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VIA ELECTRONIC MAIL

Victorville City Council
14343 Civic Drive
P.O. Box 5001
Victorville, CA 92393-5001
Email: CityCouncilMembers@victorvilleca.gov

Re: Removal and Arrest of Council Member Blanca Gomez

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. On behalf of FAC, I write to express strong concern that the removal of Council Member Blanca Gomez from the city council meeting and her arrest on February 21, 2023, violated the Brown Act and federal and state constitutions. By copy of this letter to the San Bernardino County District Attorney, I am asking that the charges against her be dismissed immediately.

Whatever the merits of any assertions by Council Member Gomez or any disputes she has with other council members, on which I take no position, the removal and arrest of an elected official or community member should be an absolute last resort. Abuse of such power threatens the fabric of democracy and open government.

The meeting was recorded on video, and the relevant portions begin at approximately 1:29:30.¹ The video speaks for itself, but in summary, Council Member Gomez addressed the city council as a member of the public during the time for non-agenda comment. Shortly after beginning to speak, she said, “During closed session ...” The mayor interrupted her, told her not to continue speaking, and ordered that the microphone be muted. The mayor then declared a recess, after which Council Member Gomez resumed her comments. As Council Member Gomez turned to face the audience at one point, the mayor interrupted and admonished her for doing so, and eventually ordered that she be removed. At that point, Council Member Gomez resumed her seat but was nonetheless arrested. I understand from press reports she was booked into jail for allegedly violating Penal Code §§ 403, 602.1(b). The San Bernardino County Superior Court website indicates she has been charged with violating section 403.

¹ See Victorville City Council Meeting video, dated Feb. 21, 2023, available at <https://www.youtube.com/watch?v=KL9Q7AAJ9Ls>.

These events present significant concerns for freedom of speech. To begin with, the mayor may have imposed an unlawful prior restraint on Council Member Gomez by preventing her from completing her comments. A prior restraint is a command to prevent speech before it occurs. *Alexander v. United States*, 509 U.S. 544, 550 (1993). As the Supreme Court has long held, “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The Court has cautioned that “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Although it is unlawful to “disclose confidential information that has been acquired by being present in a closed session ... to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information,” Govt. Code § 54963(a), that statute does not necessarily authorize the mayor’s actions.² As the statute provides, it shall not “be deemed a violation of this section” if one is engaged in:

Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action ... [or]

Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

Govt. Code § 54963(e).

The mayor interrupted Council Member Gomez before it was possible to know whether Council Member Gomez would disclose any “confidential information” – or whether the council member’s comments would have fallen within either or both of the above exceptions to the Brown Act’s confidentiality provisions. Accordingly, the mayor’s actions present serious concerns under the First Amendment and Brown Act.

After the recess, the mayor again cut off Council Member Gomez, which also presents serious concerns. Council Member Gomez was speaking during non-agenda comment time, which must be open to “comment on *any* matter within the subject matter jurisdiction of the legislative body.” *Galbiso v. Orosi Public Utility Dist.*, 167 Cal. App. 4th 1063, 1079 (2008). Her comments concerned the alleged actions of other council members, which were well within the city council’s subject matter jurisdiction. No claim was made that she was off topic.

² “Confidential information” means “a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session.” Govt. Code § 54963(b).

To the extent the mayor's conduct may have been based on Council Member Gomez's criticism of other council members, it was unlawful. Under the Brown Act, the city "shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." Govt. Code § 54954.3(c). The First Amendment also prohibits silencing a speaker for condemning council members. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 815-16 (9th Cir. 2013) (holding city may not prohibit "bold criticism of City Council members" and "a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing."); *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 956 (S.D. Cal. 1997) (holding "restrictions on raising 'complaints' or 'charges' against District employees at open Board meetings" violated First Amendment).

Apart from that concern, the removal of Council Member Gomez for alleged "decorum" violations presents significant concerns. She did not apparently exceed the time limit for comments. Indeed, she was cut off twice before she could complete her comments within the allotted time. Although she faced the audience during part of her comments, nothing in the city council's decorum rules clearly prohibits doing so.³

In any event, not every alleged violation of decorum rules justifies removing a person from a city council meeting, and a city "may not deem any violation of its rules of decorum to be a disturbance." *Acosta*, 718 F.3d at 811. Because Council Member Gomez remained within her allotted comment time and addressed matters within the city council's jurisdiction, she was not clearly engaging in any conduct "that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting," as would be required to justify her removal. Govt. Code § 54957.95(b)(1).

Regardless of any alleged violation of decorum rules, removal is justified only if an individual does "not promptly cease their disruptive behavior." Govt. Code § 54957.95(a)(2). Once Council Member Gomez returned to her seat, she had ceased any allegedly disruptive conduct and her removal was not necessarily justified.

There are also serious questions whether it was lawful to arrest Council Member Gomez on the charges for which she was booked. Penal Code section 403 requires that a person "willfully disturbs or breaks up" a lawful meeting. Such disturbance requires conduct that "substantially impairs the effective conduct of a meeting," based on the "actual impact" on "the course of the meeting," not the subjective opinion of "persons present at the meeting." *In re Kay*, 1 Cal. 3d 930, 944 (1970). To the extent Council Member Gomez remained within her allotted time while protesting interruption of her comments and the events "continued for only a few minutes," it is far from clear there was "substantial impairment of the conduct of the meeting," as required to support charges under section 403.⁴ *Id.* at 944-45.

³ City of Victorville, City Council Policy and Procedures Manual, pp. 30-34, available at <https://www.victorvilleca.gov/home/showpublisheddocument/12932/638096597635270000>. To the extent the rules prohibit "personal" or "impertinent" remarks, they are unconstitutional. *Acosta*, 718 F.3d at 815.

⁴ In addition, section 403 does not apply to a city council meeting if it is a "meeting referred to in ... Section 18340 of the Elections Code." Penal Code § 403; *CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1111 (9th Cir. 2015).

It is also far from clear that arrest was justified under Penal Code section 602.1(b), which applies only to a “person who intentionally interferes with any lawful business carried on by the employees of a public agency open to the public, by obstructing or intimidating those attempting to carry on business, or those persons there to transact business with the public agency.” By speaking within her allotted time, Council Member Gomez was not interfering with the city council’s “lawful business.” Indeed, she was engaging in “lawful business” by exercising her right to speak under the Brown Act, the First Amendment, and its California counterpart. See Penal Code § 602.1(d)(2) (statute does not apply to “activities protected by the California Constitution or the United States Constitution”).

Nor was she apparently “obstructing or intimidating” anyone else from lawfully continuing with the meeting by attempting to exercise her public comment rights within her allotted time. Even if she violated the city council’s decorum rules, which is questionable, such a violation by itself does not establish a violation of section 602.1(b). See *Hamburg v. Wal-Mart Stores, Inc.*, 116 Cal. App. 4th 497, 509 (2004) (holding mere violation of store rules was insufficient to establish violation of similar provisions in Penal Code § 602.1(a)). Finally, a violation of the statute requires that a person was “requested to leave.” Penal Code § 602.1(b). Council Member Gomez was never asked to leave. Instead, she was interrupted, admonished, and arrested.

With or without probable cause, the arrest may represent retaliation for the exercise of First Amendment rights. See *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018). Again, I take no position on the substance or merits of any claims made by Council Member Gomez, but the mayor’s order to remove Council Member Gomez and her subsequent arrest and prosecution raise substantial questions under the Brown Act and First Amendment.

“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” it is “offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Whatever one might think of Council Member Gomez’s views, she had the fundamental right to speak within her allotted time, no matter how objectionable her claims might be. The charges against her should be dismissed immediately.

Sincerely,

FIRST AMENDMENT COALITION



David Loy
Legal Director

cc: Victorville City Attorney
San Bernardino County District Attorney
San Bernardino County Sheriff