FIRE
Foundation for Individual Rights and Expression

August 18, 2025

Aimee Alcorn-Reed
City Attorney
1700 Kohlers Crossing
Kyle, Texas 78640

Sent via U.S. Mail and Electronic Mail (aalcornreed@cityofkyle.com)

Dear Ms. Alcorn-Reed:

Thank you for your August 4 response to our letter of July 21, 2025. FIRE appreciates the City's willingness to explain its position, but its legal analysis is flawed, and its characterization of the facts is inaccurate.

First, the City claims Flores-Cale's remarks at the May 27 meeting were off-topic because they referenced an alleged affair between a Council member and the Assistant City Manager, but that ignores the context of her remarks. Flores-Cale was addressing agenda item 21—a proposed amendment to the City's ethics rules, and her reference to the alleged affair tied directly to the contention that the amendment was designed to shield unethical conduct from scrutiny. More specifically, it provided context she felt necessary to make her point about the proposed change. That places her comments squarely within the forum's stated purpose of giving citizens "an opportunity to speak ... on any agenda item or any other matter concerning city business."[1] While the City may exclude truly irrelevant commentary, barring speakers from citing examples to challenge a proposed ordinance is too crabbed a view of "relevance" to withstand constitutional scrutiny. And a policy, like the City's, that allows officials to declare comments off-topic "through sheer discretion without 'objective, workable standards'" is itself unconstitutional.[2]

[1] *Kyle City Council*, CITY OF KYLE, https://www.cityofkyle.com/council.

[2] *Krasno v. Mnookin*, No. 22-3170, 2025 U.S. App. LEXIS 19426, at *36 (7th Cir. Aug. 1, 2025) (University of Wisconsin-Madison's policy of prohibiting "off-topic" comments on its social media accounts, the comment threads of which constituted limited public forums, was unreasonable and therefore unconstitutional, because while the objective of keeping its comment threads unclogged was a permissible objective, the university "neither clarified what it means to be 'off-topic' nor provided 'objective, workable standards' to guide its social media managers' discretion") (citing *Minn. Voters All. v. Mansky*, 585 U.S. 1, 21 (2018)); *see also PETA v. Tabak*, No. 23-5110, 2024 U.S. App. LEXIS 18723, at *17 (D.C. Cir. July 30, 2024) (National Institutes of Health violated the First Amendment by enforcing a prohibition on "off-topic" comments on its social media channels to filter out comments about animal testing, given the absence of "'objective, workable

Second, the Council's rule banning "discussion of personnel and employment matters" is, at a minimum, unconstitutional as applied to Flores-Cale's remarks and other relevant references to City officials' conduct. The authorities relied on by the City are distinguishable and/or non-binding and do not support its position.

As explained in our previous letter, the Fifth Circuit in *Fairchild v. Liberty Independent School District* rejected a facial challenge to a narrowly construed school board rule barring public comment on "individualized personnel matters" that were separately adjudicated through internal grievance procedures.[3] The plaintiff, a discharged employee, did not attempt to tie her remarks to school board business. Rather, she "wanted the Board to hold her post-termination grievance hearing in public."[4] In other words, the plaintiff sought to have the board resolve the "merits of an extant dispute," but the Fifth Circuit held the board could reasonably choose not to "open the comment session of its agenda to create a dispute resolution forum, anticipating that issues that do arise can be channeled into and heard at one of the Board's robust grievance processes."[5] The court, however, explicitly acknowledged that its opinion left "the door open to as-applied challenges" to the rule.[6]

This matter is readily distinguishable from *Fairchild*. Unlike the plaintiff there, Flores-Cale was not seeking to resolve the merits of an employment dispute. Rather, she criticized a proposed policy and explained her concerns using examples of alleged misconduct. As Mayor Mitchell later admitted, the "personnel" rule's purpose is to prevent a "conflict or situation with regards to city staff" from being "adjudicated in a public forum."[7] Flores-Cale was not seeking to have the Council adjudicate the alleged misconduct. Rather, she was citing it to support her criticism of a policy she believed would conceal such conduct, rendering the reference an integral part of her commentary on an issue on which the Council had authority to act. By applying the "personnel" rule to such speech, the City effectively takes the position that speakers may claim a policy would cover up officials' unethical conduct but may not explain what's being covered up—undermining the speaker's argument and the public's ability to evaluate it. This unreasonable interpretation of the rule violates the First Amendment.[8]

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standards' between what is considered on-topic and what is considered off-topic") (citing *Mansky*, 585 U.S. at 21).

[3] 597 F.3d 747 (5th Cir. 2010).

[4] *Id.* at 762.

[5] *Id.* at 760.

[6] *Id.* at 761 n.53.

[7] *June 3, 2025 City Council Regular Meeting*, CITY OF KYLE, https://kyletx.new.swagit.com/videos/344648 (video at 17:18).

[8] The City's reliance on other, out-of-circuit decisions fares no better. *Prestopnik v. Whelan* is distinguishable in the same way *Fairchild* is. That case concerned an attorney who sought to speak at a school board meeting on behalf of a teacher about her denial of tenure—a discrete personnel decision wholly unrelated to any agenda item. In that context, the Second Circuit upheld the board's prohibition on comments about "specific personnel decisions." 83 F. App'x 363, 365 (2d Cir. 2003). In *Pollak v. Wilson*, the Tenth Circuit affirmed denial of a preliminary injunction in a broad facial challenge to a school board rule barring discussion of "personnel matters." No. 22-8017, 2022 U.S. App. LEXIS 35636, at *6–7 (10th Cir. Dec. 27, 2022). On remand, however, the district court held that enforcing the rule "to prohibit the mention of any district employee for any reason is not reasonable and violates the First Amendment." *Pollak v. Wilson*, No. 22-CV-49-ABJ, 2024

Third, the City claims Mayor Mitchell invoked the "personal attacks" rule merely to keep Flores-Cale on-topic. But the Mayor's own justification for invoking the rule contradicts that assertion. At the June 3 meeting, while referencing the incident, the Mayor explained that the "personal attacks" policy prevents what the City considers overly harsh criticism, not just irrelevant comments. He said, for example, a speaker may not "call someone a liar, coward, and thief" or make "an open and hostile accusation."[9] But as we explained previously, the Council cannot allow City officials to "be praised but not condemned"[10] or censor sharp criticism simply because it allows softer critiques. This is precisely the kind of viewpoint discrimination the First Amendment forbids.

Fourth, the City's argument that its censorship of Flores-Cale did not violate the Texas Open Meetings Act relies on the same flawed assertion that her remarks were not germane to an agenda item. As explained, they were.

Lastly, the City's response failed to address FIRE's objections to the Council's unconstitutional blanket bans on "profanity" and "slurs."

FIRE renews its call for the Council to revise its rules to make clear they do not restrict criticism of City officials or comments relevant to City business, and to establish objective, written standards limiting officials' discretion in enforcing the rules. The Citizen Comment Period rules may be in line with those adopted by other cities in the region, but that does not make their text or enforcement constitutional.

We respectfully request a substantive response by September 2, 2025, to the points in this letter and to the following questions:

1. What is the precise definition of "personnel and employment matters" the City applies?

2. What is the precise definition of "personal attacks" the City applies?

We remain willing to assist, free of charge, in drafting rules that both protect Kyle constituents' rights and serve the City's legitimate interest in running orderly meetings.

Sincerely,

Aaron Terr
Director of Public Advocacy

Encl.

U.S. Dist. LEXIS 229713, at *15 (D. Wyo. Oct. 25, 2024). Similarly, the Council's censorship of Flores-Cale's reference to a city official to support her criticism of a proposed policy is unreasonable and unconstitutional.

[9] *June 3, 2025 City Council Regular Meeting*, *supra* note 7 (video at 17:55).

[10] *Monroe v. Hous. Indep. Sch. Dist.*, 794 F. App'x 381, 383 (5th Cir. 2019) (quoting *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring)).

FIRE
Foundation for Individual Rights and Expression

July 21, 2025

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Sent via U.S. Mail and Electronic Mail (tmitchell@cityofkyle.com; bheiser@cityofkyle.com; rrizo@cityofkyle.com; mzuniga@cityofkyle.com; lharris@cityofkyle.com; mmckinney@cityofkyle.com; mtobias@cityofkyle.com)

Dear Council Members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech nationwide, is concerned by the Kyle City Council's unconstitutional censorship of public comments at its meetings. We urge the Council to bring its policies and practices in line with the First Amendment.

Our concerns arise from the Council's May 27 meeting. During the Citizen Comment Period, Kyle resident Yvonne Flores-Cale spoke on agenda item 21, which proposed to amend the City's Code of Ethics to require the Ethics Compliance Officer to forward complaints to the Ethics Commission only if they are "legally sufficient."[1] Flores-Cale opposed the amendment and suggested City officials are trying to conceal unethical conduct:[2]

> What exactly are City Attorney Aimee Alcorn-Reed and City Manager Bryan Langley trying to cover up? Is it the ethically questionable makeup of the City's ethics committee? A Council member nominating a friend to oversee the actions of the very person who nominated them? Seems like a blatant conflict of interest to me. Or perhaps it's the affair between a Council member and an assistant city manager—an affair confirmed not only by the spouse of one of the parties but also by multiple sitting Council members.

[1] KYLE CITY COUNCIL, CITY COUNCIL SPECIAL MEETING AGENDA, May 27, 2025, https://www.cityofkyle.com/media/70836.

[2] *May 27, 2025 City Council Regular Meeting*, CITY OF KYLE, https://kyletx.new.swagit.com/videos/343984 (video at 8:33).

When Flores-Cale mentioned the alleged affair, Mayor Travis Mitchell tried to gavel her down. She continued:

> These are just two examples of the ethics complaints that have been dismissed by our city's ethics compliance officer. When City Attorney Aimee Alcorn-Reed sponsored this item and City Manager Bryan Langley placed it on the agenda, they directly contradicted what the Ethics Commission has already decided. By doing so, they underestimated the people's vigilance and demand for accountability.

At that point, Mayor Mitchell called for police intervention. An officer approached the lectern, cut the microphone, and escorted Flores-Cale away.

At the next regular meeting, Mitchell defended his actions, citing rules banning "personal attacks" and discussion of "personnel matters."[3] This apparently referred to Council rules that "prohibit the use of the citizen comment period to engage in personal attacks, discussion of personnel and employment matters, the use of profanity or ethnic, racial or gender-oriented slurs, or any 'disorderly conduct' which violates state or local law."[4] In describing the "personal attacks" rule, Mitchell said, "There is a line there. I'm not exactly sure what it is." He added, "You can't call someone a liar, coward, and thief. That's not a debate. That's not public discourse. It's an open and hostile accusation." All of this raises serious constitutional concerns.

I. The Council's Censorship of Flores-Cale Violates the First Amendment

The Council's censorship of Flores-Cale and its ban on "personal attacks" are unconstitutional. The First Amendment protects speech by members of the public at government meetings.[5] Public comment periods are, at a minimum, limited public forums, where the government may restrict speech only on bases that are viewpoint-neutral and reasonable in light of the forum's purpose.[6] The Council may, for example, set reasonable time limits on comments or require they be germane to City business. But the Council may not restrict comments that *are* relevant to City business—and thus in line with the forum's purpose—no matter how objectionable or inappropriate it may find them. Nor may it restrict comments "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[7]

By cutting short Flores-Cale's remarks, Mayor Mitchell unlawfully discriminated against the viewpoint she expressed about an alleged affair between City officials and its influence on the proposed amendment to the Code of Ethics. Mitchell admitted he was enforcing the Council's

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[3] *June 3, 2025 City Council Regular Meeting*, CITY OF KYLE, https://kyletx.new.swagit.com/videos/344648 (video at 16:11).

[4] CITY OF KYLE, RESOL. NO. 1100, EXH. A (RULES OF CITY COUNCIL), June 5, 2018, https://ecode360.com/documents/KY6871/public/753112262.pdf.

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

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

[7] *Id.*

ban on "personal attacks." This rule is inherently viewpoint-discriminatory—it "impermissibly targets speech unfavorable to or critical of" government officials "while permitting other positive, praiseworthy, and complimentary speech."[8] The Council cannot allow City officials to "be praised but not condemned."[9] Nor does allowing *some* criticism justify censoring harsher or more pointed critiques. Freedom of expression necessarily protects "not only informed and responsible criticism" but also "the freedom to speak foolishly and without moderation," particularly in criticizing "public men and measures."[10]

A federal court in Texas recently reaffirmed these principles in the context of rules banning "personal attacks" and "derogatory" public comments at library board meetings.[11] There, a speaker accused board members of "grooming" children and of "hateful and prejudicial actions."[12] That rhetoric, however inflammatory, was protected because it was tied to criticism of board policy and officials' public statements related to library business.[13] Similarly, Flores-Cale's comment related to an item on the Council's agenda. Characterizing it as a "personal attack" does not strip it of constitutional protection.

Mayor Mitchell's example—"You can't call someone a liar, coward, and thief"—gets the law exactly backward. Citizens have a constitutional right to use sharp language when criticizing public officials about public matters. Some criticism may well be impolite or unfair. But as the Supreme Court has recognized: "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[14]

The "personal attacks" rule is also unconstitutionally vague. When does a comment cross the line from legitimate criticism to a forbidden "attack"? Mitchell himself confessed he does not know the answer. He just knows the line is *somewhere*. That is not good enough under the Constitution. Speech regulations must "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[15] Even in a limited public forum, where "some degree of discretion in how to apply a given policy is necessary, 'that discretion must be guided by objective, workable standards' to avoid the moderator's own beliefs shaping

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[8] *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1350 (N.D. Ga. 2022); *see also Ryan v. Grapevine—Colleyville Indep. Sch. Dist.*, No. 4:21-cv-1075-P, 2023 U.S. Dist. LEXIS 41478, at *17 (N.D. Tex. Mar. 13, 2023) (school district's public comment protocols stating that "attacks of a personal nature . . . will not be allowed or tolerated" constituted evidence of viewpoint discrimination).

[9] *Monroe v. Hous. Indep. Sch. Dist.*, 794 F. App'x 381, 383 (5th Cir. 2019) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017)).

[10] *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," even when it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

[11] *Mejia v. Lafayette Consol. Gov't*, No. 6:23-CV-00307, 2025 U.S. Dist. LEXIS 52868, at *24–25 (W.D. La. Mar. 20, 2025).

[12] *Id.* at *7–8.

[13] *Id.* at 24.

[14] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

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

his or her 'views on what counts' as a policy violation."[16] The ban on "personal attacks" fails this test because its enforcement turns on officials' subjective and unpredictable judgments.

And even had Mitchell invoked only the ban on "discussion of personnel and employment matters," censoring Flores-Cale would have violated her rights. The Council cannot suppress speech about City business simply because it mentions specific City officials or employees. To the extent the City has an interest in discussing sensitive personnel matters in private, council members "can just sit and listen" to public comments then discuss sensitive matters at a closed meeting.[17] That interest simply does not translate "into a significant interest in restricting the public's ability to present its views on personnel" matters at a public meeting.[18]

Flores-Cale's reference to the alleged affair was directly tied to her criticism of a proposal before the Council to amend the ethics rules. She argued that the policy change was motivated by a desire to avoid scrutiny of unethical conduct like the affair. Right or wrong, she had every right to express that view.[19]

II. The Council's Other Rules Violate the First Amendment

The Council's blanket bans on "profanity," and "ethnic, racial or gender-oriented slurs" fare no better under the First Amendment. It is a "bedrock principle underlying the First Amendment" that officials cannot restrict speech simply because some find it "offensive or disagreeable."[20] This is no less true in the context of a public meeting.[21]

In the landmark case *Cohen v. California*, the Supreme Court overturned a disturbing-the-peace conviction for a man who wore a jacket emblazoned with "Fuck the Draft" in a public

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[16] *Marshall v. Amuso*, 571 F. Supp. 3d 412, 425–26 (E.D. Pa. 2021) (quoting *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 21–22 (2018)). This "need for specificity is especially important where . . . the regulation at issue is a content-based regulation of speech," as vagueness has an "obvious chilling effect on free speech." *Id.* (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002)).

[17] *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999).

[18] *Id.*

[19] In *Fairchild v. Liberty Independent School District,* 597 F.3d 747 (5th Cir. 2010), the Fifth Circuit rejected a facial challenge to a school board rule barring public comment on "individualized personnel matters" that the Board channeled into internal grievance procedures. The board enforced the rule to prevent a teacher's aide from using the public comment period to speak about her active post-termination grievance about another employee. The court upheld the rule, explaining the board "did not open the comment session of its agenda to create a dispute resolution forum, anticipating that issues that do arise can be channeled into and heard at one of the Board's robust grievance processes." *Id.* at 760.

This case is materially different. Flores-Cale did not seek to resolve a private employment dispute or bypass a grievance process. Rather, she referred to alleged unethical conduct by public officials to support her position on an agenda item—the proposed amendment to the City's ethics rules. The Council's decision to censor her therefore violated the First Amendment.

[20] *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992) (invalidating ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

[21] *See, e.g.*, *Mejia*, 2025 U.S. Dist. LEXIS 52868, at *24–25 (library board official's "justification for silencing [public commenter's] remarks on the ground that they were offensive does not pass constitutional muster").

courthouse where children were present.[22] The Court held that "so long as the means are peaceful, the communication need not meet standards of acceptability."[23] As another federal court said of a rule prohibiting "profane" statements at school board meetings: "Had the Board qualified the language to restrict profane remarks or profanity *that was actually disruptive* of the Board's business, that might have been a different story. But it did not, and as written, it cannot stand."[24]

Even epithets and slurs are protected if part of a comment relevant to City business. A citizen quoting an official, citing a news story, or discussing public library materials could run afoul of this overbroad policy. Impolitic use of epithets unaccompanied by actual disruption is also protected speech. If, while criticizing the Council, a speaker uses a slur to express frustration or stress the intensity of their views, Council members cannot censor this speech just because they find it offensive.[25] When it comes to protected speech that listeners find objectionable, "the remedy to be applied is more speech, not enforced silence."[26]

III. The Council's Rules and Censorship of Flores-Cale Violate the Texas Open Meetings Act

The censorship of Flores-Cale and rules restricting criticism of public officials also violate the Texas Open Meetings Act, which requires governmental bodies to "allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item."[27] The Act also provides that a "governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service."[28] As shown above, that is exactly what happened here.

IV. Conclusion

The Citizen Comment Period affords constituents an important means of sharing feedback with their leaders and holding them accountable. The First Amendment protects this vital democratic function, restraining the Council from censoring comments it does not want to hear. While the Council has authority to prohibit actual disruption, irrelevant commentary, or speech that falls outside First Amendment protections (such as true threats), Kyle citizens

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[22] 403 U.S. 15 (1971).

[23] *Id.* at 25. The Court also noted that if governments were allowed to "forbid particular words," they "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

[24] *Mama Bears of Forsyth Cnty.* 642 F. Supp. 3d at 1356 (emphasis in original).

[25] *See Johnson*, 491 U.S. at 414; *see also Matal v. Tam*, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); *Baumgartner*, 322 U.S. 665 at 673–74.

[26] *Whitney v. California*, 274 U.S. 357, 377 (1927).

[27] Tex. Gov't Code § 551.007(b).

[28] Tex. Gov't Code § 551.007(e).

must otherwise "be able to provide their feedback and critiques, even if some people, [Council] members included, find that distasteful, irritating, or unfair."[29]

FIRE therefore calls on the Kyle City Council to immediately cease censoring protected speech and to revise its public comment policies to comply with the First Amendment. We would be pleased to assist the Council in that process, free of charge.

We respectfully request a substantive response to this letter by August 4, 2025.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Bryan Langley, City Manager
Jennifer Kirkland, TRMC, City Secretary

[29] *Mama Bears of Forsyth Cnty.*, 642 F. Supp. 3d at 1350.