ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

May 15, 2019

Robert Fabella & Kristin Pelletier
200 S Anaheim Boulevard, Suite 356
Anaheim, CA 92805

Re: Brown Act and First Amendment Violations at City Council Meetings

Dear Mr. Fabella and Ms. Pelletier:

We appreciate the City's May 3rd response to our letter. However, for the reasons below, we disagree with its conclusions and urge the City to reconsider.

The Brief Amount of Time Allocated to Public Comment and the Structuring of Public Comment Violate the Brown Act

As we acknowledged in our letter, the Council is free to enact *reasonable* limits on the time allocated to public comment. The Council's rules, however, are unreasonable. No court of which we are aware has ever upheld rules as inhospitable to speech as these.

Ribakoff, *White*, and *Kindt*, which you cite for support, all considered and approved of three-minute public comment limitations where the government body's rules allowed for comment on individual agendized items— *as they were called – in addition to* a separate three-minute period for comment on anything within the subject matter jurisdiction of the body. The courts most certainly did not approve of a single three-minute period to comment on any matter within the subject matter jurisdiction of the body and any agenda item on which a community member wishes to speak. We ask the Council to enact rules consistent with the very opinions it cites.

The way in which the Council structures public comment violates the Brown Act for similar reasons. As we stated in our first letter, California courts have interpreted the Brown Act to "mean that for each agenda of a regular meeting, there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, *as well as* an opportunity for public comment on each specific agenda item *as it is taken up by the body*." *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1079 (2008) (emphasis added) (citing *Chaffee v. San Francisco Library Commission*, 115 Cal.App.4th 461, 468–69 (2004)).

Although you label *Chaffee*'s language as "dicta," it is, in actuality, the holding of the opinion.[1] The statement itself evidences that it is intended as the holding. "*[W]e conclude* that the lawmaking bodies clearly contemplated circumstances in which continuances and multiple

[1] Interestingly, the Orange County Board of Supervisors, in remarkably similar language, also claimed that the language from *Chaffee* was dicta, but changed their policy in short order following our letter.

sessions of meetings to consider a published agenda would be required, and thus they mandated that a single general public comment period be provided *per agenda,* in addition to public comment on each agenda item as it is taken up by the body." *Chaffee*, 115 Cal.App.4th at 341 (emphasis added).

Moreover, the cited language was directly responsive to the question posed to the court on appeal. The question directly before the court was whether "the Brown Act and the Sunshine Ordinance require that members of the public be given an opportunity to comment generally on matters within the jurisdiction of a legislative body at each session of that body's public meetings, *in addition to being allowed comment on specific agenda items.*" *Id*. at 465-66 (emphasis added). And the court answered this question with direct reference to the facts before it: "The Library Commission fully adhered to the language of these enactments and the Legislature's intent embedded in the statutes by hearing public comment on every agenda item taken up at the May 16th meeting. … Further, the commission provided public comment on every remaining agenda item at the session held on May 21st, including providing for general public comment." *Id*. The court's "statement was not dicta because it was responsive to the issues raised on appeal and was intended to guide the parties and the trial court in resolving the matter following our remand." *Garfield Med. Ctr. v. Belshe*, 68 Cal. App. 4th 798, 806 (1998) (citing *United Steelworkers of America v. Board of* Education, 162 Cal.App.3d 823, 834–35 (1984) (ruling that statement was not dicta where it was responsive to the question presented)). Given the extensive analysis drawing on critical facts, it strains credulity to describe the court's holding as dicta.

As the Court of Appeals recently remarked, providing for "public comment on items described in the agenda [at] the time when those items are being considered … ensures the Board has a clear and complete understanding of the public concern regarding an item of business on the agenda at the time that item is to be transacted or discussed. Allowing public comment on agenda items during general public comment may defeat this purpose because it necessarily requires members of the Board to remember the comment for later action despite addressing other topics of public concern before that action can be addressed." *Olson v. Hornbrook Cmty. Servs. Dist*., 33 Cal. App. 5th 502, 245 (2019).

You claim that structuring your meetings to allow comment on agendized items as they are taken up would make it "difficult, if not impossible," to conduct the City's business in an "expeditious and orderly fashion." Government entities far larger than Anaheim, however, are consistently able to accomplish their agendas while providing three minutes to speak on agendized items as they are called. The Los Angeles County Board of Supervisors and Orange County Board of Supervisors, for example, like the City of Los Angeles *to which you point*, provide for comment on agendized items as they are called, yet manage to complete the business of the entire county on a regular basis.

Silencing Critical Speakers Violates the First Amendment

Unfortunately, in an attempt to sidestep the issue we raised rather than address our contentions head on, the City has chosen to characterize its viewpoint discriminatory silencing of a critical speaker as being about the right to amplified sound and has claimed that it is unaware of any such law. The real issue here, however, is the Council's differential treatment of the speaker based on the viewpoints he expressed.

Because the Council provides for sound amplification for speakers generally, it violates the First Amendment to silence a critical speaker but not others. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795, 109 S. Ct. 2746, 2755, 105 L. Ed. 2d 661 (1989) (upholding against facial challenge requirement that musicians use City designated amplification equipment because the City had no power "to vary the sound quality or volume based on the message being delivered by performers.").

And there can be no doubt that the use of the microphone is essential to being heard. Indeed, because the speaker's microphone was shut off, his comments are inaudible on the meeting recording, depriving the members of the public who observe meetings remotely or following the meeting of the ability to hear his comments.

The city also claims there was no First Amendment violation because the injury was not concrete and particularized, but whether an injury is concrete and particularized is part of the standing inquiry.[2] Moreover, courts have repeatedly recognized violations of the First Amendment based on one-time violations of plaintiffs' rights. *See, e.g.*, *Norse v. City of Santa Cruz*, 118 Fed.Appx. 177, 178 (plaintiff adequately alleged First Amendment violation premised on ejection from single meeting for one second "Nazi salute"). Indeed, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

In addition, treating speakers differently based on the content or viewpoint of their speech is a clear First Amendment violation even if the speaker is not entirely silenced. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (burdens, as well as bans, violate the First Amendment). The First Amendment protects against far more than total deprivations of the right to free speech. *Id*. Thus, cutting off the microphone to a critical speaker is more than sufficient injury for both standing purposes and to state a First Amendment claim even if – as you contend – some people were still able to hear the speaker after the Mayor cut off the microphone.

Tellingly, however, the City explicitly acknowledges that the speaker's microphone was shut off and does not dispute that the speaker's microphone was shut off because of the critical viewpoint he expressed.

Prohibiting Expressive Conduct Violates the First Amendment

While we appreciate your indication that the Council rules—on their face— only prohibit actual disruption, this is contradicted by the Mayor's statements that all clapping during meetings is disruptive. We caution the City that "Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk.*" *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010). As such, we would appreciate your assurances that clapping that does not result in an actual, substantial disruption of the meeting will be allowed as a matter of practice, as well as of written policy.

[2] Perhaps the City has confused standing for injunctive relief with standing to pursue a claim for damages, which the speaker undoubtedly has.

A Larger Pattern of Anti-Democratic Behavior

While we understand that it may not violate the law for the Mayor to emphatically instruct his colleagues how to vote, our point was simply that such practices are extremely poor public policy, undermine the public's faith in the ability of their elected representatives to serve their interests exercising their independent judgment, and are indicative of a larger pattern of anti-democratic behavior.

While we are pleased to hear that the City has not adopted the proposed overly restrictive limitations on debate among council members as a rule, we remain concerned by the mayor's attempts to enforce those limitations as a matter of practice. Imposition of onerous limitations on debate by mayoral fiat is even more corrosive to the democratic process than their adoption by majority vote.

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Because the City clearly erred in its interpretation of both our letter and the underlying case law, we urge you to reconsider your stated positions, provide us assurances that the complained of violations will not recur, and adopt policies codifying those assurances. Please let us know by May 31st how you intend to handle the matter. If you have any questions, please reach out to me at BHamme@aclusocal.org or 714-450-3963.

Regards,

Brendan Hamme

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