MEMORANDUM

To: **Mayor and Council**

From: **Stephen K. Postema, City Attorney**
Jennifer A. Richards, Assistant City Attorney

Date: **March 18, 2021**

Subject: **Public Memo Concerning Limitations on Council Member Speech under the First Amendment**

Introduction

The Council requested by resolution this public memo concerning councilmember speech under the Michigan Open Meetings Act "OMA" and the First Amendment. Elected officials, including city councilmembers, are generally entitled to broad First Amendment speech rights. Indeed, a majority of courts have concluded that elected officials are not subject to certain limitations on free speech that the United States Supreme Court has deemed constitutional to impose on other public employees. But this does not mean elected officials are entitled to engage in completely unrestricted speech. Not only are elected officials still bound by other laws, including anti-discrimination laws, elected officials are also expected to endure more action taken in response to their exercise of free speech rights than ordinary citizens. This is because opposition based on the content of an elected official's public statements is "the very essence of politics."

Thus, the speech of elected officials may be subject to some restriction. Elected officials may be subject to reasonable time, place, and manner restrictions during a city council meeting, much like the general public during public comment. It is less clear, however, whether Council may enact rules prohibiting certain speech of elected officials outside of a public meeting, including on social media. That question is unsettled and the current case law suggests that established rules prohibiting certain speech outside of a public meeting may be constitutionally impermissible.

At the same time, because elected officials are expected to endure more action taken in response to their speech, it is likely elected officials may constitutionally be subject to not only political consequences but also legislative action, including censure or reprimand or even removal from an appointed position in response to their protected speech, so long as the action taken does not prevent that elected official from engaging in their ***elected*** duties. In fact, such legislative action by legislative bodies has been held to be a statement of the body and thus protected speech itself.

This memo outlines the First Amendment free speech rights of elected officials and actions a legislative body may take to regulate or express opposition to the speech of its members both during public meetings and outside of public meetings.[1]

Summary Analysis.

As an initial matter, and in contrast to the rules addressing public comment, the Open Meetings Act ("OMA") does not apply to the regulation of speech of councilmembers during public meetings or to speech outside of public meetings. The OMA does not provide for a right of councilmembers to speak at public meetings. Instead, this right is provided for and defined by the First Amendment. Council has a right to regulate itself as permitted both by the City Charter[2] and the Home Rule City Act[3] and in accordance with the First Amendment.

Elected officials are generally entitled to broad First Amendment protection with some limitation. The United States Supreme Court has upheld certain employer limitations on the speech of public employees when they speak pursuant to their official duties. Such limitations are intended to serve the public employer's interest in controlling the speech of their employees made in their professional capacity. But these limitations and the underlying rationale likely do not apply to elected officials. While the question of whether these limitations apply to elected officials is unsettled, a majority of federal courts have concluded that such limitations do not apply to elected officials. Thus, the speech of elected officials should be generally treated as First Amendment protected speech, much like the public's speech during public comment. However, it is also important to note that elected officials, as agents of the City, are still bound by other legal duties including ethical obligations and anti-discrimination laws such as Michigan's Elliot-Larsen Civil Rights Act that may impact their speech rights. (See below pp. 4-7).

Council may regulate the time, place and manner of councilmember speech during public meetings but it cannot discriminate based on viewpoint. Just like the public's speech during public comment, Council may regulate councilmember speech during the meeting to serve the interest of conducting orderly and efficient meetings. Consistent with the type of forum—a designated or limited public forum—council may impose reasonable restrictions on the content of speech but it cannot engage in viewpoint discrimination. Indeed, such restrictions must be viewpoint neutral, narrowly tailed to serve a significant

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[1] This memo is based on current law as of the date of this memo. Because there are many cases in this area of the law, not all cases covering a general topic are contained in the memo. Further, the law relating to the First Amendment is constantly changing. Subsequent changes to the law in these areas may be made by the courts after the date of this memo that may require additional review of any adopted rules in the future.

[2] City Charter, Section 4.1(b); City Charter, Section 4.4(e) and (h).

[3] MCL 114.4j(3)("Each city may in its charter provide . . . [f]or the exercise of all municipal powers in the management and control of municipal property and in the administration of municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinance relating to its municipal concerns subject to the constitution and general laws of this state)."

government interest, and leave open ample alternative channels of communication. On this basis, the same types of restrictions that may be imposed on public comment may also be imposed on councilmembers where appropriate, i.e., designated comment periods, time limits on speakers, prohibiting repetitiveness and requiring relevancy, requiring speakers to address the presiding officer, prohibiting profanity or derogatory terms if likely to incite violence or disorder or as part of a threat, and carefully drafted "personal attack" rules that avoid viewpoint discrimination. (See below pp. 7-11).

The law is unsettled as to whether an elected official's speech outside of meetings, including speech on social media, is subject to prohibition. Given this uncertainty, the safest course is to avoid enacting rules prohibiting certain councilmember speech outside of public meetings. It is not clear whether rules prohibiting certain councilmember speech outside of public meetings, including on social media, would be constitutional. There are few cases which address enacted prohibitions on speech of elected officials outside of public meetings. At the same time, courts have recognized that social media is entitled to the same First Amendment protection as other media. But courts have not reached a consensus on the more specific question of whether elected official speech and/or activity on social media is protected by the First Amendment or subject to certain prohibitions. The uncertainty in this area of the law and the potential that such rules could arguably amount to a "prior restraint" on speech suggest Council should generally not enact rules prohibiting certain councilmember speech outside of a public meeting, including on social media. (See below pp. 11-13)

On a related issue, courts have addressed First Amendment challenges by members of the public who have been blocked by elected officials from viewing the elected official's social media page after criticizing that official. Many courts have found that blocking a constituent on a public social media page is a First Amendment violation of the public's rights. Indeed, some courts have found that elected official social media pages are public forums subject to the First Amendment and some regulation where others have found that elected officials social media pages were private. (See below pp. 13-16).

The First Amendment does not, however, prohibit Council from making its own statement or taking certain legislative action in response to the speech of one of its members including counseling or reprimand as set forth in the Council Ethics Rules. Public officials are expected to tolerate more significant action taken in response to their speech than the average citizen. This is because criticism of public officials is a fundamental protection of the First Amendment. On this basis, elected officials have limited recourse under the First Amendment to claim First Amendment "retaliation" by peers for their speech or legislative action. As long as such actions do not interfere with the elected official's ability to do their elected duties, legislative actions are permissible. As such, a majority of federal courts have held that censure and reprimand in response to speech are permissible. In fact, many courts have held that such actions themselves, as statements of the body, would be protected speech. Moreover, such legislative actions would be protected by absolute legislative immunity. (See pp. 17 – 26)

The First Amendment generally prohibits Council from removing a councilmember in response to their speech. A legislative body may not remove a councilmember or prevent a councilmember from carrying out their elected duties in response to their speech. This does not include, however, removal from an appointed position. Some courts have concluded that removal from an appointed position, such as a committee assignment, is not an elected duty, and thus is a permitted action in response to conduct or speech. Nevertheless, if the removal is carried out legislatively, it could be found by a court to be an action entitled to absolute legislative immunity. (See pp. 24 -26)

Detailed Analysis

I. Generally, Elected Officials Are Entitled to Broad First Amendment Protection With Some Limitation.

Under existing First Amendment case law, public employees enjoy less First Amendment protection than private citizens in certain circumstances. Indeed, in *Garcetti v. Ceballos*, the United States Supreme Court drew a distinction between the speech rights of public employees and those of ordinary citizens who speak for themselves.[4] For public employees, restrictions on speech are permissible because "when a citizen enters government service, the citizen must accept certain limitations on his or her freedom."[5] But "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[6] Thus, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[7]

Such restrictions are valid because "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity."[8] Restrictions on public employee speech is necessary because "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[9] Thus, greater restrictions on public employee speech are permissible because restrictions "[s]imply reflect[ ] the exercise of employer control over what the employer itself has commissioned or created."[10]

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[4] 547 U.S. 410, 417 (2005). This memo will discuss many federal cases and it is important not note the different courts: The United States Supreme Court, the United States Courts of Appeals which are divided into thirteen circuits, and the United States district courts that are the initial trial courts. (The Sixth Circuit Court of Appeals controls the state of Michigan, but cases from other Circuits are instructive even though not necessarily binding on the federal courts in Michigan.)
[5] *Id.* at 418.
[6] *Id.* at 417.
[7] *Id.* at 419.
[8] *Id.* at 422.
[9] *Id.* at 422-23.
[10] *Id.* at 422.

Therefore, speech by a public employee is protected under the First Amendment only if the speech was made "as a citizen," while addressing "a matter of public concern."[11] A public employee's speech is made "as a citizen" and is protected only when the speech is not made "pursuant to [their] duties."[12] "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[13]

Importantly, this framework does not appear to apply equally to elected officials. The question of whether this framework applies to elected officials is currently unsettled.[14] Neither the United States Supreme Court nor the Sixth Circuit Court of Appeals (the appellate court governing the state of Michigan) has specifically addressed whether the First Amendment protects an elected official's speech made in the course of their official duties. Various other federal courts have addressed this question with conflicting results (as often happens with respect to constitutional issues until the Supreme Court rules on an issue), although a clear majority has found that the *Garcetti* public official speech limitation does not extend to elected officials.[15]

For example, the Third Circuit Court of Appeals in *Werkheiser v. Pocono Tp.* set forth an extensive discussion of the federal court split on this issue but ultimately concluded that *Garcetti* and its underlying rationale does not apply to elected officials. The Court noted that "the underlying rationale in *Garcetti* appears, to some extent, inapplicable to elected officials" and "[m]any of the reasons for restrictions on employee speech appear to apply with much less force in the context of elected officials."[16]

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[11] *Savage v. Gee*, 665 F.3d 732, 738-39 (6th Cir. 2012) (quoting *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)).
[12] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)
[13] *Alomari v. Ohio Dept. of Pub. Safety*, 626 F. App'x 558, 567 (6th Cir. 2015).
[14] As one federal district court recently noted, this issue is still unsettled. *Greenman v. City of Hackensack*, 2020 WL 5499331 at *8 n. 5 (D.N.J. Sept. 12, 2020).
[15] See *Werkheiser v. Pocono Tp.*, 780 F.3d 172, 179 (3d Cir. 2015)(noting that "the underlying rationale in Garcetti appears, to some extent, inapplicable to elected officials . . . ." and discussing circuit and district court disagreement); see also *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009); *Greenman v. City of Hackensack*, 2020 WL 5499331 (D.N.J. Sept. 12, 2020); *Zerla v. Stark County*, 2019 WL 3400622 (C.D. Ill. 2019); *Nordstrom v. Town of Stettin*, 2017 WL 2116718 at *3, n. 2 (W.D. Wis. May 15, 2017); Hoffman v. DeWitt County, 176 F. Supp.3d 795, 812 (C.D. Ill. 2016); *Butler v. Bridgehampton Fire District*, 2017 WL 9485711 (E.D.N.Y. Aug. 14, 2017); *Melville v. Town of Adams*, 9 F.Supp.3d 77, 102 (D. Mass. 2014); *Alsworth v. Seybert*, 323 P.3d 47, 57-58 (Alaska 2014)("Limiting elected officials' speech protections runs counter to the jurisprudence of the U.S. Supreme Court . . . ."); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *Holloway v. Clackamas River Water*, 2014 WL 6998084 (D. Oregon 2014); *Conservation Comm'n of the Town of Westport v. Beaulieu*, 2008 WL 4372761 at *4 (D. Mass. Sept. 18, 2008); *Siefert v. Alexander*, 680 F.3 974, 984-85 (7th Cir. 2010)(acknowledging that elected legislative officials are subject to a different First Amendment analysis than public employees).
[16] *Werkheiser*, 780 F.3d at 178-179.

The Court's conclusion was grounded in four reasons, and it is helpful to understand this judicial analytical framework. First, the Court noted that the speech of elected officials is not "controlled" or "created" like the speech of a public employee.[17] Second, the Court noted that "because elected officials to a political body represent different constituencies, there would seem to be far less concern that they speak with one voice. In fact, debate and diversity of opinion among elected officials are often touted as positives in the public sphere."[18] Third, the Court noted that "the notion that speech pursuant to a public official's 'official duties' is afforded no protection under the First Amendment could have odd results if applied to elected officials."[19] Fourth, the Court noted that "Supreme Court precedent prior to *Garcetti* suggests that [elected official] speech may be entitled to some degree of protection," noting the holding in *Bond v. Floyd* which was not addressed or revisited in *Garcetti*, and thus is still good law.[20]

Indeed, in *Bond*, the United States Supreme Court recognized that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[21] In recognizing this principle, the Supreme Court held that an elected official's First Amendment rights were violated when the Georgia House of Representatives refused to seat him because of statements he had made criticizing the Vietnam War.[22] The Court noted that it was part of a legislator's official duties "to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in government debates by the person they have elected to represent them."[23]

At the same time, a minority of federal district courts have concluded that the *Garcetti* public official framework applies to elected officials.[24] Significantly, no federal circuit court of appeals has explicitly held this. It should also be noted that three of the district courts that have reached this conclusion fall under the Sixth Circuit Court of

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[17] *Id.*
[18] *Id.* (citing *Bond*, 385 U.S. at 136-37).
[19] Id. (citing *Zimmerlink v. Zapotosky*, No. 10-237 (W.D. Pa. Apr. 11, 2011)) ("if *Garcetti* applied to elected officials, speaking on political issues would appear to be part of an elected official's 'official duties,' and therefore unprotected. But protection of such speech is the 'manifest function' of the First Amendment").
[20] *Id.* at 178-79.
[21] *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966).
[22] *Id.* at 135-36.
[23] *Id.* at 136-37.
[24] *Shields v. Charter Township of Comstock*, 617 F. Supp.2d 606, 615-16 (W.D. Mich. 2009)(holding that *Garcetti* applies to speech of Plaintiff town board member and that "[b]oard must be able to take into account the content of Plaintiff's speech when deciding whether to discipline him, or more routinely, whether to move onto another agenda item or adjourn the meeting entirely; *Hartman v. Register*, No. 06-cv-33, 2007 WL 915`93 (S.D. Ohio Mar. 26, 2007); *Aquilina v. Wrigglesworth*, 289 F.Supp.3d 1110, 1115 (W.D. Mich. 2018)(applied Garcetti to state court judge finding that even though she is an elected official "[t]he same basic analysis applies . . . ."); *Parks v. City of Horseshoe Bend*, 480 F.3d 837, 840 n. 4 (8th Cir. 2007)(questioning whether elected officials' speech is entitled to any protection).

Appeals--two in the Western District of Michigan and one in the Southern District of Ohio. But such decisions are not binding on other district courts. Moreover, these decisions are not well reasoned and simply conclude, without explanation, that *Garcetti* applies equally to elected officials.[25]

Given the uncertainty surrounding this unanswered question, elected official speech for councilmembers should be treated generally as if it is not subject to the *Garcetti* analysis. It is likely that a court would not apply this specific *Garcetti* analysis to the speech of an elected official. This does not mean, however, that the conduct or speech of elected officials cannot ever be regulated or subject to legislative action. Indeed, notwithstanding the *Garcetti* case law and as set forth in more detail below, Council may still regulate the conduct of its members and certain categories of unprotected speech such as threats, defamatory statements, and "obscenity" particularly during public meetings.

It is also important to note that elected officials, as agents of the City, are still bound by other legal duties including, for example, ethical obligations and anti-discrimination laws such as Michigan's Elliot-Larsen Civil Rights Act. Councilmembers may subject the City or themselves to liability through their actions, including speech, i.e. through discrimination and harassment or by creating a hostile work environment. Thus, such legal obligations may further impact councilmember speech rights.

II. A Legislative Body May Regulate the Time, Place, and Manner of Councilmember Speech During Public Meetings But Cannot Discriminate Based on Viewpoint.

A. The Law Concerning Councilmember Speech During Public Meetings.

Because councilmember speech should be treated generally as protected speech not subject to *Garcetti*, the same First Amendment limitations for public comment may apply to councilmembers during public meetings. See public memo on public commentary dated March 15, 2021 for a broader discussion of this issue. Councilmember speech during public meetings may be subject to reasonable time, place and manner restrictions that do not amount to viewpoint discrimination. The legal principles leading to this conclusion follow below.

The First Amendment "'reflects a profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open."[26] Indeed, "[t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[27] Moreover, "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association."[28]

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[25] *Id.*
[26] *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).
[27] *Connick v. Myers*, 461 U.S. 138, 145 (1983).
[28] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014).

But the freedom of speech is not absolute.[29] The Supreme Court has established that the First Amendment does not guarantee persons the right to communicate their views "at all times and places or in any manner that may be desired."[30] Nor does the constitution "grant to members of the public generally a right to be heard by public bodies making decisions of policy."[31] Accordingly, the Supreme Court has set forth a framework for analyzing the constitutionality of government regulation of speech which depends on the location or "forum" of the speech.

The United States Supreme Court set forth a three-part test for evaluating a claim of unconstitutional restriction on speech. The Court looks to:

(1) whether the individual's speech is protected by the First Amendment;

(2) the nature of the forum; and

(3) whether the justifications for regulating speech satisfy the requisite standards.[32]

Accordingly, the level of First Amendment protection afforded to speech and the applicable analysis for any restrictions on such speech depends on the classification of the particular forum or location of speech.[33] The recognized locations or "fora" for speech include:

(1) "quintessential public forums," such as streets and parks, which have the most strict limitations on government regulation,

(2) forums "opened for use by the public as a place for expressive activity," and

(3) property "not by tradition or designation a forum for public communication," which the government "may reserve for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because of the public speaker's view.[34]

This analysis applies to determine what restrictions on speech, if any, are permissible.

City council meetings are classified as "designated" or "limited" public fora. The United States Supreme Court has held that "[a] city council meeting is not 'a traditional

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[29] *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).
[30] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).
[31] *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984).
[32] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).
[33] See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983).
[34] *Id.* at 44-46.

public for[um] like parks and streets,' the sort of setting in which 'the government's regulatory powers are at their weakest.'"[35] This is because city council meetings "cannot accommodate the sort of uninhibited, unstructured speech that characterizes a public park."[36] Instead, a city council meeting is a "'designated' and 'limited' public forum: 'designated' because the government has 'intentionally open[ed]' it 'for public discourse,' and 'limited' because 'the state is not required to . . . allow persons to engage in every type of speech in the forum.'"[37]

In such a limited public forum, the government may impose reasonable restrictions on the content of speech, but it cannot engage in viewpoint discrimination.[38] Viewpoint discrimination occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[39] Indeed, it is well settled that "reasonable and viewpoint neutral" regulation of speech at city council meetings is not affront to the public's First Amendment rights.[40] Thus, a city may apply restrictions to the time, place, and manner of speech so long as those restrictions are viewpoint neutral, narrowly tailored to service a significant government interest, and leave open ample alternative channels of communications.[41] Indeed, the speech of a councilmember, like the public is subject to "reasonable time, place and manner regulations."[42]

A regulation is viewpoint neutral if it is "justified without reference to the content of the regulated speech."[43] Moreover, "[i]n this context, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation and does not burden substantially more speech that is necessary to further the government's legitimate interests."[44]

In sum, each type of rule imposed by a city council on speech at public meetings must satisfy these conditions to be constitutional—it cannot discriminate based on viewpoint, it must be narrowly tailored to serve a significant government interest, and it must leave open alternative channels of communication. Accordingly, the same types of

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[35] *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 518 (6th Cir. 2019) (quoting *Lowery v. Jefferson Cty. Bd. Of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009)).
[36] *Id.*
[37] *Id.*; *Jochum v. Tuscola Cnty.*, 239 F. Supp. 2d 714, 728 (E.D. Mich. 2003) ("A city council meeting is the quintessential limited public forum, especially when citizen comments are restricted to a particular part of the meeting").
[38] *Id.*; *Miller v. City of Cincinnati*, 422 F.3d 524, 535 (6th Cir. 2010) ("The government may restrict speech in a limited public forum as long as the restrictions do 'not discriminate against speech on the basis of viewpoint' and are 'reasonable in light of the purpose served by the forum'").
[39] *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).
[40] *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811, 814 (W.D. Mich. 1999).
[41] *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005).
[42] *Wysinger v. City of Benton Harbor*, 968 F. Supp. 349, 353 (W.D. Mich. 1997).
[43] *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984).
[44] *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005).

restrictions[45] that may be imposed on public comment (addressed in our previous advice) may also be imposed on city councilmembers where appropriate. Permissible restrictions include:

- designated comment periods
- time limits on speakers
- prohibiting repetitiveness and requiring relevancy
- requiring speakers to address the presiding officer
- prohibiting profanity or derogatory terms if likely to incite violence or disorder or part of a threat for example, a racial slur directed at members of the audience
- carefully drafted "personal attack" rules that avoid viewpoint discrimination.

B. Application of the Law Concerning Councilmember Speech During Meetings to Council Rule 10 "Council Conduct of Discussion and Debate.

Council Rule 10 concerning councilmember speech contains the following provisions that would be constitutional. See Public Memo on Public Commentary Sections dated March 15, 2021 for further discussion of these type of rules.

"No member shall speak until recognized for that purpose by the Presiding Officer."

"Members shall practice civility and professionalism in discussions and debate. When members disagree, they should do so respectfully."

"Members shall address remarks to the Presiding Officer, even if rebutting someone else's statements."

"A member shall not hold the floor for more than two times on a given question, three minutes the first time, two minutes the second time, except with the concurring vote of ¾ of the members present. The time that the member holds the floor includes member questions to and from staff."

"Members shall speak to their own views and motives, if they wish. No member shall assail question or impugn the integrity, character or motives of another member so as to disrupt the order of the meeting or incite violence." While the first that **part** of the rule standing alone could constitute viewpoint discrimination because it arguably expresses disagreement with a particular message—i.e. "question[ing]" or "impugn[ing] the integrity, character or motives of another member." (There is less concern of viewpoint discrimination with the term "assail" because it implicates conduct[46]

[45]. See Public memo on Public Commentary dated March 15, 2021.

[46] Indeed, as set forth later in this memo, one federal district court in Michigan just recently dismissed a First Amendment claim by a councilmember against his fellow councilmembers for removing him from/excluding him from council meetings for disruptive activities. The district court

rather than speech alone), the rule is modified further to prohibit specific conduct: that which disrupts the order of the meeting or incites violence.

This language is curative of any viewpoint discrimination problem because it removes the prohibition on a particular view and limits the prohibited conduct to that which is disruptive, which makes the rule narrowly tailored to the interest in conducting orderly and efficient meetings.

III. Regulation of Councilmember Speech Outside of Public Meetings.

A. Rules related to speech generally.

The law is unsettled as to whether Council may enact rules prohibiting certain councilmember speech outside of public meetings. The underlying rationale for limitations on councilmember speech in public meetings do not apply equally outside of public meetings, i.e. public events, City Hall, in the workplace, etc. Indeed, the Council does not have the same interest in conducting orderly and efficient meetings in many contexts outside of a public meeting. But there is a lack of case law regarding restrictions on elected official speech outside of public meetings generally, for example, during public events, at City Hall, or in the workplace. Almost all of the case law regarding elected official speech and conduct outside of public meetings involves social media activity only. (Because the current law largely addresses social media, we have included a discussion of the relevant law focused on this area in the section B below).

Along the same lines, it is unclear whether Council may prohibit councilmember speech specifically directed toward City staff outside of public meetings. At a minimum, Council may prohibit the ***conduct*** of councilmembers directed toward City staff such as racial or sexual harassment or violence. But the fact that such "conduct" is based on actual speech may be a problem with the conduct/speech distinction. It is less clear whether council may prohibit ***speech*** directed toward City staff. Based on First Amendment precedent, as set forth above and in the previous memo regarding public commentary, it is likely that Council could prohibit councilmember speech, including speech outside of a public meeting, that falls into unprotected categories such as "obscenity" (as defined by the United States Supreme Court in *Miller*), defamatory statements, or speech likely to incite violence or disorder or as part of a threat, for example certain racial epithets depending on the context. But it does not appear that Council could fully prohibit any other type of councilmember speech directed toward City staff outside of a public meeting. Because an individual councilmember cannot direct the work of City staff, direct contact with city staff could be subject to council rules.

The law is equally unsettled as to the application of the First Amendment to another unique forum outside of public meetings—the social media pages of elected

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held that absolute legislative immunity barred his claim against the other councilmembers because legislative bodies have the power to discipline member, the councilmember was disciplined because he "was being argumentative or disruptive," and councilmember may not sue fellow councilmembers for taking such disciplinary actions. *Mays v. Fields, et. al*., No. 20-cv-12504 (E.D. Mich. March 5, 2021) at *1-3.

officials. Current case law suggests rules prohibiting certain councilmember speech on social media would be unconstitutional. At a minimum, courts apply the same general First Amendment principles to social media. Again, "[a] fundamental principle of the First Amendment is that all persons who have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[47] But the law with respect to social media is simply unsettled. Indeed, as noted by one federal district court, "applying the First Amendment to social media is a relatively new task."[48] Existing First Amendment case law at least suggests that established rules prohibiting certain speech of elected officials on social media, like the other forums outside public meetings, would be impermissible. Given this uncertainty, the safest course is to refrain from prohibiting certain speech of councilmembers on social media.

There is also little case law on whether the government may impose restrictions prohibiting certain speech on elected officials' social media pages. The existing case law suggests that attempts to prohibit the speech of elected officials' social media pages may violate the First Amendment. For example, in a recent case, *Puerto Rico Ass'n of Mayors v. Velez-Martinez*, a federal district court found that a letter issued by an elections comptroller that precluded mayoral candidates from disclosing in their personal social media that they held a public position or their achievements as government officials was unconstitutional on its face.[49] The Court noted that:

> the Supreme Court has consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field or to level electoral opportunities to equalize the financial resources of candidates. The First Amendment prohibits such legislative attempts to fine-tune the electoral process, no matter how well intentioned. In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.[50]

This reasoning could equally be applied generally to the speech of elected officials outside a public meeting, particularly legislators who regularly engage in political speech as an essential component of this country's political system. On this basis, we do not recommend that Council enact rules prohibiting certain councilmember speech on social media. Such rules could be subject to a facial challenge as an overly broad and unconstitutional restriction on speech.

Because the law in this area is uncertain, and in light of the Supreme Court's holding in *Bond* that "legislators be given the widest latitude to express their views on issues of policy," the safest course is to avoid established rules prohibiting certain

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[47] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).
[48] *Garnier v. O'Connor Ratcliff*, No. 3:17-cv-02215, 2021 WL 129823 (S.D. Cal. 2019).
[49] 482 F.Supp.3d 1 (D. Puerto Rico, Aug. 26, 2020).
[50] *Id.* (quoting *McCutcheon*, 572 U.S. at 206-07).

Councilmember speech outside of meetings, particularly for any speech that does not fall in an unprotected category (i.e. "obscenity," defamation, threats, or violence).

This is particularly true because established rules prohibiting certain councilmember speech may also be found to be a "prior restraint" on speech. A "prior restraint" is an administrative or judicial order that blocks expressive activity before it can occur.[51] With a prior restraint, the lawfulness of the speech turns on the advanced approval of government officials."[52] "In that vein, laws that impose a prior restraint on free speech have been disfavored by the courts as tantamount to censorship and thought control."[53] Indeed, the First Amendment guarantees "greater protection from prior restraints," and thus prior restraints are presumptively invalid.[54]

An action or punishment that occurs after the speech is expressed, however, "like a punishment for disfavored speech, is not a prior restraint."[55] "Subsequent punishments are not subject to the higher protection that prior restraints receive . . . ."[56] Indeed, the United States Supreme Court has "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments."[57]Accordingly, as set forth in section IV below, the First Amendment likely does not prohibit Council from making its own statements, through reprimand or otherwise (which statements are protected speech themselves) in opposition to the speech of individual Councilmembers, including councilmember speech outside of public meetings.

B. Rules Related to the Operation of a Social Media Platform

While Councilmember speech on social media is part of speech outside of a meeting, another related issue is Councilmember regulation of public comments outside of a public meeting--on their own social media platform. This is an issue that relates both to councilmember conduct and public commentary.

Social media is now one of the most utilized media for First Amendment activity. Indeed, the Supreme Court has acknowledged that:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. . . . Social media offers relatively unlimited, low-cost capacity for communication of all kinds . . . . In short, social media users employ these websites to engage in a wide array

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[51] *Alexander v. United States*, 509 U.S. 544, 550 (1993).
[52] *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001).
[53] *Id.* (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931)).
[54] *Alexander*, 509 U.S. at 554; Polaris, 267 F.3d at 506.
[55] *Novak v. City of Parma*, 932 F.3d 421, 432 (6th Cir. 2019).
[56] *CH Royal Oak, LLC v. Whitmer*, 472 F. Supp. 3d 410, 415 (W.D. Mich. July 16, 2020).
[57] *Alexander*, 509 U.S. at 554.

> of protected First Amendment activity on topics as diverse as human thought.[58]

Despite the lack of case law applying the First Amendment to social media platforms, the Supreme Court has recognized that "as a general matter, social media is entitled to the same First Amendment protections as other forms of media."[59] Indeed, "[w]hatever the challenges of applying the constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[60] Moreover, a forum need not be "spatial or geographic" and "the same principles are applicable" to a metaphysical forum.[61]

Thus, as the body of case law currently stands, the Supreme Court's forum analysis applies to social media. In accordance with this analysis set forth above, to determine if a public forum has been created, courts look "to the policy and practice of the government" as well as "the nature of the property and its compatibility with expressive activity to discern the government's intent."[62] Opening an instrumentality of communication "for indiscriminate use by the general public" creates a public forum.[63]

While neither the United States Supreme Court nor the Sixth Circuit have addressed this issue, **a growing number of other federal courts have applied the First Amendment and its forum analysis to the activities of elected officials on social media platforms.**[64] But it is important to note that this issue has been addressed almost exclusively in the context of First Amendment challenges by a member of the public after being blocked from viewing an elected officials' social media page in response to the individual's criticism of that elected official on that social media page. Most courts have

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[58] *Knight First Amendment Institute*, 928 F.3d at 237 (quoting *Packingham*, 137 S. Ct. at 1735-36).
[59] *Id.* at 237.
[60] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011).
[61] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995).
[62] *Cornelius*, 473 U.S. at 802.
[63] *Perry Educ. Ass'n*, 460 U.S. at 47).
[64] See *Garnier*, supra (citing *Knight First Amendment Inst. at Columbia Univ.,*, 928 F.3d at 226(finding President Donald Trump's Twitter account to be a designated public forum and that blocking viewers was unconstitutional viewpoint discrimination); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019)(holding that a public official who used a Facebook page as a tool of her office exercised state action when blocking a constituent); *Robinson v. Hunt Cty. Texas*, 921 F.3d 440 (5th Cir. 2019)(finding that a government official's act of blocking a constituent from an official government social media page was unconstitutional viewpoint discrimination); *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020)(granting Plaintiff's motion for a preliminary injunction and ordering the county sheriff to unblock the plaintiffs on his official Facebook page by finding the relevant page was a public forum); *Campbell v. Reisch*, 367 F. Supp. 3d 987 (W.D. Mo. 2019)(denying motion to dismiss and finding that defendant state legislator was acting under color of law when she blocked the plaintiff from her official Twitter account); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018)(denying plaintiffs' motion for a preliminary injunction prohibiting defendant state governor from blocking plaintiffs on Facebook by finding the relevant page was not a public forum).

analyzed whether the elected official was acting as a state actor and if so, conducted a forum analysis for that elected official's page. The forum analysis application to social media has had mixed results (which, again, is not surprising in cases related to constitutional law).

Some courts have concluded that government officials' social media accounts are public forums. For example, in *Davidson v. Randall*, the Fourth Circuit Court of Appeals concluded that the social media page of a chair of the county board of supervisors constituted a public forum where she intentionally opened the comment section of her page for public discourse.[65] Similarly, in *Knight First Amendment Institute and Columbia Univ. v. Trump,* the Second Circuit Court of Appeals held that former President Donald Trump "violated the First Amendment when he used the blocking function [on Twitter] to exclude the individual plaintiffs because of their disfavored speech."[66] The Court noted that because President Trump opened the account for public discussion, used it as an official vehicle for governance, and made its interactive features accessible to the public, he created a public forum.[67] Many district courts have followed suit, finding such pages to be a public forum.[68]

Other courts have concluded that such social media pages are designated public forums. For example, in *One Wisconsin Now v. Kremer*, a federal district court found that the Twitter accounts of state legislators were designated public forums.[69] Notably, regardless of whether a social media account is a public forum or a designated public forum, viewpoint discrimination by the government in such forums is impermissible.[70]

Some courts have found, based on the character of certain elected officials' social media pages, the pages were private, and thus their actions on the page were also private and not subject to regulation or the First Amendment. For instance, the Eighth Circuit Court of Appeals concluded that a state legislator's social media page was private rather than governmental and thus, she did not violate the First Amendment when she blocked the plaintiff from her page.[71] The Court reasoned (1) that she was not a public official when she created it; and (2) it was used largely for campaign purposes.[72] The Court likened her page "to a campaign newsletter" and thus, noted it was her prerogative to select her audience and present her page as she sees fit."[73]

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[65] 912 F.3d 666, 682 (4th Cir. 2019).
[66] 928 F.3d 226, 239 (2d Cir. 2019).
[67] *Id.* at 237.
[68] See, e.g., *Windom v. Harshbarger*, 396 F.Supp.3d 675, 684 (N.D. West Virginia June 6, 2019) (finding that an individual who commented on social media page of member of state house of delegates and was subsequently blocked sufficiently alleged that the member opened the social media page as a "public forum" for expressive activity).
[69] 354 F.Supp.3d 940, 949 (W.D. Wisc. 2019).
[70] *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).
[71] *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021).
[72] *Id.* at 827-28.
[73] *Id.* at 827.

Several federal district courts have held similarly. One federal district court in New York dismissed a First Amendment claim against a congressman after he allegedly deleted a post from his campaign Facebook page, finding that it was a private action.[74] Similarly, another federal district court in Oregon found that the plaintiff failed to allege that a city commissioner purported to act under color of law when she complained about the plaintiff on her non-official Facebook page operated in her personal capacity in contrast to the official page she used to discuss city business.[75]

IV. A Legislative Body May Take Certain Actions Against its Members in Response to Speech Whether Made During Public Meetings or Outside Public Meetings.

A majority of federal courts have concluded that legislative bodies may take certain actions in response to member speech, such as reprimand or censure, so long as the action does not prevent the member from carrying out their elected duties**.** In fact, many courts have concluded that such legislative actions, as statements of the body, are themselves protected by the First Amendment. In other words, it would not be improper for the City Council to indirectly address Councilmember's speech through censure or reprimand even if direct prohibition might raise constitutional issues. This is because the City Council as a body has its own First Amendment rights to act.[76] Moreover, even apart from the right of a body to speak through legislative action, such actions would likely be entitled to absolute legislative immunity as set forth in more detail in the next section.

Thus, instead of enacting rules prohibiting councilmember speech outside of public meetings, Council could likely permissibly address councilmember speech outside of public meetings, on a case by case basis through the Ethics Rules process for counseling and reprimand as set forth in more detail below.

The government and its officials may not retaliate, i.e. take an "adverse action," against an individual, including public employees,[77] that is motivated by the individual's exercise of their free speech rights under the First Amendment. But elected officials are required to endure more action taken in response to their speech than the ordinary citizen. In other words, some action taken in response to an elected official's speech will not amount to retaliation that violates the First Amendment. **On this basis, it is more difficult for an elected official to establish that they were subject to an adverse action and thus to establish a "First Amendment" retaliation claim.**

To succeed on a First Amendment retaliation claim, an individual must show that "(1) she engaged in constitutionally protected conduct; (2) an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by her protected

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[74] *Fehrenbach v. Zeldin*, cv-17,5282, 2019 WL 1322619 (E.D.N.Y. Feb. 6, 2019), report and recommendation adopted, 2019 WL 1320280 at * 5 (E.D.N.Y. Mar. 21, 2019).
[75] *German v. Eudaly*, No. 3:17-cv-2028-MO, 2018 WL 3212020, at *6 (E. Or. June 29, 2018).
[76] Even apart from the right of a body to speak through censure or reprimand, such actions would likely be entitled to absolute legislative immunity.
[77] Subject to the limitations of *Garcetti* set forth above.

conduct."[78] To establish the first prong, a Plaintiff must show that the speech at issue is entitled to First Amendment protection. As established above, given the unsettled law, Councilmember speech generally should be treated as if it is entitled to First Amendment protection, with certain exceptions.

To establish the second prong, a Plaintiff must show that there was an adverse action that "would deter a person of ordinary firmness from continuing to engage in the conduct."[79] But courts must "tailor" this analysis to the circumstances of the specific retaliation claim.[80] "The objective inquiry into whether the actions taken against an individual rise to the level of an adverse action is highly dependent on context," and persons such as public employees "might have to endure more than the average citizen."[81] Importantly, The Sixth Circuit Court of Appeals (governing the state of Michigan) has held that "[p]ublic officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views."[82] Indeed, "[c]riticism of public officials lies at the very core of speech protected by the First Amendment."[83]

Accordingly, public officials "must tolerate more significant actions taken in response to [their] exercise of First Amendment rights than an average citizen would before the actions are considered adverse."[84] Thus, elected officials who wish to assert that they have been subjected to unconstitutional retaliation have a higher burden to meet than ordinary citizens would. Indeed, in *Mattox v. City of Forest Park*, the Sixth Circuit Court of Appeals formulated its "adverse action" prong for an elected city councilmember as whether a "public official of ordinary firmness" would be deterred from exercising her First Amendment rights.[85]

In accordance with this principle, elected officials, particularly those of legislative bodies, have difficulty establishing First Amendment retaliation claims when the retaliation does not prevent them from performing their elected duties. Indeed, "elected officials who are retaliated against by their peers have limited recourse under the First Amendment when actions taken against them do not interfere with their ability to

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[78] *Perkins v. Twp. of Clayton*, 411 F. App'x 810, 814 (6th Cir. 2011) (citing *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005)).
[79] *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999)
[80] *Id.* at 398.
[81] *Id.*
[82] *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999).
[83] *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999)(citing *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)(stating that this country enjoys "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that, it may well include vehement, caustic, and sometimes pleasantly sharp attacks on government and public officials"); *Hustler Magazine, Inc v. Falwell*, 485 U.S. 46, 51 (1988)("The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office . . . .).
[84] *Perkins v. Twp. of Clayton*, 411 F. App'x 810, 814 (6th Cir. 2011).
[85] *Mattox*, 183 F.3d at 522.

perform *elected* duties."[86] Thus, Council should not punish a member for their speech by preventing them from carrying out their elected duties.[87]

Furthermore, even apart from the higher burden to meet, such issues are inappropriate for court determination, especially in federal courts. Courts have opined that they are not the appropriate venue in which to resolve political disputes. "A retaliation claim is not the proper vehicle for the resolution of quotidian disputes among elected officials."[88] As the Second Circuit Court of Appeals has noted "[c]ourts should intervene only in the most severe cases of legislative retaliation for the exercise of First Amendment rights, thereby allowing ample room for the hurly burly of legislative decision making."[89] "Nothing in *Bond* . . . suggests the Court intended for the First Amendment to guard against every form of political backlash that might arise out of everyday squabbles of hardball politics . . . ."[90]

Further, as a district court in the Western District of Michigan recognized:

> Plaintiff is an elected representative of Comstock Township, and he is expected to speak out on issues important to his constituents. In the course of discharging this duty, political opposition will inevitably arise. Opposition may form based in whole or in part on the content of Plaintiff's public statements. That is the very essence of politics. Plaintiff has no more of a First Amendment claim than does a United States Senator whose political opposition triggers a filibuster to prevent or delay him from speaking on the Senate floor. Politics can be a frustrating and humbling experience, but "[t]he First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering. Plaintiff cannot use the federal courts to prevent his political opponents from targeting him because of public statements made in his capacity as an elected official**.**[91]

On this basis, a censure or reprimand, without more, is likely not violative of the First Amendment. Indeed, legislative actions such as censure or reprimand for a member for their speech are likely permissible as long as the action does not prevent the member from carrying out their elected duties.[92] Indeed, censure "is mere de minimis criticism,

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[86] *Id.* at 183 (Emphasis in Original).
[87] As we discuss elsewhere, if Council took legislative action preventing councilmembers from carrying out their elected duties, such action would likely be entitled to absolute legislative immunity even if it could be considered unconstitutional. This means that there would be no liability. Nevertheless, we do not recommend that such action be taken because it could be found to be unconstitutional and there is always a risk that a court may not apply legislative immunity.
[88] *Zimmerlink v. Zapotsky*, 539 F. App'x 45, 2013 WL 4873460 at *4 (3d Cir. Sept. 13, 2013).
[89] *Camacho v. Brandon*, 317 F.3d 153, 166 (2d Cir. 2003).
[90] *Werkheiser*, 780 F.3d at 181.
[91] *Shields v. Charter Tp. of Comstock,* 617 F.Supp.2d 606, 614-15 (W.D. Mich. 2009) (Emphasis Added).
[92] *Page v. Braker*, No. 06-2027, 2007 WL 432980 at *3 (D.N.J. Jan. 31, 2007)(finding a censure resolution "was de minimis and did not rise to the level necessary to constitute a First Amendment violation" because it was a "mere showing of disapproval, expressed by a

accusation [ ], or reprimand insufficient to deter a person of ordinary firmness from exercising constitutional rights and, hence, does not run afoul [of] federal and state rights to free speech."[93] And it is common practice for a legislative body to employ reprimand or censure, as evident by even a cursory review of the news.[94]

Importantly, the Sixth Circuit Court of Appeals has concluded that a legislative body does not violate the First Amendment when its members cast votes in opposition to other members. In fact, such actions are the essence of politics. The Court noted:

> A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor or because of what newspapers, television commentators, polls, letter writers and members of the general public say. We may not invalidate such legislative action based on the allegedly improper motives of legislators. Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, to do so, at least in part, because of what the target of their investigation or resolution has said or for purely partisan or ideological reasons. The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions.[95]

Indeed, in *Zilich*, the Sixth Circuit Court of Appeals found that a resolution "expressing the disapproval and outrage of the council" at a former council member's actions did not amount to retaliation and did not violate the First Amendment. Specifically, the city council passed a resolution and ordinance denouncing the plaintiff, a former city

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councilman's colleagues, and lacking any real force or punishment" and noting that a resolution to censure must "mete out some form of official punishment," rather than "merely reprimand[ing] the offending politician"); see also *Brennan v. Norton*, 350 F.3d 399, 419 (3d Cir. 2003)("[c]ourts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands").

[93] *Danchuk v. Mayor & Council of the Borough of Mount Arlington*, No. 15-2028, 2017 WL 3821469 at *6 (D.N.J. Aug. 31, 2017) (noting "the nature of the retaliatory act must be more than trivial and there can be no violation where the actions were merely criticism, false accusations, or verbal reprimand").

[94] See, censure for improper statements to City employee, https://www.detroitnews.com/story/news/local/wayne-county/2020/08/25/hamtramck-council-censures-member-over-employee-encounter/3438851001/

See, censure of Councilmember for text messages, https://www.fox47news.com/neighborhoods/downtown-old-town-reo-town/lansing-city-council-votes-to-censure-brandon-betz-for-profane-text-messages

[95] *Zilich v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994).

council member, stating that he had violated the city charter's residency requirement and that he had never been qualified to hold office. The ordinance also authorized the law director to go to court to recover the salary paid to the plaintiff during his tenure."[96] The plaintiff alleged that it was retaliation for his statements challenging the city's fiscal policies, contract bidding procedures, and the actions of police and law departments during his tenure.[97]

But the Court held that this action was permissible and reasoned that "the legislative body here passed a resolution expressing the disapproval and outrage of the council," which "does not have the effect of a law. The ordinance merely authorizes the law director to file a suit against plaintiff . . . the ordinance contains no punishment or penalty. We therefore do not consider these two horatory measures to violate the plaintiff's First Amendment rights."[98]

In fact, the Court noted that "[v]oting on legislative resolutions expressing political viewpoints may itself be protected political speech."[99] "Such resolutions are simply the expression of political opinion. They do not control the conduct of citizens or create public rights and duties like regular laws."[100] Similarly, the Third Circuit Court of Appeals noted that a public body itself may well "exercis[e] a competing First Amendment right to make a political statement" by taking action against another member of the body.[101]

Other federal courts have reached similar conclusions. For example, a federal district court in California found that although a censure did more than just reprimand and express the city council's disapproval of its member's action, it did not punish or penalize the member's free speech because it did not prevent the member from performing her official duties or restricting her opportunities to speak and, thus, did not violate the First Amendment.[102]

Similarly, in *Phelan v. Laramie County Community College Bd. of Trustees*, a community college board censured one of its trustees for violating an ethics policy when

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[96] *Id.* at 361-62.
[97] *Id.* at 361.
[98] *Id.* at 364.
[99] *Id.* at 363 (citing *Little North Miami*, 805 F.2d 962, 967 (11th Cir. 1986)(a "resolution is merely declaratory of the will of the corporation in a given matter and not a continuing regulation [or a] permanent rule of government"); see also *Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir. 1995)("voting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt . . . .")
[100] *Id.* at 363-64.
[101] *Werkheiser*, 780 F.3d at 178 (citing *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 545 (9th Cir. 2010)(noting that "almost all retaliatory actions can be expressive" and that, while an elected official may have the right to criticize other officials for their votes, the elected officials he is criticizing "had the corresponding right to replace [him] with someone who, in their view, represented the majority view").
[102] *Westfall v. City of Crescent City*, No. cv 10-5222 NJV, 2011 WL 2110306 at *6 (N.D. Cal. May 26, 2011).

she placed a newspaper ad encouraging the public to vote against a pending measure. The censured trustee sued the board but the Tenth Circuit Court of Appeals held that "[i]n censuring Ms. Phelan, board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future" which was not a First Amendment violation. [103] The Court reasoned that the censure "carried no penalties; it did not prevent [the plaintiff] from performing her official duties or restrict her opportunities to speak, such as her right to vote as a Board member, her ability to speak before the Board, or her ability to speak to the public."[104]

Likewise, in *Blair v. Bethel School District*, a school board voted to remove one of its members as their vice president because of his criticism of the school district's superintendent.[105] The member sued the district and the board alleging that he was retaliated against for exercising his First Amendment rights.[106] But the Ninth Circuit Court of Appeals held that the member was not retaliated against in violation of his First Amendment rights because of his removal as vice president.[107] The Court reasoned that the context of the case distinguished it from ordinary retaliation cases in three ways: (1) the action was de minimis; (2) "more is fair in electoral politics than in other contexts" and "the First Amendment does not succor casualties of the regular functioning of the political process," and (3) the fellow board members had an equal right to replace him with someone who they believed represented the majority view of the board.[108]

It is important to note that there is some contrary authority in this area of the law. The Fifth Circuit Court of Appeals, for example, appears to be in the minority, and perhaps an outlier, with respect to issue of whether censure or reprimand violates the First Amendment. In *Wilson v. Houston Community College System*, the Fifth Circuit Court of Appeals concluded that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim."[109] In that case, a college's board of trustees publicly censured one of its own members for criticizing other members for taking a different position on an overseas campus and for accusing the other members of violating the bylaws.[110] The censure chastised the plaintiff for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct."[111] There are factual issues that may explain this ruling, and the Court's reasoning for this holding was solely its own past precedent which establishes that reprimand or censure is actionable.[112] The Court noted the decisions set forth in other circuit courts but concluded, without much explanation,

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[103] *Phelan v. Laramie*, 235 F.3d 1243, 1248 (10th Cir. 2000).
[104] 235 F.3d 1243, 1248 (10th Cir. 2000).
[105] 608 F.3d 540, 542-43 (9th Cir. 2010).
[106] *Id.* at 543.
[107] *Id.* at 546.
[108] *Id.* at 544-46.
[109] 955 F.3d 490, 499 (5th Cir. 2020).
[110] *Id.* at 493.
[111] *Id.* at 494.
[112] *Id.* at 499. The precedent they cite is a case involving censure on the judiciary rather than a legislative body. Likewise, a community college board is also not a legislative body.

that they were inapplicable.[113] It should be noted that the Fifth Circuit's conclusion is contrary to the majority of other circuits on this issue, as cited above, including the Sixth Circuit's opinion which govern the state of Michigan[114]

Nor does a censure amount to an improper Bill of Attainder. Bills of Attainder are prohibited by Article I, §10 of the Constitution.[115] A Bill of Attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial.'[116] The Bill of Attainder clause is a "safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[117] There are three essential elements to a Bill of Attainder: "specificity . . . , punishment, and a lack of a judicial trial." [118] But "[t]he Bill of Attainder clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend or otherwise discipline a member. They have done so under English and American law for centuries."[119]

Permissible actions by a political body in response to a member's speech may also include removal of elected officials from appointed positions so long as the appointment is not part of the officials' elected duties.[120] For instance, the Fifth Circuit Court of Appeals found removal of a city council member from a planning organization due to her failure to support the city council's position did not violate the First Amendment.[121] Similarly, the Eleventh Circuit Court of Appeals found that a county commission could remove the plaintiff from an appointed, unpaid position as a committee member without violating the First Amendment.[122]

To illustrate further, in *Whitener v. McWatters*, a member of a county board of supervisors sued other board members after they voted to censure him and strip him of his committee assignments in response to his use of abusive language and uncivil behavior toward two board members.[123] The Fourth Circuit Court of Appeals, after an

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[113] *Id.*
[114] While case law on constitutional issues often results in differing conclusions, This Fifth Circuit case is actually an outlier given the reasoning of the other federal circuits. not consistent with the law in other federal circuits.
[115] "No State shall . . . pass any Bill of Attainder."
[116] *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984).
[117] *Song v. Elyria*, 985 F.2d 840, 844 (6th Cir. 1993)
[118] *Selective Service System*, 468 U.S. at 847.
[119] *Zilich*, 24 F.3d at 363.
[120] The most prominent example of this in the news was the public removal of Congressional assignments of a newly elected congressmember precisely based on the content of her first speech even before her election. https://www.cnn.com/2021/02/04/politics/house-vote-marjorie-taylor-greene-committee-assignments/index.html.
[121] *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119 (5th Cir. 1996).
[122] *McKinley v. Kaplan*, 262 F.3d 1146, 1151-52 (11th Cir. 2001).
[123] 112 F.3d 740, 741 (4th Cir. 1997).

extensive historical analysis, affirmed the district court's dismissal of the complaint stating:

> Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives. Further, because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing itself is actionable in a court.[124]

On the other hand, an action that prevents an elected officials from carrying out elected duties may violate the First Amendment rights of legislators. Indeed "[i]n order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is "regulatory, proscriptive, or compulsory in nature."[125] Courts have found that legislative actions which prevent a legislator's ability to engage in governance or participate in decision-making violate the First Amendment. For example, a federal district court in Kentucky found that the a department's vote to censure the plaintiff affected his ability to engage in the department's system of governance because it denied him participation in departmental decision making and it affected his teaching assignments and thus supported a retaliation claim.[126] On this basis, removal[127] or other prevention of elected duties may be held to violate the First Amendment rights of elected officials.

VI. Legislative Immunity.

It is also important to note that legislators would likely be entitled to legislative immunity for legislative actions. The United States Supreme Court has held that "absolute legislative immunity attaches to all actions taken in the sphere of legitimate

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[124] *Id.* at 744.
[125] *Laird v. Tatum*, 408 U.S. 1, 11 (1972).
[126] *Booher v. Bd. of Regents of N. Kentucky Univ.*, No. 2:96-cv-135, 1998 WL 35867183 at *12 (E.D. Ky. July, 1998).
[127] Section 12.12 of the City Charter also provides that "[t]he Council may remove from office any elective officer by a resolution concurred in by at least eight members." It further provides that "[p]rovisions shall be made by ordinance for preferring charges against an elective officer and for a public hearing thereon by the Council." Indeed, "the Charter . . . requires an ordinance for bringing about such a removal. Ordinance, Chapter 6, Section 1:111 covers removal. Cause for removal includes "conviction of any provision of the election laws of the state or city, conviction of a felony or of an offense involving a violation of an oath of office, conviction of a felony or of an offense involving a violation of an oath of office, conviction of the state criminal misconduct tin office statute, default of any debt to the City, or repeated violations of the Council Ethics or Administrative Rules and demonstrate a disregard for these rules." Chapter 6, Section 1:112.

legislative activity."[128] This immunity extends to local legislators.[129] "[W]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."[130] The question is whether the activity is "an integral part of the deliberative and communicative process by which members participate in committee and those House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house."[131] This includes "written reports presented in that body by its committees, to resolutions offered, which though in writing, must be reproduced in speech, and to the act of voting."[132]

This immunity likely applies to votes of censure or reprimand. For instance, in *Whitener v. McWatters*, as set forth above, a county board of supervisors disciplined one of its members for confronting other members with abusive language in expressing his opinion.[133] Specifically, the board voted to recommend that he "be formally censured for a period of [one year] and that the rules of order be changed to remove him from all standing committees of [the] Board as well as all assignments and appointments to outside committees, commissions, etc."[134] The Court concluded that this disciplinary action against one of its members was legislative in nature and thus protected by absolute immunity.[135]

Legislative immunity could also apply to actions that prevent an elected official from carrying out their elected duties including removal from meetings or even removal of a member depending on the circumstances,[136] even though such action is claimed to be a violation of the First Amendment.

For instance, in *Mays v. Fields, et. Al*., a federal district court in the Eastern District of Michigan recently applied legislative immunity to city councilmembers of Flint who were involved in the removal and exclusion of a fellow councilmember from various city council meetings. Mays alleged First Amendment violations after he was removed or excluded

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[128] *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998).
[129] *Id.*; *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218 (6th Cir. 2011).
[130] *Canary v. Osborn*, 211 F.3d 324, 329 (6th Cir. 2000).
[131] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).
[132] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).
[133] 112 F.3d 740, 741 (4th Cir. 1997).
[134] *Id.*
[135] *Id.* at 744-45.
[136] In *Gamrat v. McBroom*, the Sixth Circuit affirmed the district court's dismissal of due process claims by a former member of the Michigan House of Representatives who was removed on the basis that those who were involved in her removal were entitled to legislative immunity. Significantly, this case did **not** involve Gamrat's speech and instead was based on her conduct while in office. Gamrat did not assert First Amendment violations. The Court reasoned that "[t]he House's expulsion of Gamrat was legislative activity, regardless of any bad faith, and Gamrat cannot sue the House Defendants for participating in that process."[136] On this basis, removal, if carried out legislatively, could be entitled to absolute legislative immunity.

from several city council meetings for various reasons.[137] But the district court found that his claims were "plainly barred by legislative immunity."[138] The Court reasoned that the plaintiff "was removed from council sessions and muted during the Zoom call as a disciplinary measure" and that transcripts of such sessions showed that the actions were "taken because plaintiff was being argumentative and disruptive."[139] The Court noted that under the case law it cited, which concerned the legislative power to punish a body's own members and regulate itself, "plaintiff may not sue his fellow councilmembers or those allegedly working in concert with them or at their direction, for taking such disciplinary action against him."[140]

It should also be noted that individual councilmember conduct on social media, however, is likely not entitled to legislative immunity because such conduct would not be legislative actions. For example, the Eleventh Circuit Court of Appeals concluded that a state legislator was not entitled to absolute legislative immunity for his actions in blocking a constituent from viewing his Twitter and Facebook pages.[141] The Court reasoned that his social media accounts were not "legislative in nature" nor were they "an integral part of the deliberative and communicative process by which elected officials participate in committee and House proceedings."[142]

VII. Application of These Legal Principles to Redress of Grievances Rule.

Rule 10 provides for a "redress of grievances" process that may be utilized 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" whereby "the member can seek redress through the Administration Committee using the process outlined in Council Ethics."[143] This rule is not a direct prohibition of speech. This process of self-governance is set forth in the Council Ethics Rules, specifically, Council Ethics Rule 12 entitled "Council Self-Governance." The rule provides that "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" which includes both "counseling" and "reprimand." A councilmember may request counseling or reprimand of another member for allegations concerning a violation of law, ordinance, Council Ethics rules or Council Administrative Rules.[144]

"Counseling" as defined in the ethics rules:

> 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

[137] No. 20-cv-12504 (E.D. Mich. March 5, 2021) at *1-3.
[138] *Id.* at *5.
[139] *Id.*
[140] *Id.* at *5-6.
[141] *Attwood v. Clemons*, 818 Fed. Appx. 863, 869-70 (11th Cir. 2020).
[142] *Id.*
[143] Ann Arbor City Council Rules, 2020-2021, Rule 10.
[144] Ann Arbor City Council Ethics Rules, Rule 12.

> 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.
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> "Reprimand" as defined in the ethics rules:
>
> 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 of Administrative rules within a term of office. Failure to attend counseling when determined by the Council that counseling was warranted.[145]

"Counseling" in response to councilmember speech is likely permissible because it is merely a meeting to discuss a councilmember's actions which is a de minimis criticism insufficient to deter an elected official of ordinary firmness from exercising constitutional rights. There is no punishment or penalty associated with counseling, nor does it prevent a councilmember from performing their official duties.

Similarly, "reprimand" in response to councilmember speech is also likely permissible because it is a formal statement by the Council regarding a councilmember's actions which is also a de minimis criticism insufficient to deter an elected official of ordinary firmness from exercising constitutional rights. In fact, as set forth above, a reprimand issued by the Council is likely itself protected speech.

It is important, however, to emphasize that reliance on Council Ethics rules as a response to councilmember speech may not fully remedy the concern about viewpoint discrimination issue raised above regarding the language contained in the rule prohibiting "personal attacks" during public meetings. Changes were made to that rule to limit it to certain conduct -- prohibiting only to those personal attacks which disrupt the order of the meeting, which addresses the potential challenge to the rule as viewpoint discrimination or a challenge to the rule as overbroad. In any event, changes to that language may even further eliminate the potential for a challenge based on alleged viewpoint discrimination. However, the redress procedure itself is not a prohibition on speech in the traditional sense. Instead, it is a merely a process that may be invoked in response to speech. It simply reads, if a councilmember does something, another councilmember may seek redress through Rule 12.

The other type of challenge to this rule would be that the current redress process chills speech because the speaker may then face invocation of counseling or reprimand if the speech violates the rule. The problem with this "chilling effect" argument, as

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[145] Ann Arbor City Council Ethics Rules, Rule 12.

discussed above, is that most (but not all) of the cases concerning reprimand generally hold that reprimand is not a punishment, does not prevent a councilmember from performing their official duties, and therefore does not deter an elected official of ordinary firmness from exercising constitutional speech. Therefore, the exact same issue of the "chilling" speech is addressed in the reprimand cases and found not to be an issue. Nevertheless, the current personal attack rule in Rule 10 (although it is not a direct prohibition) could still, in theory, be challenged as facial viewpoint discrimination.

Council could likely permissibly address this issue, and avoid the "viewpoint discrimination issue" altogether, by not having a specific rule at all on personal attacks or other specific issues but instead simply broadening the Ethics Rules process to allow a wider range of conduct to be addressed by counseling and reprimand and by then dealing with issues on a case by case basis. In other words, it would not be improper for the City Council to indirectly address Councilmember's speech through the broadening of the counseling or reprimand rules to address a wider range of conduct, even if direct "prohibition" of certain speech might raise constitutional issues.