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December 5, 2013

Mayor Neil M. O'Leary
City of Waterbury
City Hall Building
235 Grand Street
Waterbury, CT 06702

Sent via facsimile and
USPS Certified First Class mail

Dear Mayor O'Leary,

We are writing on behalf of Waterbury resident and taxpayer Cicero B. Booker Jr. about paragraph 13 of the 2013-2015 "Rules of the Waterbury Board of Aldermen," which states in part: "There shall be no *ad hominem*, personal, malicious, slanderous or libelous remarks" during "Public Speaking portions of meetings and public hearings" before the Board. This public comment policy, as presently worded, violates the First Amendment to the United States Constitution and counterpart clauses of the Connecticut Constitution.

Whether the public comments segment of Board of Aldermen meetings be a designated, limited or nonpublic forum, the controlling First Amendment rules are the same. The City possesses the power to impose reasonable restrictions on the permitted subjects for public discussion: for instance, by requiring that citizens' comments relate to the meeting's agenda. But the City cannot restrict comments within a permitted subject area based on the speaker's viewpoint. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59-60 (1983); Marcavage v. City of New York, 689 F.3d 98, 104 (2d Cir. 2012) cert. denied, 133 S. Ct. 1492, (2013). Under paragraph 13, speech praising Board of Aldermen members and other City officials will be allowed, but "*ad hominem*" or "personal" remarks -- in other words, remarks critical of such individuals -- will be prohibited. The policy thus promotes paradigmatic viewpoint discrimination. This the First Amendment forbids.

Paragraph 13 also prohibits "malicious" remarks, which we take to mean remarks that are improperly motivated. The First Amendment forbids this as well. Speech rights cannot be conditioned on the speaker's motive. Hustler Magazine v. Falwell, 485 U.S. 86 (1988).

Paragraph 12 prohibits, in addition, "slanderous" or "libelous" remarks. It is true that slanderous and libelous remarks are constitutionally unprotected. However, remarks directed to public figures are slanderous or libelous only when the speaker knows, or at least suspects, that the remarks are false. NY Times Co. v. Sullivan, 376 U.S. 254 (1964). The president is obviously not in a position to make this judgment or other sensitive judgments that a slander or libel determination requires, such as whether the allegedly slanderous or libelous statement can be objectively disproved. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). Under the First Amendment, the only permissible remedy for slander or libel is a civil defamation action by the victim.

The policy also violates the even more speech-protective provisions of the Connecticut Constitution, Article First, Sections 4, 5 and 14. Under these provisions, speech and petitioning activities are protected on all government premises that are open to the public unless the activities are incompatible with the premises' normal uses. Leydon v. Town of Greenwich, 257 Conn. 318, 348 (2001); State v. Linares, 232 Conn. 345, 386 (1995). We acknowledge that off-agenda citizen comments, at a Board of Aldermen meeting, might be incompatible with the premises' normal use at that time because they could deflect the meeting from its purposes. However, an agenda-related comment, otherwise compatible, does not become incompatible merely because it criticizes rather than praises a Board member or other city official.

In the event litigation becomes necessary to remove this unconstitutional policy, the plaintiffs, if successful, will be entitled to recover damages and attorneys' fees from the City pursuant to 42 U.S.C. Sections 1983 and 1988. We hope to avoid this expedient. If you wish to discuss the matter further, please feel free to contact us, bearing in mind the Second Circuit's often-repeated caution that any delay in the exercise of First Amendment rights normally constitutes irreparable injury per se. Elrod v. Burns, 427 U.S. 347, 373 (1976); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 492 (2d Cir. 2007). Thank you for your anticipated attention and the courtesy of a reply by January 15, 2014.

Respectfully,

David J. McGuire
Staff Attorney
Sandra J. Staub
Legal Director

Martin Margulies
Cooperating Counsel

Cc(all via email): Alderman Paul Pernerewski Jr.
Alderman Jerry Padula
Alderman Steven Giacomi
Alderman Stephanie Cummings
Alderman Christopher Ursini
Alderman Gregory Hadley
Alderman Anthony Piccochi
Alderman Ernest Brunelli
Alderman Victor Lopez, Jr.
Alderman Ronald Napoli, Jr.
Alderman Joseph Begnal, Jr.
Alderman Paul Ciochetti
Alderman Ryan Mulcahy
Alderman Anne Phelan
Alderman Lawrence DePillo

SJS/jjs