







New England **First Amendment** Coalition

Protecting First Amendment Freedoms and the Public's Right to Know

111 Milk Street, Westborough MA 01581 | 508.983.6006 | nefac.org      

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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SENT VIA EMAIL TO MAYOR@MANCHESTERNH.GOV

City of Manchester
One City Hall Plaza
Manchester, NH 03101
Attn: Mayor Jay Ruais

July 31, 2024

RE: RULE 3 AMENDMENT

Dear Mayor Ruais,

I'm writing on behalf of the New England First Amendment Coalition. NEFAC is the region's leading advocate for First Amendment freedoms and the public's right to know about government. The coalition is a non-partisan and non-profit organization that believes in the power of citizen engagement in a democratic society. Its Board of Directors and Advisors include many of the state's top media attorneys, journalists and fellow open government advocates such as the ACLU of New Hampshire.

Our coalition is concerned with the amendment to Rule 3 of the Board of Mayor and Aldermen that was adopted on May 7, 2024. This amendment provides that:

"Speakers shall be civil in their language and presentation. Profanity, threats, and the use of vulgar language or fighting words are prohibited . . . The use of banners, flags, signs, or other items which may create a security concern, obstruct the view of other members of the public, or restrict public access within the Aldermanic Chambers, is also strictly prohibited."

This amendment — at least in part — violates Part I, Articles 22 and 32 of the New Hampshire Constitution, which protect the right of citizens to peaceably assemble to petition their elected representatives. These restrictions on speech also violate the First Amendment of the U.S. Constitution.

In 2022, the City of Nashua Board of Aldermen enacted a similarly unconstitutional ordinance regulating public speech at its meetings. In pertinent part, the ordinance held that "[c]rude, vulgar, profane, and/or obscene remarks are prohibited." Following our letter to Nashua officials, they revised the ordinance to address many of our concerns. We urge you to do the same with Rule 3 and revise it in accordance with our guidance below.

Limited Public Forums

Government meetings that are opened for public comment are considered limited public forums. In such a forum, speech restrictions must be viewpoint neutral and reasonable. Categories of speech such as profanity and vulgarity are protected by the First Amendment and cannot be reasonably restricted during such meetings. The First Amendment also protects speech that may be considered uncivil, so long as such speech doesn't veer into unprotected categories of expression such as true threats and incitement.

Included in protected categories of speech are non-verbal forms of expression, such as banners, flags and signs. While there may be circumstances that would allow reasonable restrictions on these types of expression, a general prohibition based on a “security concern” without any additional guidance as to what would constitute such a concern is ripe for impermissible viewpoint discrimination.

Civility Requirements

In March 2023, the Massachusetts Supreme Judicial Court found unconstitutional a similar “civility code” under the Massachusetts Declaration of Rights. See *Barron v. Kolenda*, 291 Mass. 408, 418 (2023). The code in question required that “[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated” at meetings of the Southborough Board of Selectmen.

Noting that the Massachusetts Declaration of Rights provided that “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request of the legislative body . . . redress of the wrongs done to them,” the court observed that “‘peaceable and orderly’ is not the same as ‘respectful and courteous’” and that “[t]here was nothing respectful or courteous about the public assemblies of the revolutionary period.” *Id.* The court then held that the content sought to be prohibited — “discourteous, rude, disrespectful, or personal speech about government officials and governmental actions” — was clearly protected and thus the prohibition was impermissible under the state’s constitution.

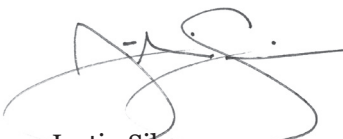
Part I, Article 32 of the New Hampshire Constitution is nearly identical to the provision of the Massachusetts Declaration of Rights at issue in *Barron*. The New Hampshire Supreme Court gives special deference to decisions of the Massachusetts Supreme Judicial Court that interpret identical provisions. See *In re Juvenile*, 2003-195, 150 N.H. 644, 652 (2004) (“Because the language of the . . . [c]lause is identical, and given the shared history of our state constitutions, we again give weight to the Massachusetts Court’s interpretation of an identical provision.”) As was the case in Nashua, the *Kolenda* holding is also instructive here: government cannot require the public to express itself only in ways officials find civil and unobjectionable.

Viewpoint Neutral and Reasonable

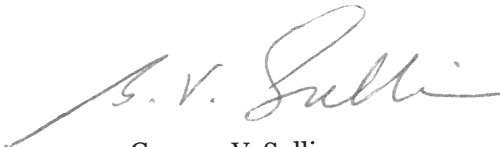
Despite our concerns with the amended Rule 3, the city is still able to regulate public comments in a viewpoint neutral and reasonable manner. It is permissible under state and federal constitutions, for example, to designate when in a meeting such speech is allowed or to set reasonable time limits for those speaking. It is also permissible for the city to enforce reasonable restrictions on the size of banners, flags, and signs. Without these limits on expression, one might argue, government meetings cannot proceed effectively and efficiently. These limits, however, must be viewpoint neutral and reasonable. Much of the recent amendment to Rule 3 is not.

Again, we request Rule 3 be revised to align with the public’s free speech rights pursuant to Part I, Articles 22 and 32 of the New Hampshire Constitution and the First Amendment of the United States Constitution. We welcome the opportunity to assist in revising the rule or helping in any other way. Thank you for your time and consideration.


Sincerely,



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NEFAC Executive Director



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Henry Klementowicz
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