



Northern  
California

September 10, 2021

Via Email

City of Vallejo City Council  
555 Santa Clara Street  
Vallejo, CA 94590

**Re: City of Vallejo’s Policy Prohibiting Certain Comments During the Public Comment Period**

Dear Honorable Vallejo City Councilmembers:

We write on behalf of the American Civil Liberties Union of Northern California to express our deep concern regarding the Vallejo City Council’s new policy prohibiting speakers from making certain types of comments during the public comment period of City Council meetings. This policy threatens to suppress the voices of community members, and thus runs afoul of First Amendment principles, as well as the California Constitution and the Ralph M. Brown Act (“Brown Act”), Gov’t Code §§ 54950 *et seq.* We urge the Council to rescind this policy immediately and at— or prior to—the next Council meeting, inform the public that it has so rescinded the policy.

**The Council’s new policy silences critical speakers.**

During the August 31, 2021 special meeting, Mayor Robert McConnell announced that the Council had “added a new aspect” to the public comment process that will prohibit certain types of public comments during Council meetings.<sup>1</sup> The Mayor described the policy as “a more cautionary and prescriptive measure” to “confine” and “limit” public comments addressed to the Council.<sup>2</sup> More specifically, and as reflected in the meeting minutes, the new policy commands:

Speakers may not make personal attacks on council members, staff or members of the public, or make comments which are slanderous or which may invade an individual’s privacy. To the extent this occurs, any council member may call for a “point of order.” If this occurs, the public speaker will be muted while the point of order is being addressed and then the speaker will be allowed to resume to finish their remaining time.

The Council appears to have adopted this new policy shortly after its August 24, 2021, where at least one member of the public provided comment expressing concern over the Council’s

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<sup>1</sup>*Special Meeting*, CITY OF VALLEJO 0:02:45 (Aug. 30, 2021) <https://vallejoca.civicclerk.com/Web/Player.aspx?id=1920&key=-1&mod=-1&mk=-1&nov=0>. See also ATTACHMENT A.

<sup>2</sup> *Id.* (00:03:52); see also *id.* (00:05:02) (advising public speaker to “be mindful of the cautionary instructions”).

**American Civil Liberties Union Foundation of Northern California**

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consideration of specific internal candidates to replace City Manager Anne Cardwell.<sup>3</sup> That speaker had urged the City to replace Manager Cardwell with an external replacement because the “internal options are limited and dangerous.” The speaker commented that Interim Assistant City Manager Gillian Hayes is “unqualified and untrustworthy,” that Chief of Police Shawny Williams “oversees a corrupt and deadly police department,” that Water Director Michael Malone “was involved in a sexual harassment and retaliation case in Sacramento” and that Manager of Economic Development Paul Kelley “has made homophobic and racist comments publicly.” The speaker also criticized Manager Cardwell for stonewalling the “ACLU surveillance accountability work” and for hiring Fire Chief Kyle Long. The speaker ended her remarks by urging Councilmembers not to be “fooled again” when hiring a new city manager.

Mayor McConnell has since doubled down on the new policy and suggested that Vallejo residents “focus on attacking the idea, project, or result instead of attacking the individual.”<sup>4</sup>

### **The Council’s new policy prohibiting critical comments unlawfully penalizes protected speech.**

Debates over public issues, including the “performance of public officials” such as city managers, chiefs of police, water directors, and managers of city departments, “lies at the heart of the First Amendment.” *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997); see also, e.g., *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers . . .”). “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 society finds the idea itself offensive or disagreeable.” *Acosta v. City of Costa Mesa*, 718 F.3d 800, 816 (9th Cir. 2013) (en banc) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); see also *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (“[Government] has no [authority] to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury rules.”).

Prohibiting public comments that a councilmember might construe as a “personal attack” constitutes the type of “criticism provision” that courts have found to be “violative of core First Amendment values.” *Leventhal*, 973 F. Supp. at 956. A person engaging in “harsh questioning” during a city council 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). Indeed, 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) (“One of the prerogatives of American citizenship is the right to criticize public

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<sup>3</sup> Regular Meeting, CITY OF VALLEJO 01:00:00 (Aug. 24, 2021)

<https://vallejoca.civicclerk.com/Web/Player.aspx?id=1381&key=-1&mod=-1&mk=-1&nov=0>.

<sup>4</sup> Mayor’s Message, Sept. 9, 2021, available at <https://cityofvallejo.net/mayorsmessage>. See also, Andres Picon, “Vallejo mayor warns prospective city-manager candid about ‘involved’ nature of residents,” SAN FRANCISCO CHRONICLE (Sept. 10, 2021), available at <https://www.sfchronicle.com/bayarea/article/Vallejo-mayor-warns-prospective-city-manager-16447736.php>.

[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)).

The Council’s new policy unconstitutionally limits protected speech based on viewpoints expressed by speakers because favorable or complimentary comments about elected officials, staff, and the public would not violate the new policy. As such, the policy “engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and, ultimately, dynamic political change.” *Leventhal*, 973 F. Supp. At 960; *see also Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996) (“It is difficult to imagine a more content-based prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance).”).

In addition, the policy is impermissibly vague and overbroad. The policy leaves it up to councilmembers to determine what public comments should be considered “personal attacks,” “slandorous,” or unduly invasive. This ambiguity risks the unlawful chilling of legitimate grievances. “For many citizens such participation in public meetings, whether supportive or critical of the speaker, may constitute the only manner in which they can express their views to a large number of people; the Constitution does not require that the effective expression of ideas be restricted to rigid and predetermined patterns.” *In re Kay*, 1 Cal. 3d at 939.

### **The Council’s new policy also contravenes the California Constitution and undermines the Legislature’s express commitment to open government and robust public comment.**

As you should be well aware, the California Constitution’s Liberty of Speech clause is “broader and more protective than the free speech clause of the First Amendment” and therefore provides at least as much protection for speech at meetings. *Snatchko v. Westfield LLC*, 187 Cal. App. 4th 469, 480 (2010) (quotations omitted); *see* Cal. Const. Art. I § 2. The state Constitution specifically guarantees Californians the “right to instruct their representatives” as to how they think they should exercise their authority, as well as the right to petition for redress. Cal. Const. Art. I §§ 2, 3(a).

Pursuant to this authority, the California legislature long ago enacted the Brown Act, requiring legislative bodies—including the Vallejo City Council—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.” Gov’t Code § 54954.3. The purpose of the Brown Act is to “aid in the conduct of the people’s business.” *Id.* § 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.*

And yet, here, the Council’s policy constrains the public airing of grievances in favor of shielding officials from legitimate criticism and potentially unflattering comments. This soft comfort is not one recognized under law. Indeed, “the Brown Act does not authorize . . . [a] broad criticism ban.” *Leventhal*, 973 F. Supp. at 961. A legislative body simply cannot “prohibit public criticism of the

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policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.” Gov’t Code § 54954.3(c); *see also Chaffee v. San Francisco Library Com’n*, 115 Cal. App. 4th 461, 469 (2004) (“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 decision making.”).

\* \* \*

Given the constitutional concerns outlined above, the Council should immediately rescind its new public comment policy to allow the public to meaningfully and robustly participate at public meetings. We ask that the Council publicly announce the repeal of this policy at, or prior to, the next public meeting. Please respond to us by September 17th and let us know whether the Council will move forward with rescinding the policy. If you have any questions, please reach out to

Kind Regards,



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## ATTACHMENT A



**IF OTHERS HAVE ALREADY EXPRESSED YOUR POSITION, YOU MAY SIMPLY INDICATE THAT YOU AGREE WITH A PREVIOUS SPEAKER.**

**IF APPROPRIATE, A SPOKESPERSON MAY PRESENT THE VIEWS OF THE ENTIRE GROUP.**

**SPEAKERS MAY NOT MAKE PERSONAL ATTACKS ON COUNCIL MEMBERS, STAFF OR MEMBERS OF THE PUBLIC, OR MAKE COMMENTS WHICH ARE SLANDEROUS OR WHICH MAY INVADE AN INDIVIDUAL'S PRIVACY. TO THE EXTENT THIS OCCURS, ANY COUNCIL MEMBER MAY CALL FOR A "POINT OF ORDER." IF THIS OCCURS, THE PUBLIC SPEAKER WILL BE MUTED WHILE THE POINT OF ORDER IS BEING ADDRESSED AND THEN THE SPEAKER WILL BE ALLOWED TO RESUME TO FINISH THEIR REMAINING TIME.**

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