



David Loy, Legal Director  
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January 30, 2023

**VIA ELECTRONIC MAIL**

Mr. John Ortega  
Vice President  
Orange Unified School District Board of Education  
1401 North Handy St.  
Orange, CA 92867  
Email: [jortega@orangeusd.org](mailto:jortega@orangeusd.org)

Re: Orange Unified School District Board of Education meeting, January 19, 2023

Dear Mr. Ortega:

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. On behalf of FAC, I ask that you retract the following statements that threatened freedom of speech, refrain from making similar statements in the future, and publicly affirm your commitment to the First Amendment.

At the Orange Unified School District Board of Education meeting on January 19, 2023, you characterized certain remarks from members of the public as “slanderous comments that you need to be very careful of, because you could be liable for these slanderous comments, so you need to be very careful of that, so I’m warning you about that.” Video of Jan. 19, 2023, Board of Education Meeting, <https://www.youtube.com/watch?v=wmZPayuzwiE>, 3:13:36.

I take no position on the substance of any disputes you may have with speakers at the meeting, but such threats of legal action chill protected speech, undermine the First Amendment, and attack the foundation of democracy.

As an initial matter, and as was pointed out at the meeting, California law guarantees absolute immunity for statements made in legislative proceedings such as school board meetings. Civil Code § 47(b); *Cayley v. Nunn*, 190 Cal. App. 3d 300, 303 (1987); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 288 (1974).

More fundamentally, critique of elected officials is democracy, not defamation. The First Amendment reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “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).

Political debate is prone to the “use of epithets, fiery rhetoric or hyperbole” that cannot be treated as defamatory. *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 191 (1989) (quoting *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976)). The First Amendment “afford[s] a wide berth to the free exchange of ideas,” and “[h]yperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies and distributing bumper stickers and pot holders.” *Issa v. Applegate*, 31 Cal. App. 5th 689, 704 (2019).

Therefore, as courts have long held, “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). Our nation’s “dedication to basic principles of liberty and freedom of expression” protects the right to “heap invective” on those who hold public office, no matter how “distasteful, offensive and unpleasant” it may be, because the “alternative is censorship and tyranny.” *Id.* at 51, 54.

Even if a person makes a substantially false and defamatory assertion of fact about a public official outside a legislative meeting, the official cannot recover for defamation without proving by clear and convincing evidence that the speaker knew the statement was false or acted with reckless disregard for the truth. *New York Times*, 376 U.S. at 279–80. This exceptionally demanding standard guarantees the breathing room necessary for robust debate to survive in a free society.

A public official’s first duty is to uphold the Constitution. An official’s threat of legal action against critics violates the First Amendment and undermines democracy. I ask that you immediately disavow your statements about “slanderous comments” and publicly affirm your commitment to respecting freedom of speech.

Sincerely,

FIRST AMENDMENT COALITION



David Loy  
Legal Director

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