FIRE
Foundation for Individual Rights and Expression

March 21, 2025

Bangor City Council
City Hall
257 West Monroe Street
Bangor, Michigan 49013

Sent via U.S. Mail and Electronic Mail (l.farmer@bangormi.org; j.muenzer@bangormi.org; a.garcia@bangormi.org; d.mccrumb@bangormi.org; h.rivers@bangormi.org; j.uplinger@bangormi.org; p.serratos@bangormi.org)

Dear Council Members:

FIRE is disappointed not to have received a response to our February 24 letter concerning the City of Bangor's unconstitutional threat to pursue legal action against speakers for statements "that have caused harm to the City." As we explained, the First Amendment prohibits such action, even if the statements in question are false.

Governments cannot be defamed. The Supreme Court has left no doubt about this.[1] The prospect of the government hauling speakers into court for allegedly false criticism is repugnant to the First Amendment. "Criticism of government is at the very center of the constitutionally protected area of free discussion."[2] Our nation witnessed the danger of this assertion of government power over 200 years ago with the passage of the Sedition Act, which criminalized "false, scandalous, and malicious" statements about the federal government.[3] President John Adams' administration infamously used the Act to target critics and suppress dissent. The immensely unpopular Act expired shortly after Thomas Jefferson succeeded Adams. Since then, First Amendment precedent has developed to unequivocally forbid any return to such repressive tactics.

Even without further action, the City's threat of legal repercussions violates the First Amendment, which "prohibits government officials from relying on the threat of invoking legal

[1] *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964) ("For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.") (citation omitted); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (The "Constitution does not tolerate in any form" the "spectre of prosecutions for libel on government.")

[2] *Rosenblatt*, 383 U.S. at 85.

[3] *Alien and Sedition Acts (1798)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts.

sanctions and other means of coercion … to achieve the suppression of disfavored speech."[4] By maintaining this threat, the City risks costly and time-consuming litigation. FIRE again urges the City Council to promptly revoke the City Attorney's authority to take legal action against speakers over constitutionally protected expression.

We request a substantive response no later than March 28, 2025.

Sincerely,

Aaron Terr, Esq.
Director of Public Advocacy

Cc: Shelly Umbanhowar, City Clerk

Encl.

[4] *NRA of Am. v. Vullo*, 602 U.S. 175, 189 (2024) (citation omitted); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("[T]he threat of sanctions may deter … almost as potently as the actual application of sanctions") (citation omitted).

FIRE
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February 24, 2025

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257 West Monroe Street
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Sent via U.S. Mail and Electronic Mail (l.farmer@bangormi.org; j.muenzer@bangormi.org; a.garcia@bangormi.org; d.mccrumb@bangormi.org; h.rivers@bangormi.org; j.uplinger@bangormi.org; p.serratos@bangormi.org)

Dear Council Members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech, is concerned that the Bangor City Council authorized the City Attorney to "take action against speakers who knowingly lie about the City." Such action would violate the First Amendment, which completely bars government entities like the City of Bangor from suing for defamation. FIRE thus calls on the City Council to rescind its decision and to recommit to its duty to uphold the First Amendment.

Our concerns arise out of the City Council's January 6, 2025, approval of a motion "to allow City Attorney [Scott] Graham to file charges with the court against all parties involved in statements that have caused harm to the City."[1] At the Council's January 21 meeting, Graham asserted this grant of authority is in fact more "limited," stating at various points that:[2]

- "What the City's interested in doing is limiting false statements, especially statements that are knowingly false, that damage the reputation of the city, its elected officials, and its appointed officials."
- "If someone says something that is an objective fact, can be compared to an objective fact, can be verified, is not verified, is a false statement—they have no right to do that."
- "Knowingly false statements that harm reputation or would be considered by a reasonable person to be defamatory—well if someone's going to utter those things, they need to know that the city doesn't have to tolerate that."

[1] CITY OF BANGOR, BANGOR COUNCIL MEETING MINUTES (Jan. 6, 2025), https://www.cityofbangormi.org/wp-content/uploads/010625.Meeting-Minutes.Draft_.Date-Fixed.pdf.

[2] Official City of Bangor, MI, *City of Bangor Official YouTube*, YOUTUBE (Jan. 22, 2025), https://www.youtube.com/watch?v=_lRNdHPilLo.

- "If someone says, 'the City Manager is paid too much, it is my opinion the City Manager is paid too much,' well of course they have a right to say that. Of course. They can voice opinions about things like that. … But when they make a knowingly false statement, or a statement that is so easily shown to be false: the City Manager gets two paychecks. They don't have a right to do that. They don't have the right to defame a person by making a knowingly false statement that harms reputation."

Graham said the City has "repeatedly" received complaints that City Manager Justin Weber receives two paychecks and that "anyone who checked records would know it's false." Two days later, Weber issued a statement claiming the "publication of false statements regarding the operation of the City has plagued the City of Bangor."[3] He clarified that the Council "authorized the City Attorney to take action against speakers who knowingly lie about the City by filing actions to stop or enjoin the lies and by seeking to recover amounts equal to the damage caused to the City by the lies."[4]

Even if so limited, the January 6 motion raises serious First Amendment issues. Most pointedly: **The First Amendment flatly prohibits government entities from bringing defamation actions, even against speakers who make knowingly false statements.**

The Supreme Court has more than once rejected the notion that actions for "libel on government have any place in the American system of jurisprudence."[5] Penalizing speech critical of the government "strikes at the very center of the constitutionally protected area of free expression."[6] "Public debate must not be inhibited by the threat that one who speaks out on social or political issues may be sued by the very governmental authority which he criticizes."[7] Were it otherwise:

> Every criticism of public expenditure, policy, management or conduct of public affairs would place its utterer in jeopardy. It is difficult to imagine anything more destructive of democratic government than the power in the hands of a corrupt government to stifle all opposition by free use of the public treasury to silence critics by suit.[8]

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[3] *City of Bangor clarifies city council resolution on false public statements*, WSJM (Jan. 23, 2025), https://www.wsjm.com/2025/01/23/city-of-bangor-clarifies-city-council-resolution-on-false-public-statements.

[4] *Id.*

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964) (quoting *City of Chicago v. Trib. Co.*, 139 N.E. 86, 91 (Ill. 1923) (Chicago could not constitutionally sue newspaper for libel, even though newspaper admitted it published malicious and false statements about the city with intent to destroy its credit and financial standing)); *see also Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (The "Constitution does not tolerate in any form" the "spectre of prosecutions for libel on government.").

[6] *Sullivan*, 376 U.S. at 292.

[7] *Edgartown Police Patrolmen's Ass'n. v. Johnson*, 522 F. Supp. 1149, 1152 (D. Mass. 1981) (citing *Sullivan*, 376 U.S. at 292).

[8] *Johnson City v. Cowles Commc'ns, Inc.*, 477 S.W.2d 750, 754 (Tenn. 1972).

Federal and state courts thus consistently bar defamation claims by cities and other governmental entities.[9] In *Philadelphia v. Washington Post Co.*, for example, a federal court dismissed a defamation suit alleging the Post made false and malicious statements about the Philadelphia Police Department that brought the city and police into disrepute. The court held the "City cannot maintain an action for libel on its own behalf" because a "governmental entity is incapable of being libeled."[10] "More fundamentally," the court added, "to permit such a lawsuit to be maintained, either on behalf of the City itself, the citizens of the City, or officials or employees of the City, would plainly violate the First Amendment of the United States Constitution."[11]

The risk that speakers will sometimes say false things about their government cannot override this constitutional barrier. The Supreme Court has recognized that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive."[12]

City officials and employees are free to bring *personal* defamation actions to recoup damages for harm to their individual reputations. But the City Attorney, acting on behalf of the City of Bangor, may not sue or prosecute Bangor citizens for allegedly defamatory statements about the City, its officials, or any other person or entity. As another court explained,[13] this distinction is critical:

> Individuals holding governmental office remain free to vindicate their interests in their good reputations by personal actions for libel. The powerlessness of government itself to do so is the price our society has with absolute constancy stood ready to pay to insure that its citizens retain one of their most basic rights and cherished traditions — that of criticizing the government freely

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[9] *See, e.g.*, *281 Care Committee v. Arneson*, 638 F.3d 621, 634 (8th Cir. 2011) ("A government entity cannot bring a libel or defamation action," even as to "knowingly false political speech."); *Edgartown Police Patrolmen's Ass'n*, 522 F. Supp. at 1152 ("It is well-established that a governmental body may not sue for libel."); *ACLU v. Tarek ibn Ziyad Acad.*, No. 09-138, 2009 U.S. Dist. LEXIS 114738, at *11–12 (D. Minn. Dec. 9, 2009) (public charter school could not sue for defamation or related claims under *Sullivan* and its progeny); *Cowles Commc'ns*, 477 S.W.2d at 753 ("utterances or publications against a government must be considered absolutely privileged … so that the citizen, private or corporate, is free to utter and write critically of its government"); *Cox Enters., Inc. v. Carroll City/Cnty. Hosp. Auth.*, 273 S.E.2d 841, 842 (Ga. 1981) ("Governments and governmental entities cannot maintain an action for libel."); *Cap. Dist. Reg'l Off-Track Betting Corp. v. Northeastern Harness Horsemen's Ass'n*, 399 N.Y.S.2d 597 (N.Y. Sup. Ct. 1977) (dismissing governmental corporation's defamation complaint based on rule that government may not maintain action for defamation).

[10] 482 F. Supp. 897, 898 (E.D. Pa. 1979).

[11] *Id.* at 899.

[12] *Sullivan*, 376 U.S. at 271–72 (cleaned up); *see also see also United States v. Alvarez*, 567 U.S. 709, 718 (2012) (There is no "general exception" to the First Amendment for "false statements," which "comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation."); *City of Chicago*, 139 N.E. at 91 ("[I]t is better that an occasional individual or newspaper that is so perverted in judgment and so misguided in his or its civic duty should go free than that all of the citizens should be put in jeopardy of imprisonment or economic subjugation if they venture to criticize an inefficient or corrupt government.").

[13] *Cox Enters.*, 273 S.E.2d at 846–47 (internal citations omitted).

> and without fear of retaliation. Paraphrasing what Judge Learned Hand wrote in another context, the First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues; upon this principle we have staked our all.

Courts also will toss defamation suits ostensibly brought by city officials or employees in their personal capacities if they target "impersonal discussion of government activity," even if that discussion results in the officials becoming "tinged with suspicion."[14] Government officials cannot use "legal alchemy" to "sidestep" the constitutional bar on government defamation actions "by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."[15]

If Bangor officials believe a constituent has made a false statement about the City, they can publicly condemn the statement, express disagreement, or say why they believe it inaccurate. What they may not do is sue or otherwise punish the speaker.

For the foregoing reasons, FIRE calls on the Bangor City Council to revoke the City Attorney's unconstitutional authority to "take action against speakers who knowingly lie about the City." We request a substantive response no later than March 10, 2025.

Sincerely,

Aaron Terr, Esq.
Director of Public Advocacy

Cc: Shelly Umbanhowar, City Clerk

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[14] *Rosenblatt*, 383 U.S. at 82.

[15] *Sullivan*, 376 U.S. at 292; *see also Edgartown Police Patrolmen's Ass'n*, 522 F. Supp. at 1153 ("Public authorities must not be permitted to stifle commentary concerning their conduct by simply substituting individuals as plaintiffs in a defamation action."). Public officials suing for defamation in their personal capacities also must prove "actual malice"—a legal term of art that means the false statement was made "with knowledge that it was false or with reckless disregard of whether it was false." *Sullivan*, 376 U.S. at 280. "Reckless disregard" is a high bar; it is not enough, as City Attorney Graham suggested, that the speech is "so easily shown to be false." As the Supreme Court explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Rather, there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* Thus, even assuming statements about the City Manager receiving two paychecks are false, the speakers would not be liable for defamation merely because they did not check public records before speaking, as Graham implied.