AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

August 19, 2020

Via Email

Board of Commissioners
Fresno Housing Authority
1331 Fulton Street
Fresno, CA 93721
executiveoffice@fresnohousing.org

Re: Deletion of Public Comments Made at Housing Authority Meeting

Dear Board of Commissioners:

We are deeply concerned that the Fresno Housing Authority ("Authority") is considering unlawfully suppressing the voices of community members by deleting selected comments from its written public record. This action not only runs counter to sound public policy and government transparency, but also runs afoul of the spirit of the Ralph M. Brown Act ("Brown Act") and the First Amendment. We urge the Authority to adopt the written minutes from its June 23 public meeting without altering the public's comments.

As you know, the Brown Act requires legislative bodies to "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." Cal. Gov't Code § 54954.3. As reported to us by several advocates who attended the Authority's June 23 meeting and as confirmed by the *Fresno Bee*,[1] attendees exercised this right by voicing strong opposition to the Authority renewing its $194,363 annual contract with the Fresno Police Department.

The grounds for opposition varied. For example, Sukaina Hussain at CAIR and Nourbese Flint with the Black Woman for Wellness Action stated that the budget needed to prioritize underserved communities of color. Eric Payne with the Central Valley Urban Institute talked about a past of racist housing policies. Stacy Williams, a community advocate, stated that the agreement with the police department was a "money grab," and she mentioned Fresno's "racist policies of redlining," racist policies or comments by the mayor and a commissioner on the Authority, and the need for the Authority to "answer to the community for their negligence." Another noted that "Fresno PD [has] a long and well-documented history of racism at the individual level in addition to the historic systemic racism of policing in general." While perhaps uncomfortable for the commissioners and mayor, all of these comments are part of democratic discourse.

[1] Dympna Ugwu-Oju, "Fresno Housing Authority board considers excluding 'unflattering' comments from minutes," FRESNO BEE (Aug. 4, 2020), available at https://www.fresnobee.com/fresnoland/article244704862.html.

Adopting the June 23 meeting minutes was Consent Agenda Item 5(a) for the July 28, 2020 Authority meeting.[2] When this item was introduced, Commissioner Cary Catalano expressed "concerns about the narrative and tone of the [June 23] minutes," and said that "some of the comments seem personal in nature," and that "because it is a public document," he was "not really comfortable" with the "minutes being approved."[3] He thus requested that the Authority delay approval of the minutes until the next meeting to provide staff and general counsel an opportunity to review the minutes. Specifically, Commissioner Catalano stated that he believed the Authority needed "to go out and take out the personal punches and stick to the facts" in the written record. The Authority agreed to take up the matter of whether to delete comments from the June 23 during its August 2020 meeting.

Silencing Critical Speakers Violates the First Amendment

Debates over public issues, including the "performance of public officials" such as housing authority commissioners, "lies at the heart of the First Amendment." *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997). Deleting public comments such as those at issue here from the public record would resemble a "criticism provision[] . . . violative of core First Amendment values." *Id*. at 956. A person engaging in "harsh questioning" during an Authority meeting, "even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment." *In re Kay*, 1 Cal.3d 930, 939 (1970). 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); *see also, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) ("'[A] prerogative[] 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.'") (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

Moreover, deleting public comments based on their content could have a chilling effect on future speech at public meetings. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016).[4]

Although the Authority may view some of the public comments at the June 23 meeting as impolite, or "personal punches," these comments were constitutionally protected speech.

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[2] *See* Board of Commissioners Meeting (July 28, 2020), pp.5-14, http://fresnohousing.org/wp-content/uploads/2020/07/07.28.2020-Joint-Board-Packet-with-Addendums.pdf

[3] Audio from the July 28, 2020 Board of Commissioners Meeting (starting at minute 18).

[4] Note also that local governments that have deleted public comments from social media have settled or lost in subsequent litigation. *See, e.g.*, Cara Anthony, *Beech Grove, ACLU Reach Settlement in Facebook Case*, Indianapolis Star (Aug. 4, 2016), https://www.indystar.com/story/news/2016/08/04/beech-grove-aclu-reach-settlement-facebook-case/88075666/; Andrew Walden, *HPD Ordered to Pay $31K over Censored Facebook Comments*, Hawai'i Free Press (June 27, 2014), http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/12959/HPD-Ordered-to-Pay-31K-over-Censored-Facebook-Comments.aspx.

Whether or not deletion of comments violated the Brown Act, as addressed *infra*—indeed, "even if the Brown Act sanctioned" deleting meeting minutes—"First Amendment speech guarantees would trump the statute. It is no defense to suggest that since the Brown Act created the Board meetings, the Brown Act can also authorize unconstitutional limitations on those meetings." *Leventhal*, 973 F. Supp. at 958.
Commissioner Catalano's comments, and the Authority's decision to postpone adopting the minutes, makes clear that the Authority is considering deleting *certain* comments that it finds objectionable. As public officials serving approximately 50,000 residents throughout Fresno County, the commissioners should be well aware that the public can and does comment on their duties and responsibilities, including by criticizing decisions and (in)action. While the Authority may place certain limits on speakers during public meetings—such as time limits for public comment—it cannot silence speakers merely because they are criticizing it.

Deleting Challenging Comments Conflicts with the Brown Act

The purpose of the Brown Act is to "aid in the conduct of the people's business." Cal. Gov't Code § 54950. "The people of this State do not yield their sovereignty to the agencies which serve them," but rather "retain control over the instruments they have created." *Id*. But instead of acknowledging its role serving the community, the Authority is moving to delete public comments from its written public record simply because the Housing Authority Commissioners disfavor or disapprove of the content.

The Legislature intended that public agencies not suppress public comments, whether during or after a meeting. "The Brown Act is intended to ensure the public's right to attend public agency meetings to facilitate public participation in all phases of local government decisionmaking." *Chaffee v. San Francisco Library Com'n*, 115 Cal.App.4th 461, 469 (2004). Indeed, "the Brown Act does not authorize . . . [a] broad criticism ban." *Leventhal*, 973 F. Supp. at 961. A legislative body cannot "prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." Cal. Gov't Code § 54954.3(c).

The Brown Act also requires that agendas of public meetings and any other writings associated with an agenda item be disclosable to the public. *See* Cal. Gov't Code § 54957.5(a). The public can also request the opportunity to review audio or video recordings of the public meetings. *See* Cal. Gov't Code § 54953.5(b). The Authority meeting minutes are considered writings associated with an agenda item because the Authority considered approval of those minutes during its July meeting. The Authority also recorded the audio of the June 23 meeting and is available to the public upon request. And the July 28 meeting minutes, which are posted online, contain the full, as yet unadopted June 23 minutes.

However, the intent of the Brown Act was not to make the public have to hunt through different minutes and audio or video recordings, and compare them, in order to obtain an accurate disclosure of what happened at a meeting. Altering past meeting minutes would be contrary to the spirit of the Brown Act, which seeks to ensure that all government bodies provide transparency and remain accountable to the public. Moreover, in addition to being legally and

ethically suspect, it would be fruitless to delete certain comments from the record when the public could easily obtain them through a public records act request or just online.

Deleting Challenging Comments Is Contrary to General Requirements

Deleting certain kinds of comments also would be contrary to the general requirement that meeting minutes be accurate. *See, e.g.* Cal. Gov't Code § 36814 ("The council shall cause the clerk to keep a correct record of its proceedings. At the request of a member, the city clerk shall enter the ayes and noes in the journal."); Cal. Gov't Code § 40801 ("The city clerk shall keep an accurate record of the proceeding of the legislative body"). While minutes perhaps need not have to provide a word-for-word transcription of a meeting, if a particular cluster of comments is deleted, the minutes become inaccurate. *Cf. Dist. Attorney for N. Dist. v. Sch. Comm. of Wayland*, 455 Mass. 561, 567(2009) (violation of an open meeting law in not providing a "precise statement of the reason for convening in executive session"); *White v. Clinton Cty. Bd. of Commrs.*, 1996-Ohio-380, 76 Ohio St. 3d 416, 416 ("full and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision").

When the Authority reviews previous meeting minutes for approval, it is an "opportunity to correct any misstatements and rectify any omissions." *Kunec v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 524 (1997), *as modified on denial of reh'g* (June 20, 1997). The review process is meant to ensure the accuracy of the meeting minutes rather than an opportunity to scrub the minutes from any statements that the commissioners disagree with. If any legislative body can scrub meeting minutes then, "[w]hat is the import of the minutes ... if [they] can't be relied on for anything?" *Ibid*. The accuracy of meeting minutes is also important because courts can take judicial notice of meeting minutes. *See e.g. Chaffee*, 115 Cal. App. 4th at FN 3 (court granting respondents' request for judicial notice of meeting minutes).

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The Authority should approve the complete June 23 Meeting Minutes. It should not delete or alter public comments in its meeting minutes simply because commissioners dislike them. Please respond to us by August 25, 2020 and let us know whether the Authority will move forward with deleting certain comments from its June 23 Meeting Minutes. If you have any questions, please do not hesitate to reach out to my at asalceda@aclunc.org or via phone at (559) 554-2994.

Kind Regards,

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