FIRE
Foundation for Individual Rights and Expression

May 2, 2024

Select Board
Town of Sterling
Butterick Municipal Building
1 Park Street
Sterling, Massachusetts 01564

Sent via U.S. Mail and Electronic Mail (kjayne@sterling-ma.gov; jscalisemullett@gmail.com)

Dear Board Members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the Town of Sterling's prohibition on "disparaging" comments during the public comment section of town meetings. This prohibition unconstitutionally restricts residents' First Amendment right to comment on public issues, which encompasses criticism that township officials might find "disparaging." FIRE calls on the Select Board to eliminate this policy and affirm its commitment to its First Amendment obligations ahead of its annual Special Town Meeting on May 6.

I. Sterling's ban on "disparaging" public comments at town meetings

In her introductory comments to the 2023 Special Town Meeting, Moderator Jennifer Scalise-Mullet stated: "I'm asking we don't make disparaging comments either to anyone who's either made a motion, anyone that's connected to a motion, anyone that might not be connected to the motion, anyone that's related to the dog of the person who made a motion or anything to that effect."[2] It is unclear if the town has adopted this prohibition in writing or codified it into a municipal ordinance or rule. Consequently, FIRE filed a public records request on April 30, 2024, to verify if Sterling has formally adopted this prohibition as a matter of policy.

While the Select Board heard public comment on a motion for an audit of the Board of Health, resident James Getten attempted to discuss a perceived conflict of interest of an unnamed Board of Health employee. However, Scalise-Mullet accused Getten of "disparaging" an individual and asked him not to make those comments. Getten then attempted to discuss the findings of a public records request allegedly indicating financial malfeasance by the employee,

[1] More information about FIRE's mission and activities is available at thefire.org.

[2] Town of Sterling, *Sterling Special Town Meeting - October 16, 2023, at 5:52*, Town Hall Streams (Oct. 16, 2023), https://townhallstreams.com/stream.php?location_id=80&id=55679.

but Scalise-Mullet told Getten not "to go there." When Getten continued to discuss the issue, Scalise-Mullet again interrupted and ended his comment time.[3]

II. Sterling's ban on "disparaging" public comments violates the First Amendment

Scalise-Mullet's actions violated the First Amendment, which protects Sterling citizens when they speak at town meetings.[4] The public comment period of the Special Town Meeting is, at a minimum, a limited public forum, which means Sterling may restrict its constituents' speech only when those restrictions are viewpoint-neutral *and* reasonable in light of the forum's purpose.[5] Sterling may, for example, limit the amount of time reserved for each public comment and bar individuals from speaking out of turn. The town may also prohibit speech that falls fall into one of the few, narrowly defined categories of expression that receive no First Amendment protection, like true threats.[6] But Sterling may not adopt vague, overbroad, or viewpoint-discriminatory regulations that infringe its citizens' right to speak freely and criticize town officials during public comment periods. The prohibition on "disparaging" comments about individuals—and its enforcement of against Getten—fails each of these constitutional tests.

A. Viewpoint discrimination

The ban on "disparaging" comments violates the First Amendment's bar on viewpoint discrimination. Viewpoint discrimination is an "egregious" form of censorship, and government bodies like Sterling's Select Board "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale."[7] The Supreme Court has made clear that even a speech restriction that "evenhandedly prohibits disparagement of all groups" is viewpoint discriminatory, as it requires the government to consider the viewpoint expressed.[8]

The First Amendment makes no exception for speech that others find subjectively offensive or objectionable.[9] This core principle applies with special force to criticism directed at the

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[3] *Id. at 1:50:00.*

[4] *See, e.g.*, *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167, 174–76 (1976) (recognizing the public's right to speak at school board meetings "when the board sits in public meetings to conduct public business and hear the views of citizens").

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

[6] *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). A "true threat" is a statement through which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[7] *Rosenberger*, 515 U.S. at 829.

[8] *Matal v. Tam*, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019) (holding that determination of whether something is "immoral" or "scandalous" is viewpoint-based as it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation").

[9] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

government, which must be viewed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[10] The Supreme Court has thus held that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[11] Sterling's prohibition on "disparaging" comments directed at individuals is precisely the sort of viewpoint discrimination that is barred by the First Amendment.

Last year, in *Barron vs. Kolenda*, the Massachusetts Supreme Judicial Court held a public comment policy similar to Sterling's violated the Massachusetts Declaration of Rights' guarantees of the rights to free expression and to petition the government for redress of grievances.[12] The case involved a town's public meeting civility code requiring that all remarks and dialogue be "respectful and courteous, and free of rude, personal, or slanderous remarks."[13] The Court noted that speech that "politely praises public officials or their actions is allowed by the policy, but speech that rudely or disrespectfully criticizes public officials or their actions is not. This constitutes viewpoint discrimination."[14] As per the holding, permissible time, place and manner restrictions for public meetings include designating when public comment can occur, time limits for each speaker, and rules that prevent speakers from disrupting others and provide for removal of those who do.[15]

Like the unconstitutional restrictions in *Barron*, Sterling's ban on "disparaging" comments fails First Amendment scrutiny, because it selectively targets speech based on viewpoint. Any such rule is incompatible with the "free flow of ideas and opinions on matters of public interest and concern" at "the heart of the First Amendment."[16]

At last year's town meeting, Scalise-Mullett unconstitutionally prohibited Getten from calmly stating facts he believed substantiated an audit of the Board of Health. While Getten criticized an employee, he was not disrupting the proceedings or doing anything to justify Scalise-Mullett cutting off his comment. In fact, a town forum is precisely the place where residents should be able to speak and hear about issues of public concern like potential misconduct by town officials or employees. Censoring a speaker simply for criticizing a government employee unconstitutionally discriminates against the speaker based on the viewpoint they express.

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[10] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").

[11] *Rosenberger*, 515 U.S. at 829.

[12] 491 Mass. 408 (2023).

[13] *Id.* At 412.

[14] *Id.* at 429.

[15] *Id*. at 410.

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

B. Overbreadth

Sterling's ban on "disparaging" comments directed at individuals also violates the First Amendment because it is overbroad and unreasonable in light of the purpose of the public comment period.[17] Because of this ban, Getten was unable to publicly comment on perceived conflicts of interest or suspected financial malfeasance, all matters of public concern and entirely relevant to the motion at hand for an audit of the Board of Health.

A regulation is overbroad if it "prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[18] The policy banning "disparaging" comments directed at individuals reaches a vast amount of protected, non-disruptive speech, including Getten's comments and other relevant criticism of town officials, employees, policies, or actions. The rule is both overbroad and unreasonable because it prohibits a wide range of speech pertinent to local governance—the very speech for which public comment periods are intended to provide a forum.[19]

C. Vagueness

Finally, even setting aside the fatal flaws of viewpoint discrimination and overbreadth, the prohibition on "disparaging" individuals is unconstitutional for the independent reason that it is vague. Regulations are unconstitutionally vague when they fail to provide persons of ordinary intelligence reasonable notice of what speech is prohibited and in affording city officials too much discretion to decide what speech is allowed.[20]

The prohibition lacks specificity regarding what speech is "disparaging." When does a comment directed at a government official cross the line from merely critical to "disparaging"? Making this determination is an unavoidably subjective exercise. There is no clear answer. Yet laws and regulations "must provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[21]

III. Conclusion

FIRE calls on Sterling to confirm whether it maintains a written policy banning "disparaging" or similar public comments and, if so, to repeal or amend it to eliminate the unconstitutional defects. FIRE further calls on Sterling to publicly affirm that it will not enforce any such official

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[17] *Cornelius v. NAACP Legal Def. Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985).

[18] *United States v. Williams*, 553 U.S. 285, 292 (2008). The overbreadth doctrine "is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear" of violating the law. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989).

[19] *See, e.g.*, *Tyler v. City of Kingston*, 74 F.4th 57, 63 (2d Cir. 2023) ("In a limited public forum, the reasonableness analysis turns on the particular purpose and characteristics of the forum and the extent to which the restrictions on speech are reasonably related to maintaining the environment the government intended to create in that forum.") (cleaned up).

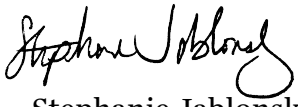
[20] *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

[21] *Id.* at 108.

or informal policy at the May 6 town meeting, and would be pleased to work with Sterling to ensure its laws and regulations comply with the First Amendment.

Given the urgent nature of this matter, we respectfully request a substantive response to this letter no later than May 6, 2024.

Sincerely,



Stephanie Jablonsky
Senior Program Officer, Public Advocacy

Cc: Maureen Cranson, Chair
David Smith, Vice Chair
Kirsten Newman, Clerk
Jennifer Scalise-Mullet, Moderator
Kama Jayne, Senior Executive Assistant