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Via Email

Members of the Taunton City Council  
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City Solicitor Matthew J. Costa  
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Taunton, MA 02780  
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Re: Public comment periods at City Council meetings

Dear Councilors and Solicitor Costa:

We are writing on behalf of the American Civil Liberties Union of Massachusetts (“ACLUM”) to provide some feedback on the City Council’s policies and practices around public comment at its meetings, which we understand are under review. Residents of Taunton have contacted us about these matters. We supply this feedback with the hope that better policies will be adopted that do not improperly censor or chill public input – including criticism of public officials – in violation of basic constitutional free speech principles.

### **Summary of issues**

Based on having reviewed the videos and minutes of various City Council meetings, our understanding is that some councilors have concerns about being criticized during public comment. This is not a legitimate basis for curtailing public comment, as negative feedback delivered to and about public officials and employees – who work for the public, not the other way around – is within the core of constitutional free speech protections.

It also seems that there have been discussions about eliminating public comment altogether, based on an assumption that the Council has unfettered power to do so.

But given the protections in Article 19 of the Massachusetts Declaration of Rights,<sup>1</sup> the provisions of the state open meeting law requiring that such meetings be open to the public, G. L. c. 30A, § 20, and the long history of public participation at such meetings in Massachusetts, such a notion may be flawed. Particularly where elimination of public comment is motivated by the desire to avoid listening to certain viewpoints, the move would raise serious issues of retaliation for protected expression. *See, e.g., Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (closure of a forum cannot be “a ruse for impermissible viewpoint discrimination”); *see also Student Gov’t Ass’n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 480 (1st Cir. 1989) (“Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it”). We are therefore pleased to see that the Council reinstated public comment opportunities as of October 18.<sup>2</sup>

While the resumption of public comment is a positive step, we continue to have serious concerns about the terms and conditions of the policies implemented on October 18. We ask that application of the problematic provisions be suspended immediately and eliminated from any final policy being developed.

First, the policy continues to require that comments be “respectful and courteous” and “not be personal in nature.” These are content-based and indeed viewpoint-based and standardless restrictions on protected expression that cannot survive constitutional scrutiny. They can be and have been used to suppress criticism of public officials, which is among the highest form of protected speech in our representative democracy. Even virulent criticism “directed at an elected political official and primarily discussing issues of public concern” constitutes core, protected speech. *Commonwealth v. Bigelow*, 475 Mass. 554, 561-63 (2016); *see also Van Liew v. Stansfield*, 474 Mass. 31, 38-39 (2016); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that

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<sup>1</sup>“The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”

<sup>2</sup> Our understanding is that the policy currently being applied is reflected in the Agenda for the October 18, 2022 meeting available here: <https://www.taunton-ma.gov/AgendaCenter/ViewFile/Agenda/10182022-468>. We also understand that the advance “registration” requirement for addressing issues that will not be on the agenda for the next meeting is here: <https://www.taunton-ma.gov/649/Public-Input-Registration>.

Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes”). Of course, the Council can lawfully prohibit comments that rise to the level of being wholly unprotected speech, such as true threats of physical violence or incitement to imminent lawless conduct. And it can require that comments be relevant to a matter within the Council’s jurisdiction and adhere to a uniformly enforced time limit. But the current policy goes way beyond those boundaries.

Second, the requirement that individuals wishing to address matters within the Council’s jurisdiction, but that will not be on the agenda for a particular meeting, must register “by 10 a.m. on the date that notice of the meeting is required to be posted under Massachusetts law preceding any meeting of the Municipal Council” is not reasonable as currently fashioned. It therefore does not constitute a reasonable time, place or manner restriction.

For one thing, members of the public cannot know until they see the agenda whether the issue they seek to address will be covered by it; yet this policy seemingly demands they submit their “registration” before the agenda is available. For another, the wording is so confusing that members of the public may well be unable to discern the intended deadline. Although we have noticed that the City website seems to state the deadline for each meeting in text boxes further down the page, not everyone will be able to readily access that information.

Most fundamentally, the registration policy is not reasonable because it precludes people from providing public input on important matters (1) that may come to their attention in the days between the registration deadline and the meeting or (2) when they were simply unable to sign up days in advance. And it restricts these individuals’ access for no good reason. If the Council wants early input from the public about what should be on the agenda for their next meeting, or to get a sense of how much time should be dedicated to public comment at the next meeting, such feedback can obviously be sought without turning the process into a *restriction* on public comment at the meeting. Of course, to the extent advance registration is being required so that the Council can ensure that there will *not* be enough time for anticipated comments on certain subjects or to allow it to otherwise construct the agenda to prevent opportunities for certain comments to be delivered, *that* would be unlawful content- and viewpoint-based discrimination.

## **Conclusion**

As you may be aware, the Massachusetts Supreme Judicial Court will soon be deciding the case of *Barron v. Southborough Board of Selectmen* concerning the

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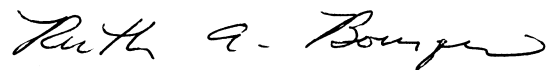
constitutionality of provisions similar to those in the Taunton policy. Oral argument was held on November 2, 2022. A link to the SJC case page, which includes links to the briefs that have been filed in response to the Court's solicitation for amicus briefs, including the amicus brief of ACLUM, is here <https://www.ma-appellatecourts.org/docket/SJC-13284>.

A review of our brief will provide greater detail about the well-established legal principles we think are at issue here and give you a sense of the seriousness with which ACLUM takes the free expression interests that are stake. Of course, protection of free expression rights in Taunton (and throughout the Commonwealth) cannot and must not wait for the SJC's decision in this case, so we urge you to take steps promptly to address the concerns outlined above.

If you would like to have a conversation about these issues, please do not hesitate to reach out through the email or phone number listed on the first page of this letterhead.

Thank you in advance for your consideration of these comments.

Sincerely,



Ruth A. Bourquin  
Alexandra Arnold, Legal Fellow