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December 10, 2024

VIA ELECTRONIC MAIL

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Re: Resolution Amending Meeting Management Rules

Dear Board 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 serious concerns with the following provisions of today's Resolution Amending Meeting Management Rules and urge the Board to reconsider these provisions if it has not already done so.

1. **Statements addressed to Board and not staff**

While I appreciate the Board's concerns, members of the public should not be prevented from addressing remarks to staff when such remarks are otherwise within the scope of agenda or non-agenda comment.

The First Amendment generally 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). "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, including staff, at public meetings. *Leventhal v. Vista Unified School Dist.,* 973 F. Supp. 951, 958 (S.D. Cal. 1997).

Therefore, statements addressed to the conduct of staff are fully protected by the First Amendment and cannot be excluded from public comment.

2. "[I]mpertinent, slanderous, profane, or abusive language"

I appreciate the Board's concern for civility, but these terms cannot lawfully be enforced under the First Amendment. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812–13 (9th Cir. 2013) (holding rule against "personal, impertinent, profane" or "insolent" remarks at city council meeting violated First Amendment). Such terms are inherently subjective and depend largely on the personal viewpoint of the listener, creating impermissible opportunities for arbitrary or viewpoint-based censorship. I appreciate that this provision by itself does not authorize removal of a speaker, but it still chills and deters constitutionally protected speech.

The term "slanderous" is problematic for at least two reasons. First, California law guarantees absolute immunity for statements made in legislative proceedings such as board of supervisors' 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). Second, what is "slanderous" is a complex factual and legal question that cannot be resolved summarily during the public comment period of a board of supervisors meeting.

Under state law, the elements of a defamation claim are intentional publication of a statement of fact concerning the plaintiff that is false, unprivileged, and has a natural tendency to injure or causes special damage. *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007); *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999). Apart from the absolute privilege for legislative proceedings, other absolute or qualified privileges may apply to certain statements under state law, *see* Civil Code § 47, and the First Amendment also limits defamation claims in certain circumstances.

A significant question in any defamation case is whether a statement is an assertion of fact or opinion. A statement is generally not actionable as defamation unless "it could reasonably be understood as declaring or implying actual facts capable of being proved true or false…. An opinion is not actionable if it discloses all the statements of fact on which the opinion is based and those statements are true." *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 527 (2006). The issue of falsehood is also complex. "Libel law overlooks minor inaccuracies and concentrates on substantial truth … from the perspective of the average reader, not a person trained in the technicalities of the law." *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1404 (1999) (citation and quotation marks omitted).

In particular, political debate is prone to "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).

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.

An order to stop speaking, however briefly, 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, 1139 (1996). For all these reasons, what is "slanderous" is a matter that can be determined only by a court after thorough litigation, not summarily in the middle of a board of supervisors meeting.

3. Removal from meeting and limits on future attendance

While removal of an individual from a given meeting may be allowed for actual disruption as described in the relevant provision of the Brown Act, Government Code section 54957.95, any further sanctions, such as prohibiting persons from attending future meetings, are not authorized by the Brown Act. The authority to adopt "reasonable regulations" of public comment at a given meeting, Govt. Code § 54954.3(b)(1), does not include authority to limit or ban attendance at future meetings.

While the Board may adopt regulations that provide more protections than the Brown Act requires, it may not restrict attendance in ways that the Brown Act does not authorize. Under the Brown Act, "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, *except as otherwise provided in this chapter*." Govt. Code § 54953(a) (emphasis added). Therefore, unless a specific provision of the Brown Act states otherwise, a person may not be excluded from a board of supervisors meeting.

In addition, although it may not violate the First Amendment to remove an individual from a meeting for actually disrupting that meeting, any restrictions on future attendance based on past conduct raise significant First Amendment concerns. *See Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 507 (6th Cir. 2001) ("[W]here a law sets out primarily to arrest the future speech of a defendant as a result of his past conduct, it operates like a censor, and as such violates First Amendment protections against prior restraint of speech.").

For these reasons, FAC objects to the foregoing provisions and urges the Board to reconsider them. Thank you for your attention to these comments.

Sincerely,
FIRST AMENDMENT COALITION

David Loy
Legal Director