ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

April 16, 2019

Councilmembers of the City of Anaheim
200 S Anaheim Boulevard, 7th Floor
Anaheim, CA 92805

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

Dear Councilmembers of the City of Anaheim,

We are deeply concerned by the Council's recent actions to unlawfully suppress the voices of community members at its public meetings. The City of Anaheim should not follow the example set by the Orange County Board of Supervisors, which is among the least transparent and accountable government bodies in the state— the actions of which resulted in our recent, high profile lawsuit against them. "[T]he [] councils and the other public agencies in this State exist to aid in the conduct of the *people*'s business... The people of this State do not yield their sovereignty to the agencies which serve them." Government Code Section 54950 [emphasis added]. We urge you all to reconsider your rules of procedures, as well as your path as a city and the relationship you want to foster with your constituents as a whole.

The Brief Amount of Time Allocated to Public Comment Is Unreasonable

The Council's limitations on the public comment period—limiting members of the public each to a single three minute comment in which to speak on every agendized item and anything else in the subject matter jurisdiction of the Council, while allowing the Council to then further cut the time for each speaker when more than three people have signed up for public comment – are unreasonable and illegal. Listening to your constituents is not an inconvenience to be endured; it is your job.

Although "[t]he legislative body of a local agency may adopt reasonable regulations…, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker," these restrictions must be *reasonable*. Government Code Section 54954.3(b). In interpreting the Brown Act, the California Attorney General concluded that "The legislative body of a local public agency may limit public testimony on particular issues at its meetings to five minutes or less for each speaker, depending upon the circumstances such as the number of speakers." 75 Ops. Cal. Atty. Gen. 89 (1992).

If the ability of a public agency to limit public comment to five minutes or less per speaker on a particular agenda item is contingent on the number of speakers present, then a flat limitation of three minutes total per speaker, in which the public must present their opinions on

potentially dozens of items, cannot be reasonable. The same is true of slashing the time allocated to speakers when more than three people wish to comment on matters of public concern.

The Council's Structuring of the Public Comments Period Violates the Brown Act

The Council's structuring of public comment on agendized and non-agendized items also violates the Brown Act. Government Code Section 54954.3(a) mandates that "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body...." This language "mean[s] 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)). Thus, the Council must allow for public comments on each agendized item as it is called, as well maintain a general public comments period; if it does not, it will be in clear violation of the Brown Act.

In addition, the Council's placement of the general public comments period at the end of the meeting makes it unreasonably difficult for the public to address the Council on matters within the Council's subject matter jurisdiction. Meetings vary in length, generating unpredictability about when the public comments period will begin. Members of the public thus face the following dilemma: they may arrive early and wait hours to speak, or they may take a guess as to what time the comments period will begin and risk losing their opportunity to address their elected officials if they guess incorrectly.

Silencing Critical Speakers Violates the First Amendment

Not only do the Council's rules unlawfully stifle public comment, but the Council has also literally silenced speakers at its meetings. At your April 2nd meeting, the Mayor shut off a speaker's microphone in the middle of his remarks after the speaker leveled biting criticism at him, referring to him as a "racist," "bigot," "anti-American" and a "son of a bitch." After the speaker concluded their remarks with their microphone silenced, the Mayor warned the audience against "making personal, threatening, abusive, slanderous, or profane remarks."

Courts have repeatedly recognized "a 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). Although the speakers' remarks may have been impolite, they were no doubt protected speech. Indeed, "'(o)ne of the prerogatives of American citizenship is the right to criticize public [figures] and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" *Cohen v. California*, 403 U.S. 15, 26 (1971) (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)). Even the speaker's use of the term "son of a bitch"

is protected speech. *See id*. (holding that the First Amendment protected the phrase "Fuck the Draft" written on a jacket in a courthouse).

Prohibiting Expressive Conduct Violates the First Amendment

The Council's prohibition on expressive conduct, such as clapping and booing, also violates the law. "Audience activities, such as heckling, interrupting, harsh questioning, and booing" may "advance the goals of the First Amendment." Indeed, actions like clapping and booing are among the simplest and most effective ways of expressing support for or disapproval of ideas. As such, the First Amendment recognizes a limited right to interrupt public meetings with speech activity. *In re Kay*, 1 Cal. 3d 930, 944-45 (1970).

Because of this First Amendment protection, individuals may only be punished for conduct that "substantially" impairs the meeting. *Id*. at 942. "Whether a given instance of misconduct substantially impairs the effective conduct of a meeting depends upon the actual impact of that misconduct on the course of the meeting; the question cannot be resolved merely by asking persons present at the meeting whether they were 'disturbed.'" *Id*. at 944.

Despite this clearly established law, the Mayor has indicated that he views all clapping, no matter how inobtrusive, as disruptive and warned audience members against it.

Requiring Commenters to Submit a Speaker Card Near the Scheduled Start Time is Unreasonable

Your rules also require those seeking to provide public comment to submit their speaker card "within an hour of the scheduled start time." This requirement too makes participation unreasonably difficult. For example, this requirement leaves a meeting attendee unable to respond to comments made by a member of the public or a member of the Council during the public comments period or the public hearing period on an agenda item if that attendee had not originally planned to speak. A member of the public who is motivated to make a comment because of a point made during another individual's public comment, or by a response by a Councilmember to a public comment, is barred from doing so. This discourages public participation in representative government.

Moreover, the City has no legitimate interest in enforcing the restriction. For instance, it requires minimal effort and does not detract from the City's work to introduce a meeting attendee who submitted a request form after the identified time period has begun.

A Larger Pattern of Anti-Democratic Behavior

The above illegal restrictions all speak to a pattern of anti-democratic behavior exhibited by members of the Council. At the April 2nd meeting, for example, in deciding whether to suspend rules to allow for debate on a motion, Mayor Siddhu plainly instructed Councilmember Faessel how to vote, saying, "No, no. Just put down no. Just vote no. Voting no."

The most recent proposed change to the Council's rules further exemplifies this hostility to democratic processes by placing strict time limits on the amount of time council members may spend debating matters of city governance and substantially limiting the public discussion of all business conducted by the Council. Adopting such a rule would further restrict the flow of information to your constituents and deny them precious insight into the workings of their elected officials.

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The Council must abandon its proposed changes to its rules and immediately begin the process of rescinding and replacing its illegal policies and practices. It is also clear that the Council must fundamentally change its approach to the community it purports to serve. Your constituents are not obstacles to be avoided—listening to and addressing their concerns is the very purpose of this Council. Please let us know by April 26th how you intend to address our concerns. If you have any questions, please do not hesitate to reach out to Brendan Hamme at BHamme@aclusocal.org or at 714-450-3963.

Regards,

Brendan Hamme

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