MEMORANDUM

To: **Mayor and Council**

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

Date: **March 15, 2021**

Subject: **Public Memorandum on Public Commentary under the Michigan Open Meetings Act and the First Amendment**

Introduction

The Council requested by resolution this public memo concerning public commentary under the Michigan Open Meetings Act "OMA" and the First Amendment. The OMA sets forth an important right of public access to public meetings to observe deliberations and decisions made at such meetings and to provide public input at those meetings. But this statutory right of access does not provide an absolute right of unregulated public comment at such a meeting. The council may enact rules for the public to address the body and may remove individuals from meetings in very limited circumstances upon disruption of a meeting. Moreover, even the rules enacted by a public body are further subject to Constitutional limitation. The First Amendment provides broad protection to the speech of individuals at city council meetings, which are considered "limited public forums." But that protection also is not absolute. Indeed, the First Amendment allows a city council to impose reasonable restrictions on speech at public meetings. This memo will review the limitations of the OMA and the First Amendment on rules regarding public commentary at a public meeting.[1] The memo contains, first, an overall summary of the issues to cover the basics of each issue. For those who wish further analysis, the memo contains a more detailed analysis of each issue.

Overall Summary

A rule limiting speech to a designated comment period is allowed under the OMA and is also permissible under the First Amendment. This is a content neutral rule. Courts have generally found that limiting speech to designated comment periods is permissible. There is no "right" to speak at the beginning of a meeting as opposed to the end. But it is important to note that some "speech" outside of a public comment period still may be protected by the First Amendment, for example, a gesture from the audience as long as it is not disruptive of the meeting. (See below at pp. 5, 11, 12).

[1] This memo is based on current law as of the date of this memo. The law relating to the OMA and 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 change the analysis.

A rule limiting the length of time an individual speaker may speak is allowed under the OMA and is permissible under the First Amendment. This is a content neutral rule. Courts have consistently upheld time limits as constitutionally permissible. Time limits of three to five minutes have been held to be reasonable, and it is likely that lower time limits are permissible. However, there is no specific guidance on the lower limit of speaking times. And at some point, too low of a time period would be viewed under the OMA as a denial of the right to address a public body. (See below at pp. 5-6, 12-13).

The OMA itself does not specifically address the issue of a limitation as to the total number of speakers during public comment and it is untested in the courts with respect to the OMA. Yet there is an Attorney General Opinion finding that a half hour limit on the total amount of time for public comment would violate the OMA if it is applied in a manner which completely denies a person the right to address the public body. In fact, the Attorney General has taken an almost absolutist position on the right of everyone present to speak. At the same time, the First Amendment would be more tolerant of such a limitation. Such a rule limiting the number of speakers during public comment has been upheld as a permissible content-neutral restriction on the time, place and manner of speech. It would be the more restrictive standard set under the OMA that would be applicable. (See below at pp. 5-6, 12).

While the OMA itself does not directly address the issue of a residency requirement for public commentary and there is limited case law on such a rule, it appears that such a rule is permissible under the First Amendment. This is a content neutral rule. However, it is important to point out that the OMA does not distinguish between residents and non-residents when using the term “person” or “public” and defining the right to speak. And while such a rule may seem reasonable, the Attorney General has taken an almost absolutist position on the right of everyone present to speak and has concluded that non-residents are included in this. (See below at pp. 6-7, 13).

A rule precluding a speaker from making repetitious comments is allowed by the OMA and the First Amendment. It is established that a person addressing a city council at a meeting may be stopped from speaking if the speech is overly repetitious. (See below at pp. 5-6, 14).

A rule requiring that speech be relevant is likely permissible under the OMA and the First Amendment. Under the First Amendment, it is well-settled that a citizen addressing a city council at a meeting may be stopped from speaking if the speech is irrelevant. In other words, the city council may limit speech to only agenda items or city business. For example, a business owner could not simply use the public commentary period to promote a commercial business. (See below at pp. 5-6,14).

A rule requiring speakers to address the presiding officer of a meeting is likely permissible under the OMA and the First Amendment. Courts have generally upheld rules that require the speaker to address the chair on the basis that it ensures the speaker will not be inciting other attendees to heckle or debate the commentator or otherwise disrupt the orderly process of the meeting. (See below at pp. 5-6,15).

While the OMA would likely allow a rule prohibiting profanity or curse words or derogatory words, a blanket prohibition on such language raises constitutional issues. Blanket prohibitions on profanity are generally disfavored by courts as violative of the First Amendment. The use of words such as "f***" and "damn" as points of emphasis cannot be banned. But there are some circumstances where profanity or derogatory terms may be barred such as if it is likely to incite violence or disorder at the meeting or is part of a threat. For example, racial slurs likely could be limited at public meetings. (See below at pp. 5-6, 15-19).

A rule prohibiting personal attacks at public comment must be carefully drafted. The First Amendment prohibits viewpoint discrimination. Such a rule would need to be drafted to avoid showing a disagreement with any particular viewpoint and be narrowly tailored to achieve the government interest in orderly meetings. (See below at pp. 5,6, 19 – 23).

A prohibition on certain campaign materials in a public meeting may be permissible under the First Amendment if it is viewpoint neutral. Such a rule must prohibit campaign materials evenhandedly without regard to a particular candidate or issue. (See below at p. 23).

A rule prohibiting livestreaming or video recording is likely not permissible under the OMA or the First Amendment. The law regarding this issue under the First Amendment is unsettled. At a minimum, most courts afford this activity some level of protection and video recording is clearly protected by the OMA. (See below at pp. 9, 24 – 25).

Under the OMA, a city council may remove an individual but generally only if the individual committed a breach of the peace at the meeting. A prospective ban on an individual from an otherwise public meeting is generally not permissible under either the OMA or the First Amendment. If there was conduct that threatened to impair safety at a future meeting, a court injunction would be a possible remedy instead if actually ordered by a Court. (See below at pp. 7-8, 25-26).

Law and Analysis

I. Michigan's Open Meetings Act.

The OMA provides the public the right to attend public meetings and address a public body at its meetings. But the OMA makes this right subject to the rules established by the public body. While the OMA allows public bodies to enact rules regarding the conditions of the public's right to address the public body, it further limits the public body's ability to remove an individual from a meeting to only for a breach of the peace at a meeting.

The important right of the public to attend meetings is necessary to further the purpose of the OMA, which is "to promote governmental accountability by facilitating public access to decision making, and to provide a means through which the general public may better understand issues and decisions of public concern."[2] In accordance with this purpose, the OMA provides that "[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public."[3] Moreover, "[a]ll persons shall be permitted to attend any meeting except as otherwise provided in this act."[4]

The OMA also sets forth a right to address a public body. It provides that "**[a] person shall be permitted to address a meeting of a public body under rules established and recorded by the public body**. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only."[5] Few courts have interpreted this provision. But the Michigan Court of Appeals has concluded that "[i]t is clear from reading this provision in its entirety that the Legislature intended to grant public bodies the authority to establish and enforce rules regarding public comment . . . ."[6]

With regard to this provision, the Attorney General[7] has explained that:

> [u]sually the public's right to attend a meeting of a public body is limited to the right to observe and hear the proceedings so that they may be informed of the manner in which decisions affecting them as citizens are made. For this reason, in granting the public an additional right to address

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[2] *Manning v. East Tawas*, 234 Mich. App. 244, 250; 593 N.W.2d 649 (1999).
[3] M.C.L. § 15.263(1).
[4] *Id.*
[5] M.C.L. § 15.263(5).
[6] *Lysogorski v. Bridgeport Charter Tp.*, 256 Mich. App. 297, 301; 662 N.W.2d 108 (2003) (upholding a rule limiting public comment to a prescribed time near the beginning of the meeting as valid under the OMA.
[7] Attorney General opinions are not binding on the courts, but they can be persuasive authority. *Id.* at 301.

> the public body, the legislature made this right "subject to rules established and recorded by the public body." Nevertheless, although the right to address a public body may be limited by the reasonable rules of the body, the provision may not be construed as empowering a public body to develop rules which completely denies a person the right to address the public body.[8]

The Attorney General has also opined that:

> [t]he procedural matters which may be and established and limited by rule are: control over the length of time that a person may address a public meeting, designation of the time for public participation during a certain part of the agenda, and requirement that speaker identify himself or herself prior to speaking.[9]

The Attorney General has further concluded that it is "clear that under the Open Meetings Act, §3(5), supra, in the absence of a statutory directive to the contrary, a public body in its discretion may determine through reasonable rules whether the public shall address the public body at the beginning, middle, or end of its meeting."[10]

Whether the OMA allows a public body to limit the total number of speakers during public comment or limit the total amount of time for public comment is an open question in that a court has not ruled on this tension between the right to public comment and the right of a public body to enact reasonable rules. However, the Attorney General has determined that such a limitation may violate the OMA but also identified the practical problem this could create.[11] The Attorney General has taken an absolutist position on the right of every person to speak at the meeting. Specifically, the

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[8] OAG, 1977-1978, No. 5332, pp. 536, 538 (July 13, 1978) (citing OAG, 1977-1978, No. 5183). OAG 5183 notes that "public bodies may establish rules which regulate the conditions under which the public may address the meeting. These rules must be reasonable, flexible and designed to encourage public expression and not discourage or prohibit it."

[9] OAG, 1977-1978, No. 5218, pp. 224, 225 (September 13, 1997).

[10] OAG, 1979-1980, No. 5716, pp. 812, 814 (June 4, 1980). The implication that these are the only procedural matters that can be limited by rule is not embodied in the statute itself which states: "…under rules established and recorded by the body." The attempt to limit to these procedural rules further leaves open that other substantive rules would be allowed.

[11] The Attorney General's interpretation suggests that all people—no matter where located or how many—have an absolute right to speak at a public meeting. It is likely that in the 1970s when the OMA was enacted, and the Attorney General interpreted the OMA, no one imagined a scenario in which an unlimited number of people could phone in from anywhere in the world to speak during public comment as can be done now with virtual meetings, in part because the OMA did not contemplate virtual meetings. Although the Attorney General opinions can be read to suggest an unlimited right to address the public body, by recognizing the difficulties as set forth above does suggest that a lower time limit for speaking would be acceptable when there is a large number of speakers. A Court when faced with the difficulties of a large number of speakers could simply find that this is a matter for the legislature to correct.

Attorney General has opined that "a provision that limits the period of time at a public meeting during which citizens may address the public body to ½ hour may result in certain members of the public being denied the opportunity to address the body" and thus, if such a rule "is applied in a manner which completely denies a person the right to address the public body, it will constitute a violation of the [OMA]."[12]

Notably, the Attorney General, while insisting that no one can be denied the right to speak, also recognized at the same time that:

> **occasions may arise when it is impractical for the public body to hear out the comments of every person present if an unusually large crowd attends the meeting and every person wishes to be heard**. Since the public body has a duty to carry out its public responsibilities, it may be necessary to adopt rules which authorizes the chairperson to place limits on how long a person may speak and such methods by which an individual representing a particular viewpoint may be designated by others to speak for them. Other devices to handle such unusual situations may also be explored such as a requirement that persons who wish to speak indicate this desire in writing prior to the meeting so that proper time arrangements can be made.[13]

Whether the OMA would allow a City to adopt a rule allowing only residents to address the body at public comment is also an open question for similar reasons. The OMA itself does not explicitly prohibit a rule allowing only residents to address the body at public comment. But the OMA uses the term "person" rather than "resident" when discussing public commentary.[14] Indeed, it states: "A **person** must be permitted to address a meeting of a public body under rules established and recorded by the public body."[15]

Moreover, while the OMA uses the term "person" it also allows the body to establish rules. Further, the OMA makes the right to address a body at the meeting subject to the body's rules. The OMA makes a distinction between the right to attend meetings and to speak at those meetings, but considering the Attorney General opinions addressed above, it appears that such distinctions are made only with respect to prescribed times of speaking and not classification of person speaking, i.e. resident or non-resident.

Further, under MCL 15.263(4) it would be difficult to prevent a non-resident from addressing a public body as it states "[a] person must not be required as a condition of attendance at a meeting of a public body to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance." On

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[12] OAG, 1977-1978, No. 5332 (July 13, 1978).
[13] *Id.* (emphasis added.)
[14] M.C.L. §15.263(5).
[15] *Id.*

this basis, there would be no mechanism to determine residency status to determine eligibility to address the public body at the meeting.

Certainly, it would make logical sense if a City limited public commentary to residents of that City if there was "an unusually large crowd" like the Attorney General was concerned about above. Elected representatives would be getting input from those impacted by Council decisions. While it would seem reasonable, there is no specific case on point. But again, the Attorney General has offered some guidance on this issue in the context of school board meetings. The Attorney General opined that a rule limiting the right to address the public body to persons who are residents or members of the educational community of the school district was invalid because it may have the effect of completely denying a person the right to address a public body.[16]

The right to attend a meeting also includes a right to remain at the meeting, except for limited circumstances. While a public body may prescribe rules regarding the right to address a public body, it may only exclude an individual from a meeting in very limited circumstances—a breach of the peace at the meeting. The Michigan Court of Appeals has recently recognized that "although under MCL 15.263(5), public bodies may establish and enforce recorded rules that limit public comment . . . such authority does not nullify MCL 15.263(6)'s prohibition against exclusion of any person from a public meeting except for a breach of the peace at the meeting."[17]

This prohibition provides that "[a] person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting." Thus, Council may not order or exclude anyone from a meeting without a breach of peace committed at that meeting. This provision, in addition to the First Amendment as set forth above, precludes any prospective ban from a subsequent meeting by the Council. If there were a concern about threatening conduct carrying over to another meeting, the correct procedure would be to get a court order if necessary. Whether a Court would grant such an injunction would depend on the seriousness of the threat, but that might be the best procedure if future conduct became a significant concern.[18]

In addition to the breach of the peace provision in the OMA, Michigan also has several criminal statutes prohibiting disturbances that on their face seem applicable to city council meetings. For instance, Michigan has a disorderly conduct statute which provides that "[a] person is a disorderly person if the person is any of the following":

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[16] OAG, 1977-1978, No. 5332.

[17] *Cusumano v. Dunn*, unpublished opinion per curiam of the Court of Appeals, issued August 27, 2020, 2020 WL 5079615 at p. 7.

[18] The University of Michigan attempted to obtain such an injunction, but it was deemed not necessary as an alternative procedure was used to prevent disruptive persons from attending a meeting. See *UM v. WCCAA*, 97 Mich. App. 532 (1980). Advanced notice of this possible remedy is also prudent.

> (e) a person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance;
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> (f) a person who is engaged in indecent or obscene conduct in a public place;
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> (l) a person who is found jostling or roughly crowding people unnecessarily in a public place.[19]

Similarly, Michigan law prohibits the disturbance of a lawful meeting: "any person who shall make or excite any disturbance or contention in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor."[20] But this statute has been held to be "overbroad" by several courts, which noted that certain language within the statute infringed on constitutionally protected speech.[21]

A final issue concerning public activity at a meeting is that the OMA's right to attend a meeting of a public body also "includes the right to tape-record, to videotape, to broadcast live on television the proceedings of a public body at a public meeting."[22] Further, "[t]he exercise of this right does not depend on the prior approval of a public body."[23] But "a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting."[24]

II. The First Amendment.

Simply setting rules under the OMA does not prevent further Constitutional scrutiny. The First Amendment protects speech at city council meetings and limits the rules a council may enact regarding speech for its meetings. Indeed, "citizens have an enormous First Amendment interest in directing speech about public issues to those who govern their city."[25] This is because the First Amendment "'reflects a profound

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[19] M.C.L. § 750.167(1).
[20] M.C.L. § 750.170
[21] See e.g. *People v. Vandenburg*, 307 Mich. App. 57, 66; 859 N.W.2d 229 (2014); *People v. Purifoy*, 34 Mich. App. 318, 321; 191 N.W.2d 63 (1971) (noting that the language "exciting a contention" needed to be excised from the statute).
[22] M.C.L. § 15.263(1).
[23] *Id.*
[24] *Id.*
[25] *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open."[26]

But the freedom of speech is not absolute.[27] 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."[28] Nor does the constitution "grant to members of the public generally a right to be heard by public bodies making decisions of policy."[29]

A. The Applicable Analysis for City Council Meetings.

The United States 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 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.[30]

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 as a threshold matter.[31] 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

[26] *Boos v. Barry*, 485 U.S. 312, 318 (1988)(quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).
[27] *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).
[28] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).
[29] *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984).
[30] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).
[31] See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983).

> speech is reasonable and not an effort to suppress expression merely because of the public speaker's view.[32]

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 public for[um] like parks and streets,' the sort of setting in which 'the government's regulatory powers are at their weakest.'"[33] This is because city council meetings "cannot accommodate the sort of uninhibited, unstructured speech that characterizes a public park."[34] 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.'"[35]

In such a limited public forum, the government may impose reasonable restrictions on the content of speech, but it cannot engage in viewpoint discrimination.[36] 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.[37] 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.[38]

A regulation is viewpoint neutral if it is "justified without reference to the content of the regulated speech."[39] 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."[40]

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

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[32] *Id.* at 44-46.
[33] *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)).
[34] *Id.*
[35] *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").
[36] *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'").
[37] *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811, 814 (W.D. Mich. 1999).
[38] *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005).
[39] *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984).
[40] *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005).

must leave open alternative channels of communication. Courts have applied this analysis to decide many challenges to various types of city council meeting rules.

B. Analysis of Various Types of City Council Rules.

This section surveys examples of city council rules for speech and court decisions regarding constitutional challenges to such rules. Such decisions and their analyses provide guidance on what types of rules for speech at city council meetings are constitutionally permissible to enact. Since this section discusses mainly different federal court decisions, it is important to remember that there are three levels of federal 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.)

Rules Designating Comment Periods

A rule limiting speech to a designated comment period is likely permissible under the First Amendment, just as it is allowable under the OMA. Courts have generally found that limiting speech to designated comment periods is permissible.[41] But it is important to note that some speech outside of a public comment period is still protected. This means that while Council may limit public speech to designated public comment periods, Council should not enforce a broad rule barring *all* speech or expressions outside of the public comment period.

A Ninth Circuit Court of Appeals case is illustrative of this point. The Court found that a silent gesture from the audience during a council meeting was protected expressive conduct, even when it occurred outside of the public comment period.[42] There, an audience member expressed dissatisfaction with remarks at a city council meeting by making a silent Nazi "heil" gesture from the audience.[43] Upon giving the council a Nazi salute, he was ejected from the meeting and arrested.[44]

The Court noted that the city council could not declare that the public had no First Amendment right once the public comment period closed—"what a city council may not do is, in effect, close an open meeting by declaring that the public has no First

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[41] See *Galena v. Leone*, 638 F.3d 186 (3d Cir. 2011)(upholding dismissal of First Amendment claims against the chair of a county commission meeting for being ejected for standing up from the audience and repeatedly objecting that the meeting was being held in violation of state open meeting laws); *Griffin v. Bryant*, 677 Fed. Appx. 458, 461-62 (10th Cir. 2017) (finding that it was not a violation of the First Amendment to deny a citizens' request to speak on the agenda and require him to speak during the public input portion of the meeting).
[42] *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010).
[43] *Id.*
[44] *Id.* at 969.

Amendment right whatsoever once the public comment period has closed . . . . Thus, even though . . . [the plaintiff's] provocative gesture was made after the public comment period was closed, [the plaintiff] still had a First Amendment right to be free from viewpoint discrimination at that time."[45]

Rules Limiting the Total Number of Speakers

A rule limiting the total number of speakers during public comment is also permissible under the First Amendment. For example, the Sixth Circuit Court of Appeals has upheld a school board's policy that limited the number of speakers at board meetings on the basis that it was a permissible content-neutral restriction on the time, manner, and place of speech.[46] The Court reasoned that the rule "restricted the number of speakers and the amount of time each person could speak, but it did not limit the content of the speech or restrict the full range of expressive activity available outside the board meeting. The policy left open ample alternative opportunities for communication."[47] The Court noted that "[t]he board held several meetings to hear public comment, and citizens were free to write or speak to board members outside the board meeting."[48] The justification for such a rule is for the efficiency and orderliness of public meetings. Indeed, the Sixth Circuit Court of Appeals has noted that "[f]or a school board to function, it must be able to keep its meetings in order, a requirement that necessarily demands that the moderator of speakers and the time allotted for each to speak."[49] This principle is equally applicable to city council meetings, however, as outlined above the more restrictive view of the OMA would take precedence.

Rules Imposing Time Limitations

A rule limiting the length of time a speaker may speak is also permissible under the First Amendment. Courts have consistently concluded that placing a limit on the length of time a speaker may speak is a constitutionally permissible "time, place and manner" restriction.[50] For example, a five-minute limit on speeches at a congressional hearing was found to be a lawful, content-neutral restriction.[51] Similarly, the Tenth Circuit Court of Appeals concluded that a five-minute limit for the public input portion of a council meeting was not an unconstitutional restriction on speech.[52] Even a three-minute time limit has been upheld by the Tenth Circuit as "a restriction designed

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[45] *Id.*
[46] *Hansen v. Westerville City School Dist. Bd. of Educ*., 43 F.3d 1472, at *11-12 (6th Cir. 1994).
[47] *Id.*
[48] *Id.*
[49] *Lowery v. Jefferson County Bd. of Educ*., 586 F.3d 427, 437 (6th Cir. 2009); see also *Ison v. Madison Local School Board*, 385 F.3d 923, 937 (S.D. Ohio 2019).
[50] *Wright v. Anthony*, 733 F.2d 575, 577 (6th Cir. 1984).
[51] *Id.*
[52] *Griffin v. Bryant*, 677 Fed. Appx. 458, 461-62 (10th Cir. 2017).

to promote orderly and efficient meetings."[53] The lower limit of such a time limitation is not clear.

Rules Setting Forth Residency Requirements for Speakers

While there is limited case law on such a rule, it is likely that a rule setting forth a residency requirement for speakers is permissible under the First Amendment. Several courts have upheld a residency requirement for speakers at public meetings. For example, in *Rowe v. City of Cocoa*, the Eleventh Circuit Court of Appeals upheld a residency requirement for public commenters as a content-neutral time, place, and manner restriction.[54] The City's rule allowed the council to limit the speech of non-residents and non-taxpayers during its city council meetings to agenda items only.[55] However, this case limited but did not prohibit all non-resident public comment.

The Court concluded that the rule did not impermissibly restrict speech because it served the significant governmental interest in conducting orderly and efficient meetings.[56] The Court noted that "[t]o permit non-residents, those without a direct stake in the outcome of the City's business, to ramble aimlessly at City Council meetings on topics not related to agenda items would be inefficient and would unreasonably usurp the presiding officer the authority regulate irrelevant debate at a public meeting."[57]

Similarly, *Eichenlaub v. Indiana Twp.*, the Third Circuit Court of Appeals held that "[i]t is also not a violation of the equal protection clause of the Fourteenth Amendment for a municipality to favor commentary by its own citizens over noncitizens, as long as the rule does not discriminate on the basis of [the] speaker's view."[58] Likewise, in *Carlow v. Mruk*, a federal district court in Rhode Island found a rule of order prohibiting nonresidents from speaking at an annual fire district meeting was "reasonable in light of the purpose of the annual meeting" and viewpoint neutral.[59] The Court reasoned that this rule was reasonable because nonresidents were not entitled to vote on matters considered at the annual meeting.[60]

While a residency requirement might be allowed by the First Amendment, as outlined above the more restrictive view of the OMA would take precedent.

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[53] *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).
[54] *Rowe v. City of Cocoa*, 358 F.3d 800, 802 (11th Cir. 2004).
[55] *Id.*
[56] *Id.* at 803.
[57] *Id.*
[58] 385 F.3d 274, 281 (3d Cir. 2004) (citing *Rowe*, F.3d at 803)("It is reasonable for a city to restrict the individuals who may speak at meetings to those individuals who have a direct stake in the business of the city—e.g., citizens of the city or those who receive a utility service from the city—so long as that restriction is not based on the speaker's viewpoint").
[59] 425 F. Supp. 2d 225, 244 (D. Rhode Island, 2006).
[60] *Id.*

Rules Prohibiting Repetitiveness and Requiring Relevancy

A rule prohibiting repetitiveness and requiring that speech be relevant during city council meetings is likely permissible under the First Amendment.

In fact, the Sixth Circuit has noted that there is "no content-based restriction more reasonable than asking that content be relevant."[61] "It is well established that a citizen addressing a city governmental body in a limited public forum may be stopped from speaking if the speech is 'irrelevant or repetitious' or 'disrupts, disturbs, or otherwise impedes the orderly conduct of the council meeting,' so long as the speaker is not stopped from speaking because the moderator disagrees with the viewpoint he is expressing . . ."[62]

Thus, "a speaker may properly be excluded from a limited public forum because he wishes to address a topic not encompassed within the purpose of the forum."[63] In other words, the council could, in theory, limit public comment to agenda items or city business only.[64]

Based on a similar reasoning, courts have generally upheld prohibitions on repetitive speech during council meetings. For instance, in *Lowery v. Jefferson Cty. Bd. of Educ.*, the Sixth Circuit found that there was no First Amendment violation when the parents of high school football players were denied a repeat opportunity to air grievances about purported mistreatment by the head coach—the court concluded that the desire to avoid repetitious testimony qualified as a permissible content-neutral regulation of speech.[65]

Several other federal circuit courts outside of the Sixth Circuit have also illustrated this principle. In *Eichenlaub v. Indiana Twp.*, the Third Circuit Court of Appeals upheld the removal of a member of the public who was repetitive and explained that restricting such behavior prevented the speaker from "hijacking" the proceedings.[66] Similarly, in *White v. City of Norwalk*, the Ninth Circuit Court of Appeals recognized a moderator's right to limit "unduly repetitious or largely irrelevant" comments.[67] Likewise, in *Jones v. Heyman*, a Florida mayor was found to have authority to reject a speaker

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[61] *Youkhanna*, 934 F.3d at 432.
[62] *Gault*, 73 F. Supp. 2d at 814.
[63] *Freedom from Religion Found., Inc. v. City of Warren*, 873 F. Supp. 2d 850, 863 (E.D. Mich. 2012).
[64] *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270-71 (9th Cir. 1995) ("in dealing with agenda items, the council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious"); *White*, 900 F.2d at 1425.
[65] 586 F.3d 427, 427 (6th Cir. 2009).
[66] 385 F.3d 274, 281 (3d Cir. 2004) (noting that "[m]atters presented at a citizen's forum may be limited to issues germane to town government").
[67] 900 F.2d 1421, 1425-26 (9th Cir. 1990).

who refused repeated requests from the chairman to limit his comments to the item on the agenda and responded with belligerent remarks interpreted as threatening.[68]

Rules Requiring Speakers to Address the Presiding Officer

A rule requiring speakers to address a presiding officer of the meeting is permissible under the First Amendment. Courts have generally upheld rules that require the speaker to address the chair. For example, in *Holeton v. City of Livonia*, the Michigan Court of Appeals recently found that a city council's "address the chair" rule did not violate the First Amendment because it "was reasonable and consistent with the requirements of the First Amendment for limited public fora."[69]

The Court reasoned that requiring commentary to be directed to the chair "ensured that commentators would not be inciting other attendees to heckle or debate the commentator or otherwise disrupt the orderly progress of the commentary."[70] The Court further reasoned that the city council had a significant governmental interest in conducting orderly and efficient meetings and that "[t]he rule was on its face reasonably calculated to ensure the orderly participation of the community members who wished to express their views without targeting their viewpoint."[71]

Rules Prohibiting Profanity

A blanket prohibition on profanity at city council meetings is likely unconstitutional. Blanket prohibitions on profanity are generally disfavored by courts as violative of the First Amendment. Indeed, the Supreme Court in *Cohen v. California* upheld the right of an individual to wear a jacket bearing the words "F*** the Draft" through a public courthouse to express "his feelings against the Vietnam War and the draft."[72] Significantly, the Court held that a state may not make a "single four-letter expletive a criminal offense."[73]

There are some limited circumstances where profanity may be barred or cut off. For instance, profanity may be precluded if it is likely to incite violence—i.e., if it rises to the level of "fighting words" or a "true threat." Indeed "[t]he First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and mortality."[74] "Thus, for example . . .

[68] 888 F.2d 1328, 1334 (11th Cir. 1989).
[69] 328 Mich. App. 88, 99; 935 NW2d 601 (2019).
[70] *Id.*
[71] *Id.*
[72] 403 U.S. 15, 18 (1971).
[73] *Id.* at 26.
[74] *Virginia v. Black*, 538 U.S. 343, 358-59 (2003)(holding that the First Amendment permits a ban on cross burnings done with the intent to intimidate); see also Chaplinski v. New Hampshire, 315 U.S. 568, 572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any

fighting words—those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction—are generally allowed to be prohibited under the First Amendment."[75]

Moreover, profanity spoken as part of a "true threat" is also not constitutionally protected and may be precluded.[76] "True threats" include statements "where 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."[77]

Importantly, in *Leonard v. Robinson*, the Sixth Circuit rejected a blanket prohibition on profanity for city council meetings.[78] (Again, the Sixth Circuit is the court that has jurisdiction over the federal courts in Michigan.) The Court concluded that profanity cannot be categorically outlawed unless there is a showing that the speech was delivered in a disruptive or threatening way.[79] In this case, a member of the public was removed from a council meeting and arrested for stating "[t]hat's why you're in a God damn lawsuit."[80] The Court reasoned that Leonard's use of "God Damn" was not "likely to cause a fight."[81] The Court concluded that "[p]rohibiting Leonard from coupling an expletive to his political speech is clearly unconstitutional."[82]

In accordance with these principles set forth above, courts have held that offensive speech that has a tendency to disrupt a meeting or incite others may be prohibited. For example, in *Kirkland v. Luken*, the court found that a city's mayor did not violate a speaker's First Amendment rights by directing that the microphone be shut off after the speaker used a racial epithet—the term "n****nati."[83] The Court noted that the

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constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words").

[75] *Id.*; see also *Barnes v. Wright*, 449 F.3d 709, 717 (6th Cir. 2006) ("fighting words" are one of the limited categories of speech that are not afforded protection—fighting words are "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[76] See *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001); *Watts v. United States*, 394 U.S. 705, 708 (1969); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) ("threats of violence at outside the First Amendment").

[77] *Black*, 538 U.S at 359.

[78] 477 F.3d 347, 359 (6th Cir. 2007).

[79] *Id.* at 359.

[80] *Id.* at 352.

[81] *Id.* at 359.

[82] *Id.* at 360.

[83] 536 F. Supp. 2d 857, 876 (S.D. Ohio 2008). To give context to this term, it is a reference to the City of Cincinnati which combines the word "Cincinnati" with a racially derogatory term, to form one word that is still racially derogatory. The Plaintiff stated at the Cincinnati City Council meeting that "this ain't Cincinnati, this is 'N*****nati'." The Plaintiff used this term "as part of a political 'training' exercise to demonstrate that no matter how you cloak racial epithets, they are still racial and they are insensitive." *Id.*

mayor, as chair of the meeting, was responsible for preserving order.[84] The Court also recognized that the interest in conducting orderly city council meetings was a compelling state interest and that the action of turning off the microphone was narrowly tailored to achieve the interest of preventing the plaintiff from inciting those at the meeting and prevent it from becoming disorderly.[85]

Significantly, the court reasoned that the mayor "correctly construed the term 'n*****nati' to be a highly offensive and degrading racial slur when used by any member of the public at a government meeting."[86] The Court concluded that "[w]hen [the term] was directed to citizens in the audience, who were already restive, it was likely to incite the members of the audience during the meeting, cause disorder, and disrupt the meeting."[87] On this basis, and under those circumstances, shutting off the microphone was reasonable and constitutionally permissible.

It is also important to note in this section that several Michigan statutes prohibit and criminalize "cursing and swearing."[88] But it is likely that any such statute is unenforceable as unconstitutional.

M.C.L. § 750.103 provides that "any person who has arrived at the age of discretion, who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor." The constitutionality of M.C.L. § 750.103 was questioned by the Sixth Circuit in *Leonard v. Robinson* on the basis that it "if not facially invalid, is radically limited by the First Amendment."[89]

M.C.L. § 750.337 regulated profanity in the presence of women and children. But it was held unconstitutional by the Michigan Court of Appeals in *People v. Boomer* on the basis that it was unconstitutionally vague.[90] The Court also concluded that the statute violated the First Amendment because it "reache[d] constitutionally protected speech and it operate[d] to inhibit the exercise of First Amendment rights."[91] Accordingly, in 2015, the Michigan legislature repealed M.C.L. § 750.337 which prohibited indecent language used in the presence of women and children.

Moreover, given that city council meetings are broadcast on CTN, it is also important to consider the role of the Federal Communications Commission ("FCC") in

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] See M.C.L. § 750.337; M.C.L. § 750.170.
[89] 477 F.3d at 359-60.
[90] 250 Mich. App. 534; 655 N.W.2d 255 (2002)("in order to pass constitutional muster, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").
[91] *Id.* at 259.

regulating profanity, indecency, and obscenity broadcast on radio or television. Indeed, the FCC retains authority to regulate obscene, indecent, or profane broadcast content on radio and television.[92] The United States Supreme Court upheld this authority against a First Amendment challenge in *FCC v. Pacifica*, concluding that prohibiting such content at certain times of the day did not violate the First Amendment.[93]

Significantly, indecent and profane content is afforded some First Amendment protection while obscene content is not.[94] Thus, the FCC currently limits "indecent" or "profane" content to be broadcast between the hours of 10:00 p.m. to 6:00 a.m. where there not a reasonable risk that children may be in the audience. Because it is unprotected, the FCC is permitted to prohibit the broadcast of obscene content at any time.[95]

The FCC has defined "indecent" and "profane" content in its own guidance documents. It has concluded that for material to be considered "indecent" it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive or measured by contemporary community standards for the broadcast medium."[96] The FCC defines "profane" as "those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[97]

Obscenity, which again is not protected speech, was defined by the Supreme Court in *Miller v. California*.[98] Material is obscene if it meets the following test:

> (1) Whether the average person, applying contemporary community standards, would find the work appeals to the prurient interest;
>
> (2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined in state law; and
>
> (3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[99]

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[92] See 18 U.S.C. § 1464 ("whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years or both").
[93] 438 U.S. 726, 739-41 (1978).
[94] See *Sable Commc'ns of Cal., Inc. v. FCC*, 429 U.S .115, 126 (1989).
[95] *Id.*
[96] Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, at ¶¶ 7-8 (2001).
[97] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards Program", 19 F.C.C.R. 4975, ¶ 13 (2004).
[98] 413 U.S. 15, 23 (1973).
[99] *Id.*

Obscenity may be prohibited without qualification because it is not entitled to any First Amendment protection.

While it is important to acknowledge the FCC's role in the regulation of speech protected by the First Amendment, it is equally important to note that FCC regulations and the accompanying interpretive case law do not provide a basis for Council to regulate profanity at Council meetings. Instead, this authority means that the FCC may regulate ***CTN's broadcast*** of profanity that happens to occur during Council meetings. Thus, notwithstanding FCC broadcasting regulations, a council rule prohibiting all profanity during Council meetings would violate the First Amendment as set forth in the First Amendment discussion above.

Rules Prohibiting Personal Attacks

A rule prohibiting personal attacks may violate the First Amendment because it carries a higher risk of viewpoint discrimination. Thus, any such rule should be reviewed carefully to avoid running afoul of the First Amendment and the case law on this issue is divided as demonstrated below.

Notably, the United States Supreme Court, while not addressing such speech in limited public forums, has at least suggested that an "attack rule" could be considered viewpoint discrimination.[100] Several lower court cases also illustrate how a "personal attack rule" could easily constitute viewpoint discrimination. For example, a federal district court in New Mexico concluded that a proscription against "any negative mention" of members of the city council or their employees at a municipal meeting was viewpoint discrimination and failed strict scrutiny.[101] The Seventh Circuit Court of Appeals also concluded that a mayor violated the First Amendment by refusing to allow a citizen activist to address the city council unless the activist first apologized for berating a city employee at a public gathering several days earlier.[102]

Moreover, many courts have struck down, or at the very least, questioned rules against "personal attacks." For example, in *Timmon v. Wood*, the Sixth Circuit Court of Appeals found that a reasonable jury could conclude a personal attack rule violated the First Amendment on the basis that it was not "narrowly tailored" and thus burdened more speech than necessary to achieve the legitimate government interest in the preservation of order in city council meetings.[103]

The council rule at issue in that case prohibited "slanderous or profane remark[s] which disturb[ ], disrupt[ ] or otherwise impede[ ] the orderly conduct of any council

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[100] *Matal v. Tom*, ___ U.S. ___, 137 S. Ct. 1744, 1763 (2017) (stating that "[g]iving offense is a viewpoint").
[101] *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1171-72 (D.N.M. 2014).
[102] *Surita v. Hyde*, 665 F.3d 860, 866, 872 (7th Cir. 2011).
[103] 316 Fed. Appx. 364, 366 (6th Cir. 2007).

meeting."[104] Under this rule, a citizen was reprimanded for: (1) accusing the city clerk of violating the Michigan Constitution by referring to his companion as his husband at a state-sponsored event, (2) calling a city council member a "cheater' based on allegations that she remained at the polls longer than permitted on election day, (3) labelling a former police officer "old school," and (4) disagreeing with that police officer's comments by stating that he "needs to stay home" rather than voice his opinions at city council meetings.[105]

The Court noted that the legitimate government interest justifying the rule was "the preservation of order in city council meetings to ensure that the meetings can be efficiently conducted." [106] But the Court opined that the rule appeared "to burden substantially more speech than necessary to achieve this interest." [107] The Court reasoned that after viewing a tape of the meeting, a reasonable jury could reject the assertion that applying the rule to the plaintiff's comments served the city council's interest in ensuring order.[108]

Other courts have overruled certain "personal attack" rules on the basis that they failed to focus on the *conduct* of the speaker as opposed to the individual's *speech.* Indeed, the Ninth Circuit Court of Appeals has found that personal attack rules that do not focus on conduct violate the First Amendment.

For instance, in *Acosta v. City of Costa Mesa*, the Ninth Circuit Court of Appeals found that a city ordinance making it a misdemeanor for members of the public who speak at city council meetings to engage in "insolent" behavior was facially invalid because it was overbroad.[109] The Court noted that the ordinance improperly permitted the city to "prohibit non-disruptive speech that is subjectively 'impertinent,' 'insolent,' or essentially offensive . . . ."[110] The Court concluded that the ordinance was overbroad "because it unnecessarily swe[pt] a substantial amount of non-disruptive, protected speech within its prohibiting language."[111]

Similarly, in *White v. City of Norwalk*, the Ninth Circuit Court of Appeals found that a prohibition on "personal, impertinent, slanderous or profane remarks" is constitutional only if understood to apply to conduct disruptive to the meeting and not to words alone.[112]

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[104] *Id.* at 365.
[105] *Id.*
[106] *Id.* at 366.
[107] *Id.*
[108] *Id.*
[109] *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812 (9th Cir. 2013).
[110] *Id.* at 815.
[111] *Id.*
[112] 900 F.2d 1421, 1424 (9th Cir. 1990).

While many courts have struck down rules prohibiting personal attacks, other courts in other jurisdictions have upheld them, finding that they were content-neutral. For instance, in *Steinburg v. Chesterfield Cty. Planning Comm'n*, the Fourth Circuit Court of Appeals rejected a facial challenge to a county policy forbidding "personal attacks" by commenters at public meetings, upholding the rule as a content-neutral restriction on the manner of speech.[113] The Court concluded "that a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order."

The Court succinctly set forth the public interests served by a personal attack rule:

> A policy against "personal attacks" focuses on two evils that could erode the beneficence of orderly public discussion. First, as an insult directed at a person and not speech directed at substantive ideas or procedures at issue, a personal attack is surely irrelevant—unless, of course, the topic legitimately at issue is the person being attacked, such as his qualifications for an office or his conduct. Second, as an insult directed at a person and not the issues at hand, a personal attack leads almost inevitably to a response defense or counter-attack and thus to argumentation that has the real potential to disrupt the orderly conduct of the meeting.[114]

The Court further concluded that "[s]uch a policy is deemed content-neutral when it serves purposes unrelated to the content of expression even if it has an incidental effect on some speakers or messages and not others."[115] The Court noted that denying a speaker the right to engage in personal attacks "does not interfere with what that speaker could say without employing such attacks. The same message could be communicated, indeed probably more persuasively . . . ."[116]

Similarly, in *Scroggins v. City of Topeka*, a federal district court upheld a rule against personal attacks as a content-neutral restriction on speech.[117] The rule at issue provided that: "Any person making personal, rude or slanderous remarks, or who becomes boisterous, while addressing the council shall be requested to leave the meeting and may be at once barred by the presiding officer from further audience before the council."[118]

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[113] 527 F.3d 377 (4th Cir. 2008).
[114] *Id.* at 386-87.
[115] *Id. at 377.*
[116] *Id.* at 387.
[117] 2 F. Supp. 2d 1362, 1371 (D. Kan. 1998).
[118] *Id.* at 1366.

In concluding that the rule was content-neutral, the court reasoned that the prohibition was "not based on the council's disagreement with any particular message, is unrelated to any particular viewpoint being expressed, and serves purposes unrelated to the particular content of the speech."[119] The Court noted that the rule prohibited personal attacks on anyone—not just city employees and officials and focused "on the inherently disruptive nature of a personal attack in a council meeting and not the expressive content of the personal attack."[120]

Also, in *Charnley v. Town of South Palm Beach*, the Court found that "disparaging personal remarks" were unprotected speech during a town council meeting.[121] The Court noted that "to the extent Plaintiff attempted to question individual members of the council, speak beyond her allotted time, remain at the podium, and *make disparaging personal remarks*, her speech was not protected and thus, her First Amendment rights were not violated."[122]

Finally, in *Anderson v. City of Bloomington*, the court rejected a First Amendment challenge to a city council's rules of decorum, which, among other things, required speakers to "refrain" from "personal attacks" concluding that the rules were viewpoint neutral, regulating conduct not views.[123] The Court reasoned that the rules did not "restrict any particular viewpoint" and instead were "aimed at a speaker's conduct."[124] The Court concluded that "[r]ules that focus on a speaker's manner of speech rather than the content of the speech do not violate the constitution."[125]

It should also be noted that in some instances, it may be difficult to distinguish between irrelevant personal attacks and protected speech on matters of public concern regarding individual public officials. For instance, a federal district court in Michigan in *Gault v. City of Battle Creek*, dealt with the following situation: although the City Commission had no "personal attack" rule, the Plaintiffs were ruled out of order during public comment when they raised concern about the continued employment of the police chief on the basis that he was unfit to serve as chief.[126] Specifically, the Plaintiffs asserted that the chief authorized the illegal cloning of a pager of an officer of the department which they further alleged was motivated by the chief's animosity toward that officer due to an affair the chief had with that officer's wife.[127]

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[119] *Id.* at 1371.
[120] *Id.*
[121] No. 13-81203, 2015 WL 12999749 at *7-8 (S.D. Fla. Mar. 23, 2015).
[122] *Id.* (Emphasis Added).
[123] 2012 WL 2034174 at *3 (S.D. Ind. 2012).
[124] *Id.* at *3.
[125] *Id.*
[126] 73 F. Supp. 2d at 812-814.
[127] *Id.*

The City asserted that the Plaintiffs' comments were not protected by the First Amendment because they were personal attacks concerning private matters.[128] The federal district court disagreed, concluding that the allegations were matters of public concern properly at issue at the meeting.[129] The court reasoned that the allegations related to matters of public concern because they could relate to the morale, leadership, and teamwork of the police department.[130] Thus, the Court concluded that the restriction of the Plaintiffs' attempts to raise these issues at public comment violated their First Amendment rights.[131] This analysis is consistent with the principle that when it comes to personal attacks, public officials must have a thicker skin than the ordinary citizen.[132]

In sum, a rule prohibiting personal attacks is likely permitted if carefully drafted to avoid viewpoint discrimination and targeted at conduct. Such a rule should not be based on a disagreement with any particular message and should instead focus on the disruptive nature of the personal attack, not its expressive conduct. Personal attacks that do not relate to City business can likely be prohibited.

Rules Prohibiting Campaign Materials

A prohibition on certain campaign materials in a public meeting may be permissible under the First Amendment if it is view-point neutral. An Eleventh Circuit Court of Appeals case is illustrative of this point. The Eleventh Circuit Court of Appeals found that a prohibition against the display of campaign messages related to a local political campaign at a city council meeting "was content-based but viewpoint-neutral" and thus, permissible.[133] The rule was viewpoint neutral because the mayor prohibited only speech in which the subject matter pertained to the local political campaign but restricted promotional campaign materials evenhandedly without regard to the particular candidate that was being endorsed.[134]

Rules Prohibiting Livestreaming or Video Recording

A rule prohibiting livestreaming or video recording is likely not permissible under the First Amendment. Further, as set forth in the section above it is also not permissible under the OMA.

The right to livestream or video record a meeting is likely protected by the First Amendment. But that right is not yet clearly defined by the courts. Given the undefined

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[128] *Id.* at 815-16.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] See *Mattox v. City of Forest Park,* 183 F.3d 515, 522 (6th Cir. 1999)("Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views."
[133] *Cleveland v. City of Cocoa Beach*, 221 Fed. Appx. 875, 878-79 (11th Cir. 2007).
[134] *Id.*

contours of the right to livestream and video record public officials, we do not recommend a rule prohibiting livestreaming or video recording.

In sum, the right of the public to gather information about government officials and disseminate is recognized. Indeed, the First Circuit Court of Appeals has "explained that gathering information about government officials in a form that can be readily disseminated 'serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.'"[135]

Livestreaming and video recording appear to qualify as the gathering of information in a form that can be readily disseminated. But at this time, there is little case law that discusses whether a prohibition on livestreaming a meeting passes First Amendment muster. "Neither the Sixth Circuit nor the Supreme Court has taken up the issue of whether livestreaming on social media qualifies as a form of expression that is protected by the First Amendment.[136] Further, at least one federal district court's very recent "independent research indicate[d] that no federal court has yet to decide this issue."[137]

There is a similar lack of consensus with respect to video recording. The Supreme Court has yet to decide the issue.[138] There is currently a split among federal courts as to whether video recording is expressive conduct. Numerous courts have held that video recording is not speech, but is instead protected by the First Amendment through a right of access theory. For example, the Third Circuit Court of Appeals has found that a municipality's act of preventing an individual from videotaping a planning commission meeting did not "interfere[ ] with speech or other expressive activity" because recording a government meeting was not expressive activity.[139]

The Seventh Circuit Court of Appeals has also noted that "recording police activity in public falls squarely within the First Amendment right of access to information." On the other hand, there is a competing view that video recording is considered "speech" for First Amendment purposes. In accordance with this theory, several courts recognize video recording as either expressive conduct or conduct as a first step to speech.[140]

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[135] *Gerick v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (quoting *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)).
[136] *Knight v. Montgomery County*, 470 F. Supp. 3d 760, 765 (M.D. Tenn. 2020).
[137] *Id.*
[138] *People for Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 566 (M.D. N.C. June 12, 2020).
[139] *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999).
[140] *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018)("[t]he act of recording is itself an inherently expressive activity"); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording").

At this time, it is "unclear whether the Sixth Circuit views video recording as expressive conduct constituting speech."[141] In *S.H.A.R.K v. Metro Parks Serving Summit Cnty.*, the Sixth Circuit Court of Appeals viewed the right to record video as being protected by the First Amendment through a right-of-access theory instead of a freedom-of-expression theory, noting that "[a]lthough access cases are rooted in First Amendment principles, they have developed along distinctly different lines than have freedom of expression cases."[142]

But the Sixth Circuit Court of Appeals also recently decided a First Amendment challenge to a state court rule prohibiting video recording in certain areas of the courthouse, in which it appeared to depart from *S.H.A.R.K*.[143] The Court did not analyze whether the restriction on recording interfered with expressive conduct or right of access. But the Court indicated that the local rule implicated speech concerns and thus should be subject to a forum analysis, stating that "[n]o one denies that [the rule] is a reasonable restriction on speech."[144]

Removal from a Meeting

A council action removing an individual from a meeting is permissible under the First Amendment only if the individual is disrupting the meeting and is not removed for his or her views. Indeed, courts generally disfavor the removal of individuals from meetings unless the individual is disorderly or disrupting the meeting.[145] This is because the First Amendment, in addition to affirmatively protecting speech at public meetings, also prohibits government officials from punishing individuals for engaging in protected speech.[146] Courts have noted that "[e]ven in a limited public forum like a city council meeting, the First Amendment tightly constrains a government's power; speakers may be removed only if they are actually disruptive."[147]

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[141] *Knight*, 470 F. Supp. 3d at 767.
[142] 499 F.3d 553, 559 (6th Cir. 2007); see also *McKay v. Federspiel*, No. 14-cv-10252, 2014 WL 140091 (E.D. Mich. Apr. 10, 2014)("The Sixth Circuit has clarified, however, that a member of the public's right to record involves the First Amendment right to access information, not freedom of expression").
[143] *Enoch v. Hamilton Cty. Sheriff's Office*, 818 F. App'x 398 (6th Cir. 2020).
[144] *Id.* at 405.
[145] See *Denhe v. City of Reno*, 222 Fed. Appx. 560, 561 (9th Cir. 2007)(removing an individual from a public meeting "did not violate the Constitution provided that the individual is sufficiently disruptive and is not removed because of his or her views").
[146] *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1949 (2018).
[147] *Norse*, 629 F.3d at 979 (Kozinski, J., concurring).

Enacting a Prospective Ban from a Meeting

A prospective ban on an individual from an otherwise public city council meeting is likely not permissible under the First Amendment. In *Walsh v. Enge*, a federal district court in Oregon struck down a 60-day exclusion order imposed on an individual who had been disruptive at a city council meeting and who had a repetitive history of disturbances at city council meetings.[148] The court reasoned that maintaining decorum did not require prolonged and future exclusions from council meetings.[149] The court further noted that the city had a simple alternative—to order any disruptive individual to leave the meeting he or she disrupts only for the duration of the meeting.[150]

Significantly, the court noted that it could find no court decision allowing "an incident, or even several incidents of actual disruption to justify the prospective exclusion of an individual from future public meetings."[151] The court concluded "to prospectively exclude [the plaintiff], or any other individual, based on a past incident, or even several past incidents, of disruption is not exclusion from a given meeting for actual disruption: it is an impermissible prospective exclusion for possible or assumed disruption in the future."[152] However, a specific threat of harm may warrant another result. If an extreme situation presented itself, for example, threats to come back to a subsequent meeting and cause harm, injunctive relief from a court may be an appropriate remedy.

[148] 154 F. Supp. 3d 1113, 1132 (D. Oregon 2015).
[149] *Id.* at 1131.
[150] *Id.*
[151] *Id.*
[152] *Id.*