defamatory, or similarly disruptive language that substantially interrupts, delays, or disturbs the peace and good order of the proceedings of the City Council meeting or constitutes an imminent threat to the person or property of an individual or individuals.
- D. No speaker shall continue to address the meeting after being advised by the Mayor that the speaker's time for addressing the meeting has expired.
- E. Speakers shall use their time only for voice comment. There shall be no audible comment by the members of the audience other than the speaker, and there shall be no audible indication of approval or disapproval of any remarks of the speaker or member(s) of the public body (i.e., no clapping or hooting or similar activity). The purpose of this rule is to make sure that each speaker can address City Council without interference or intimidation.
- F. Each speaker may address the meeting for 3 minutes. The Mayor has the authority to grant additional time, if requested by a speaker, for good cause.
- G. Speakers wishing to display visual materials through the City's audiovisual system must provide the materials to City staff for screening no later than 12:00 P.M. the day of the meeting. The materials submitted will be reviewed by the City Clerk (or designee) to ensure that (1) the materials are in a format capable of broadcast or presentation over the City's audiovisual system; (2) the materials relate to a permitted purpose under Paragraph C above; and (3) the material is legally appropriate for broadcast over the audiovisual system and/or cable system. Visual materials include any visual or textual items that are to be displayed through the audiovisual system irrespective of their specific format or media. This includes, without limitation, photographs, audio and video presentations, charts, computer presentations, computer screen images, posters and fliers, whether in physical or electronic format. Once the materials have been submitted for review, they cannot be changed before the meeting. Notwithstanding the foregoing, the Mayor may allow a speaker to utilize the City's audiovisual system to display a limited number (no more than three) of non-electronic, physical documents (e.g., photographs of potholes), provided that the documents are presented to the Clerk for review under Paragraph G above, before the documents are displayed.
- H. Speakers using visual materials are subject to the same time limitation set forth in Paragraph F above.
- I. Taped or recorded audio presentations not presented through the City's audiovisual system (i.e., with sound only, not displaying visual materials) shall also

be submitted for review as described in Paragraph G above. The use of microphones, speakers, megaphones, amplification systems, or sound or noise distraction devices, except those provided by the City, is prohibited.

- J. Council Members or the Mayor shall not respond to general Audience Comment. The Mayor or Council members can bring up a point of order in regard to false information and direct it to the parliamentarian for a response. The Mayor may direct the administration to respond to the speaker, if appropriate, during or outside of the meeting. The Mayor may also respond with an indication of the appropriate action to be taken.
- K. Committee Reports will not be accepted during Audience Comment. An Applicant or Representative may present proposals for a period of time at the discretion of the Mayor.



February 6, 2025

Novi City Council
45175 Ten Mile Road
Novi, Michigan 48375

Sent via U.S. Mail

Dear Novi City Council:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech, writes today to urge the Novi City Council to review and revise its public comment policies that infringe the rights of its residents. Both a 2021 federal appellate court ruling and the recent settlement of FIRE's First Amendment lawsuit against the City of Eastpointe, Michigan, underscore the need for the Novi City Council to make the necessary policy revisions.

The First Amendment protects speech by members of the public at government meetings.¹ The public comment period is, at a minimum, a limited public forum, which means the government may restrict the content of commenters' speech only when those restrictions are viewpoint-neutral *and* reasonable in light of the forum's purpose.² While municipal bodies can prohibit genuinely disruptive conduct—such as speaking out of turn or making true threats³—they cannot stretch the meaning of disruption to encompass constitutionally protected speech.

The U.S. Court of Appeals for the Sixth Circuit—whose decisions bind the Novi City Council—made this clear in 2021 when its decision in *Ison v. Madison Local School District Board of Education* invalidated bans on “antagonistic,” “abusive,” and “personally directed” public comments at local government meetings.⁴ As the Sixth Circuit explained,

¹ *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp. Rels. Comm'n*, 429 U.S. 167, 174–76 (1976).

² *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

³ 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).

⁴ 3 F.4th 887, 895 (6th Cir. 2021).

such restrictions impose “impermissible viewpoint discrimination” by prohibiting nondisruptive speech “purely because it disparages or offends.”⁵

FIRE put those principles into practice when it filed suit on behalf of four Eastpointe, Michigan residents against the city and its mayor, Monique Owens, after she repeatedly prohibited them from criticizing her during the public comment period of City Council meetings. The November 2022 suit challenged not only the constitutionality of Mayor Owens’ actions but also Eastpointe’s policy barring public comments “directed” at an individual council member.

In April 2024, Eastpointe reached a settlement with the residents that required the City Council to refrain from enforcing its unconstitutional ban on public comments directed at council members; to allow members of the public to criticize Eastpointe officials; to pay damages and attorneys’ fees totaling \$83,000; and to apologize to its censored residents.⁶ Eastpointe citizens are now free to express even severe criticism of public officials at City Council meetings without facing unlawful censorship.

As the Novi City Council maintains similarly unconstitutional public comment policies, FIRE strongly urges the Council to reform these policies and avoid costly and time-consuming litigation.

In particular, the Council prohibits “inappropriate, profane, vulgar or abusive language and personal attacks” during the audience comment portion of its meetings.⁷ Fortunately, the Council can easily take the necessary steps to remedy this policy’s legal shortcomings and safeguard its residents’ First Amendment rights. FIRE would welcome the opportunity to work with the Council toward full First Amendment compliance, as we have successfully done with local governments in Michigan and across the country.⁸

Thank you for your attention to this matter. We look forward to hearing from you.

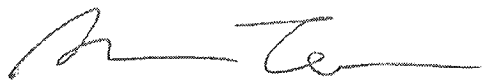
Sincerely,

⁵ *Id.* at 894; see also *Matal v. Tam*, 582 U.S. 218, 243 (2017) (“Giving offense is a viewpoint.”); *Rosenberger*, 515 U.S. at 829 (viewpoint discrimination is an “egregious” form of censorship, and the “government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction”).

⁶ 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>.

⁷ *City Council Audience Comment Rules*, CITY OF NOVI, MICH., <https://cityofnovi.org/government/city-council>.

⁸ See, e.g., Carrie Robison, *VICTORY: Michigan city recognizes First Amendment right to ‘demean’ government officials*, FIRE (Jan. 17, 2024), <https://www.thefire.org/news/victory-michigan-city-recognizes-first-amendment-right-demean-government-officials>.

A handwritten signature in black ink, appearing to read 'A. Terr', with a long horizontal line extending to the right.

Aaron Terr
Director of Public Advocacy
aaron.terr@thefire.org