

August 25, 2021

John McNish  
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**Re: Prosecution of Mr. David Sain pursuant to Uniform Public  
Offense Code Section 11.1**

Mr. McNish:

We write concerning the City of Blue Rapids' prosecution of David Sain pursuant to Uniform Public Offense Code, Section 11.1, for displaying a flag with the words "Fuck Biden" on his private property. We recently became aware of this matter through news media and have since spoken to Mr. Sain. Because this prosecution clearly violates the First Amendment, we urge the City to drop the charges and dismiss the case.

While we do not yet represent Mr. Sain, we are troubled by the implications of the case the City brought against him. Each of us, Mr. Sain included, enjoys a constitutionally protected right to freedom of speech. Criminalizing the political expression inherent in Mr. Sain's flag strikes at the core of that right. Not only is the prosecution unconstitutional, but it also sends a chilling message to all others who would express a political opinion with words some may find offensive.

Caselaw makes clear that "[f]reedom of speech is indispensable to the discovery and spread of political truth" and that "[t]he First and Fourteenth Amendment remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) (internal citations omitted). As set out more fully below, prosecution of Mr. Sain flies in the face of this precedent.

**I. The First Amendment protects Mr. Sain's speech.**

The First Amendment protects Mr. Sain's right to display his political message, even if it contains a swear word. *Cohen v. Cal.*, 403 U.S. 15 (1971), makes clear the Constitution protects political speech even when profane. In *Cohen*, the Court held that Cohen's display of the message "Fuck the Draft" was constitutionally protected, even when made in the Los Angeles County Courthouse.

As was the case in *Cohen*, Blue Rapid's prosecution of Mr. Sain "quite clearly rests upon the asserted offensiveness of the *words* [Mr. Sain] used to



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convey his message to the public. The only ‘conduct’ which [Blue Rapids seeks] to punish is the fact of communication.” *Cohen*, 403 U.S. at 18. (emphasis original). Thus any conviction here would rest “squarely upon [Mr. Sain’s] exercise of the ‘freedom of speech’ protected from arbitrary governmental interference by the Constitution.” *Cohen*, 403 U.S. at 19.

Another case is instructive. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), a dance-rock band’s lead singer applied to register the band’s name—the Slants. The Patent and Trademark Office denied the application, finding the name violated the Lanham Act’s so called “disparagement clause” because the name was a derogatory term for persons of Asian descent. The Court held that the First Amendment prohibited the denial. In doing so, the Court described a “bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” *Tam*, 137 S. Ct. at 1751.

The City’s targeted prosecution of Mr. Sain’s flag is just such a ban and is impermissible viewpoint discrimination. “The ‘public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” *Id.* at 1749 (citing *Street v. New York*, 394 U.S. 576, 592 (1969)).

Similarly, in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Court was unequivocal: “[A] law disfavoring ‘ideas that offend’ discriminates based on viewpoint, in violation of the First Amendment.” *Iancu*, 139 S. Ct. at 2301 (citing *Tam*, 137 S. Ct. 1744). In *Iancu*, another trademark applicant sought to register the mark FUCT. “According to Brunetti, the mark... is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone.” *Brunetti*, 139 S. Ct. at 2297. Because of this pronunciation, the Patent and Trademark Office denied Brunetti’s application just as it had in *Tam*, but this time under the Lanham Act’s “immoral or scandalous” prohibition. The office determined that FUCT was vulgar and not registrable. “On review, the [Appeal] Board stated that the mark was ‘highly offensive’ and ‘vulgar,’ and that it had ‘decidedly negative sexual connotations.’” *Id.* at 2298.

The Supreme Court held that this decision, and the portion of the Lanham Act authorizing it, violated the First Amendment. FUCT’s similarity to “fuck” did not remove it from the First Amendment’s protections. “There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.” *Id.* at 2302.

Finally, in a strikingly similar prosecution to Blue Rapids’ case against Mr. Sain, Roselle Park, New Jersey recently charged a homeowner with violating its obscenity ordinance for also flying a “Fuck Biden” flag. Like Blue Rapids, Roselle Park brought charges under an anti-obscenity ordinance. The ACLU

of New Jersey got involved and warned the town that its actions violated the First Amendment. Then, after analyzing the issue and considering the free speech implications, the town dismissed the charges.<sup>1</sup>

We urge you to do the same.

**II. The City’s ordinance is not a reasonable time, place, or manner regulation as applied to Mr. Sain.**

The ordinance as a whole, when applied as intended, is likely valid. But in this instance, the City’s ordinance cannot be justified as a valid time, place, and manner regulation. Just like the statute at issue in *Cohen*, the Uniform Public Offense Code, Section 11.1, is broadly applicable and makes no distinction between the place or manner of the speech it regulates. No fair reading of the ordinance, in this instance, “can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.” *Cohen*, 403 U.S. at 19.

As a result, the City’s attempted regulation of Mr. Sain’s speech should fail.

**III. Mr. Sain’s flag is not obscene and no other exception to the First Amendment applies.**

It is true that there are certain categories of speech which enjoy more limited protection under the First Amendment. But Mr. Sain’s speech does not fall into one of those relatively few categories.

Despite the ordinance the City charged him under, Mr. Sain’s flag is not obscene. “Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Cohen*, 403 U.S. at 20 (citing *Roth v. United States*, 354 U.S. 476 (1957) and holding that “Fuck the Draft” was not obscene). There is nothing erotic about Mr. Sain’s message.

Nor does the flag contain so-called “fighting words” subject to government restriction. Again, *Cohen* is instructive: “While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’ No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” *Id.*

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<sup>1</sup> Dana DiFilippo, *Roselle Park bows out of fight over profane anti-Biden flags*, New Jersey Monitor (July 28, 2021), <https://newjerseymonitor.com/2021/07/28/anti-biden-flags-shine-spotlight-on-nj-obscenity-laws/>.





As in *Cohen*, there is no evidence here that Mr. Sain’s flag was directed at any specific person who saw it, nor is there evidence that anyone who saw the flag was in fact violent.

There is thus no exception to Mr. Sain’s speech which would justify the government’s intrusion here.

#### **IV. The ordinance likely does not apply.**

Beyond our constitutional concerns, we note that the ordinance likely does not apply anyway.

Section 11.1 of the Uniform Public Offenses Code prohibits the exhibition of obscene material, but material is only obscene if it meets a three-part, conjunctive test. To qualify, the material must (1) appeal to prurient interests, (2) represent sexual acts, and (3) lack literary, educational, artistic, political, or scientific value. Mr. Sain’s flag does not satisfy any of these elements—though it would need only fail one to fall outside the ordinance’s purview. The flag does not appeal to prurient interests. “[P]rurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex.” *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985); see *Cohen*, 403 U.S. at 20 (obscene expression “must be, in some significant way, erotic.”)

Similarly, Mr. Sain’s flag certainly did not represent or depict any sexual act. And, finally, while many may disagree with the political sentiments Mr. Sain holds, the message was ultimately political.

Like the constitutional issues, the New Jersey case had a similar dynamic. The Roselle Park obscenity ordinance prohibited only obscene speech, and the flag was not obscene.

Thus, while the City’s ordinance would violate the First Amendment if held to apply here, it need not be applied to Mr. Sain’s flag at all.

#### **V. The prosecution is arbitrary.**

Finally, beyond our First Amendment concerns, we are especially troubled by the manner in which this prosecution came about. As we understand it, Mr. Sain had flown his flag for some time without the City’s attention. Law enforcement only acted after a group of citizens petitioned the City for the prosecution. Our criminal laws and ordinances cannot be enforced in such a manner, and the situation creates a dangerous precedent for all manner of group targeting. “The state criminal law should be equally enforced throughout the state. Criminal punishment cannot depend upon ‘community



conscience’ or ‘community standards.’” *State v. McClanahan*, 212 Kan. 208 (1973) (addressing the role of the judiciary in jury trials).

The manner of the City’s prosecution also raises concerns about the arbitrary enforcement of its ordinances. The process risks turning the coercive powers of the courts into a means for individuals or groups to vindicate personal grievances. Addressing the issue of whether private citizens should be allowed to bring criminal complaints, the Supreme Court of Minnesota wrote that the procedure “would entail grave danger of vindictive use of the processes of the criminal law and could well lead to chaos in the administration of criminal justice.” *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 365 (Minn. 1977). Similarly, the California Court of Appeals noted, “Nothing could be more demoralizing... to efficient administration of the criminal law in our system of justice than requiring a district attorney’s office to dissipate its effort on personal grievance, fanciful charges and idle prosecution.” *People v. Municipal Court*, 27 Cal. App. 3d 193, 205 (Cal. App. 1972).

We thus urge you to refrain from prosecuting individuals based only on the demands of other constituents.

## VI. Conclusion

The First Amendment protects Mr. Sain’s speech. No exception applies and the fact that the message may be offensive to some does not alter the constitutional analysis. In addition, prosecution by group petition raises serious civil liberty concerns. Finally, the ordinance does not apply anyway. Use of a swear word does not make the flag “obscene.”

We therefore ask you to drop the charges and dismiss the City’s case against Mr. Sain.

Sincerely,

A handwritten signature in black ink that reads "Sharon Brett". The signature is written in a cursive, flowing style.

Sharon Brett  
Legal Director, ACLU of Kansas

A handwritten signature in black ink that reads "Josh Pierson". The signature is written in a cursive, flowing style.

Josh Pierson  
Senior Staff Attorney, ACLU of Kansas