ACLU Minnesota

September 20, 2019

Mayor Dave Kleis
St. Cloud City Council
400 2nd St. S
St. Cloud, MN 56301

Re: Concerns about St. Cloud City Council's Rules of Conduct

Dear Mayor Kleis and Councilmembers:

We write concerning the St. Cloud City Council's Rules of Conduct and recent enforcement of them against Councilmember Hontos for his August 14 published letter to the editor of the St. Cloud Times. Specifically, we believe that rules six, seven, and eight appear to violate the First Amendment in that they broadly prohibit a substantial amount of protected speech. Although we do not represent him, it also appears to us that Councilmember Hontos was exercising his free speech rights and the Council's action to censure him was inappropriate. We urge the City Council to immediately amend its Rules and rescind the censure of Councilmember Hontos.

The First Amendment guarantees freedom of expression, press, and speech. The United States Supreme Court has continually held that debate on public issues should be "uninhibited, robust, and wide-open and [the Court has] consistently commented on the central importance of protecting speech on public issues."[1] Not only is speech on public issues entitled to special protections, it occupies "the highest rung of the hierarchy of First Amendment values."[2] "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government."[3] Indeed, statements made by public officials on matters of public concern are guaranteed First Amendment protections.[4]

Here, rule six mandates that councilmembers "respect the majority vote…and do not undermine or sabotage [its] implementation" and rule seven requires that councilmembers "respect, and do not belittle, the minority opinions and votes." Taken together, these rules appear to cast a broad net of censorship over council members' exercise of free speech about public issues. As such, these rules are likely unconstitutional because they are overly broad and they restrict expression based on message, ideas, subject matter, or content.[5] The Minnesota Supreme Court has observed that "to be a constitutional exercise of police power" a rule or statute that punishes speech may not be overly broad.[6] Rules or statutes are overly broad when they chill a substantial amount of protected speech along with unprotected speech. It is well-established that the speech of elected officials engaged in a public debate about political issues is constitutionally protected speech.[7]

For similar reasons, rule eight is likely unconstitutional. It impermissibly limits debate on public issues by mandating that council members "praise in public and critique in private." This rule explicitly prohibits council members from publicly critiquing polices and actions of the Council.

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Council members have a constitutional right to engage in public debate on issues that impact the public and by definition, such debate involves disagreement, opposition, and criticism.[8] Forbidding this type of public dialogue amounts to a First Amendment violation that the courts have consistently found presumptively unconstitutional.[9]

Finally, censuring an elected official for engaging in public debate on issues of public concern is likely a violation of the First Amendment. The Supreme Court has long held that public institutions cannot sanction or otherwise take adverse action against an elected official simply because he or she spoke out on an issue of public importance.[10] Because such sanctions can be used as a "means of inhibiting speech" and/or have "a chilling effect" on the exercise thereof, they run afoul of the First Amendment.[11]

We strongly urge the Council to amend its Rules of Conduct to ensure compliance with the Constitution as discussed above, and to publicly rescind the censure of Council Member Hontos. We respectfully ask that you provide us with a written response addressing our concerns.

Respectfully yours,

s/David P. McKinney

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[1]*Boos v. Barry*, 485 U.S. 312, 318 (1998).
[2]*Connick v. Myers*, 461 U.S. 138, 145 (quoting *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886, 913 (1982) and *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (differentiating between speech that is of public concern from speech that is of personal interest).
[3]*NAACP v. Claiborne Hardware Co.*, 485 U.S. 886, 913 (1982).
[4]*Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968) (holding that a teacher could not be dismissed for writing a letter to a local paper critical of the school board because this was speech protected by the First Amendment). *Also see Garrison v. Louisiana*, 379 U.S. 64 (1964) (holding district attorney could not be convicted of defamation for disparaging comments about local judges, because speech was protected under the First Amendment) and *Wood v. Georgia*, 370 U.S. 375 (1962) (upholding a sheriff's free speech right to criticize a judge in the local paper).
[5]*Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[6]*State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012).
[7]*See generally*, *Bond v. Floyd*, 385 U.S. 116 (1996) (holding that an elected official was entitled to criticize the Vietnam War and that a state could not apply a stricter free speech standard to a legislator than to a private citizen).
[8]*Id.* at 135 ("[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. . . The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.").
[9]*Id.*
[10]*Pickering v. Bd. Of Educ.*, 391 U.S. at 574 (1968); *Also see*, *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Wood v. Georgia*, 370 U.S. 375 (1962) (upholding First Amendment rights even when remarks were disparaging).
[11] *Pickering v. Bd. Of Educ.*, 391 U.S. at 574 (1968).