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August 8, 2022

**VIA ELECTRONIC MAIL**

Mayor Paulo Morales  
Mayor Pro Tem Anne Hertz-Mallari  
Council Member Frances Marquez, Ph.D.  
Council Member Scott Minikus  
Council Member Jon Peat  
City of Cypress  
5275 Orange Avenue  
Cypress, CA 90630

Email: [adm@cypressca.org](mailto:adm@cypressca.org)

Re: City of Cypress Ordinance No. 1193

Dear Mayor, Mayor Pro Tem, and Council Members:

The First Amendment Coalition (“FAC”) is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. I am writing on behalf of FAC to discuss City of Cypress Ordinance No. 1193 (“Ordinance”), which regulates the speech of persons addressing the City Council.

According to Section 12(b) of the Ordinance, “Any person making personal, impertinent or slanderous remarks or who shall become boisterous while addressing the City Council shall be forthwith, by directive of the Presiding Officer, be [sic] barred from further audience at such meeting before the City Council unless permission to continue is granted by a majority vote of the City Council.”

Section 12(b) violates the First Amendment because it regulates speech based on viewpoint without requiring any actual disruption of a meeting. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812–13 (9th Cir. 2013) (holding virtually identical language was “an unconstitutional prohibition on speech”). I know of nothing in the Ordinance or Cypress Municipal Code that would limit Section 12(b) to prohibiting only actual disruption regardless of viewpoint.<sup>1</sup>

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<sup>1</sup> The term “boisterous” was not at issue in *Acosta*, but it is not limited to actual disruption. “Boisterous” includes mere “exuberance and high spirits,” <https://www.merriam-webster.com/dictionary/boisterous> (visited Aug. 8, 2022), which cannot by themselves amount to disruption. *Cf. United States v. Agront*, 773 F.3d 192, 197 & n.5 (9th Cir. 2014) (upholding prohibition of “conduct sufficiently ‘loud, boisterous, and unusual’ that it would tend to disturb the normal operation of a VA facility” because it “poses an ‘actual or imminent interference’ with that facility’s operation”).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In particular, at a city council meeting, "a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing." *White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

Section 12(b) violates the First Amendment by allowing a speaker to be ejected simply for "bold criticism of City Council members." *Acosta*, 718 F.3d at 815. "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). "Debate over public issues, including the qualifications and performance of public officials ... lies at the heart of the First Amendment," which protects "the ability to question and challenge the fitness" of public officials. *Leventhal v. Vista Unified School Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997). Therefore, one "who seeks or accepts public office invites and is properly subject to public criticism so far as it may relate to his fitness and qualifications for his office." *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 289 (1974).

A decorum ordinance might be valid to the extent it allows removal "for actually disturbing or impeding a meeting," but "[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption." *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010).

Merely "personal" or "impertinent" speech is insufficient. "In America, one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman – 'If you can't stand the heat, get out of the kitchen.'" *Desert Sun Publishing Co. v. Superior Court*, 97 Cal. App. 3d 49, 52 (1979).

Section 12(B) cannot be enforced against merely "slanderous" speech. An order to stop speaking is a prior restraint, and a prior restraint based on alleged defamation may issue only as to specific statements a court has found to be defamatory after a full trial. *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1143 (2007). Any other prior restraint based on alleged defamation is unlawful. *Gilbert v. Nat'l Enquirer*, 43 Cal. App. 4th 1135, 1144-45 (1996).

For these reasons, FAC asks the City Council to refrain from enforcing Section 12(b) in its current form and bring it into compliance with the First Amendment as soon as possible.

Sincerely,

FIRST AMENDMENT COALITION



David Loy  
Legal Director