



Northern
California

March 1, 2023

Via Electronic Mail

Los Gatos Mayor and Town Council
110 E. Main Street
Los Gatos, CA 95030
council@losgatosca.gov

Re: Unconstitutional Censure of Kylie Clark; Public Records Act Request

Dear Honorable Mayor and Town Council:

On behalf of the American Civil Liberties Union of Northern California (“ACLU”), I write regarding the decision by the Los Gatos Town Council (“Town Council”) to formally censure Kylie Clark, a resident of Los Gatos, based on a November 18, 2022 email that she sent to the California Department of Housing and Community Development (“HCD”). As more fully set forth below, the Town Council’s decision to discipline Ms. Clark for her purported failure to engage in “constructive communication” violates her free speech rights under federal and state law. The Town Council’s actions—formal censure (both written and verbal), a lengthy public meeting, and a requirement that she engage in future “counseling”—constituted the kind of retaliatory discipline that the First Amendment of the United States Constitution prohibits. The ACLU urges the Town Council to reconsider its decision and, moving forward, to better comport its approach to complaints and its interpretation of town codes with the free speech rights of its constituents. We also request, pursuant to the California Public Records Act (“CPRA”), additional records regarding the Council’s handling of this and similar complaints.

The First Amendment protects the right of all citizens, including public employees, to speak as private citizens on matters of public concern.¹ Thus, when a person who serves in a

¹ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County., Ill.*, 391 U.S. 563, 574 (1968); see also *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (affirming *Pickering* framework).

public role speaks in their personal capacity on a matter of general public interest—even one that is related to their public duties—that speech is protected.²

California’s housing crisis has engendered much debate and discourse among the public; so too has the varied response by municipalities and towns to California’s statewide housing plan. The press has regularly reported on the ways in which wealthy, predominantly white communities have responded to state mandates to build more housing.³ Ms. Clark, in her November 18 email to HCD, voiced concern about a referendum undermining a Los Gatos housing plan that the Town Council had recently approved; she also noted the racial and economic issues at play. While she acknowledged her service on the Los Gatos Planning Commission, Ms. Clark expressly offered her comments “just as a concerned citizen.” In expressing her personal thoughts to HCD, Ms. Clark was clearly opining as a private citizen on a matter of public concern. Whether her comments were “constructive” or “respectful” in the eyes of others is beside the point; they were protected speech.

Of course, the other members of the Los Gatos community are free to agree or disagree with Ms. Clark’s opinion—in fact, many did just that at the February 15, 2023 special meeting convened by the Council. But under the First Amendment, a public agency—like the Town Council—can *discipline* an employee for personal speech only if it has a legitimate interest in regulating speech that strongly outweighs the employee’s interest in exercising their constitutional rights.⁴ This foundational framework holds true whether the person against whom a government entity has retaliated is an employee, volunteer, or legislator.⁵ Thus, federal and state courts have held that it is unconstitutional for the government to discipline an employee for

² See, e.g., *Thomas v. City of Beaverton*, 379 F.3d 802, 809 (9th Cir. 2004); *Gray v. Cnty. of Tulare*, 32 Cal. App. 4th 1079, 1090 (1995); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992).

³ See, e.g., Conor Dougherty, *Twilight of the NIMBY*, N.Y. Times (last visited Mar. 1, 2023), <https://www.nytimes.com/2022/06/05/business/economy/california-housing-crisis-nimby.html>; Liam Dillon, *Thousands of Apartments May Come to Santa Monica, Other Wealthy Cities Under Little-known Law*, L.A. Times (last visited Mar. 1, 2023), <https://www.latimes.com/homeless-housing/story/2022-10-24/santa-monica-housing-apartment-boom>; Nico Savidge, *The State Rejected Berkeley’s Housing Plans. What Happens Next?*, Berkeleyside (last visited Mar. 1, 2023), <https://www.berkeleyside.org/2023/02/01/berkeley-housing-element-builders-remedy-hcd>.

⁴ *Pickering*, 391 U.S. at 563; see also *Bond v. Floyd*, 385 U.S. 116, 135 (1966) (ruling that the government has “no interest in limiting its legislators’ capacity to discuss their views of local or national policy”).

⁵ *Hyland*, 972 F.2d at 1136.

advocating to overthrow the government,⁶ for expressing a desire that the President of the United States be assassinated,⁷ for using racial slurs,⁸ for complaining about racially discriminatory employment and hiring policies,⁹ for opining on their employer’s affirmative action policy,¹⁰ and for criticizing the provision of government assistance for low income populations.¹¹

Here, the Town Council has not expressly identified any clear interest that would overcome Ms. Clark’s presumptive right to speak on politically charged issue of housing. Instead, the Council decided to impose discipline based on the mere finding that, through the contents of her November 18 email, Ms. Clark violated a “code of conduct” that applies to her voluntary service as a Planning Commissioner. But it is unclear what precise rule or written provision is the purported basis for this finding. The Town Council seemingly relies upon the phrase “constructive communication”¹² from the Town Council Code of Conduct as the primary basis for its conclusion. The Council’s own process, however, diverged significantly from the steps laid out in this very same Code of Conduct; to explain this divergence, the Town Attorney repeatedly stated that this Code serves only as a “model” for situations involving Commissioners like Ms. Clark. The Town Council also referenced various undefined terms from the “Commissioner’s Handbook,” citing phrases such as “model of leadership and civility,” “respect and dignity,” “fair treatment,” and “highest standards of the community.” None of these generic phrases contains a prohibition on referencing race or socio-economic status, nor does any suggest that a volunteer Commissioner may be disciplined or removed for failing to use “constructive” language in their personal communications. Instead, the Town Council Code of Conduct expressly provides that “Council Members may from time to time express opinions regarding broad policy matters which may be in conflict with currently adopted Council policies. Such

⁶ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 602-04 (1967).

⁷ *Rankin v. McPherson*, 483 U.S. 378, 392 (1987).

⁸ *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 675 (6th Cir. 2001).

⁹ *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

¹⁰ *Dep’t of Corr. v. State Pers. Bd.*, 59 Cal. App. 4th 131 (1997).

¹¹ *Davi v. Roberts*, 523 F. Supp. 3d 295 (2021); see also *Deltondo v. Sch. Dist. of Pittsburgh*, 2023 U.S. Dist. LEXIS 15133 (2023).

¹² Presumably, this phrase was taken from the following sentence in the Town Council Code of Conduct: “[t]he commitment of Town Council Members to their work is characterized by open constructive communication, innovation, and creative problem solving.”

statements are permissible if clearly characterized as personal opinion or policy change objectives.”

Fundamentally, the Town Council’s invocation of a “constructive communication” requirement, whether supported in writing or not, is at odds with the Constitution. If the national political stage has proven anything, it is that what is deemed “offensive” to one person may seem “constructive” to another; what some see as behaviors that model “leadership” may seem repugnant to others. More to the point, while some may think it “divisive” or not “constructive” to reference racial and socio-economic privilege in discussing matters of public policy, others consider use of that very language critical to progress. To the extent that *any* rule in the Town Council Code of Conduct or *any* phrase in a handbook allows the Town Council—based only on its subjective view of what is “constructive”—to regulate, constrain, or discipline personal expression on public issues, that rule is impermissibly content-based, viewpoint-discriminatory, overbroad, vague, lacking in standards, and constitutionally invalid.¹³

Finally, the actions that the Town Council took against Ms. Clark are plainly retaliatory. The First Amendment prohibits the government from taking, in response to protected speech, adverse actions against an official that would “chill a person of ordinary firmness from continuing to engage in the protected activity.”¹⁴ Ms. Clark serves as an unelected, volunteer Commissioner for the Town of Los Gatos. In response to complaints regarding a single email that she sent in her personal capacity, the Town Council took the following actions: 1) sent Ms. Clark a formal written censure on February 3, 2023; 2) held a 2.5-hour special public meeting at which they verbally presented the censure and invited the residents of Los Gatos to comment on Ms. Clark’s personal communication and to opine on what punishment she should bear; 3)

¹³ See, e.g., *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (noting that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional”); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment); *Edge v. City of Everett*, 929 F.3d 657, 664-65 (9th Cir. 2019) (requiring “specificity and clarity of laws” when “First Amendment freedoms are at stake” because uncertain rules “might have the effect of chilling protected speech or expression by discouraging participation”) (citation omitted); *Kaahumanu v. Haw.*, 682 F.3d 789, 806 (9th Cir. 2012) (explaining that “unbridled discretion” doctrine, which requires that laws include adequate standards, protects against risk that officials “will favor or disfavor speech based on its content”) (citation omitted).

¹⁴ *Boquist v. Courtney*, 32 F.4th 764, 775 (9th Cir. 2022) (citing *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 542-43 (9th Cir. 2010)); see also *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

formally voted at that February 15, 2023 meeting for censure, although written censure had already been delivered; and 4) imposed on Ms. Clark an obligation to participate in additional “counseling [with the Mayor and Town Manager] regarding the Town Council’s expectations with regard to future communications.”

Indeed, these disciplinary measures were specifically designed to chill future speech and to force Ms. Clark to conform her communications to the expectations of her assigned “counselors.” The Town Council neither sought outside legal counsel, as is required by its Code for any violation deemed “major,” nor did they handle the matter in private, as is called for with complaints that are deemed “minor.” Instead, the Council chose a particularly punitive hybrid approach: it first decided via written letter that censure was appropriate, then convened a 2.5-hour public meeting at which Ms. Clark was personally and publicly insulted, and then conducted a public vote for censure and continued counseling. It is particularly concerning that the Town Council also seriously considered and invited public comment on whether Ms. Clark should be removed entirely from her post on the basis of her speech. It is clear that the Council intended to make an example of Ms. Clark and to “chill” any similar expression in the future.¹⁵

Because its decision to discipline Ms. Clark violates her free speech rights protected under federal and state law, we now urge the Town Council to take the following actions: 1) revoke the public and written censure of Ms. Clark; 2) revoke any requirement that she attend “counseling” or “coaching”; and 3) revisit its policies on citizen complaints and its application of the Town Council Code of Conduct and related handbooks and apply those codes in a manner that is consistent with the free speech rights of its constituents.

¹⁵ While *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S.Ct. 1253 (2022) held that some forms of *verbal* censure do not rise to the level of retaliation, the Supreme Court specifically stated that their holding in *Wilson* was not meant “to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim.” There, the Supreme Court found that the verbal censure in *Wilson* did not constitute retaliation because 1) *Wilson* (the subject of censure) was an elected official and was thus expected “to shoulder a degree of criticism about [his] public service,” and 2) the verbal censure in *Wilson* encompassed only the censure of individuals who were “equal member[s] of the same deliberative body.” The Court was careful to note that *Wilson* did not touch upon the “First Amendment implications of censures or reprimands issued by government bodies against government officials who do not serve as members of those bodies.” Here, Ms. Clark was not an elected official, she was given both a written and a public verbal censure, she was subject to censure by the Town Council (of which she is not a part), and she has been instructed to attend “counseling.”

We look forward to the Town Council's response and welcome further conversation regarding this matter.

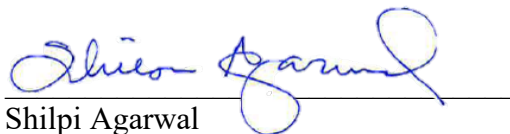
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Furthermore, and pursuant to the CPRA¹⁶ and the California Constitution,¹⁷ we also request the following records in the possession or control of the Town of Los Gatos for the time period of January 2013 to present:

1. All records in which the Town Council has censured, either verbally or in writing, another Town Council member, a commissioner, a committee member, or another public official of Los Gatos;
2. All records related to any prior complaints regarding a Los Gatos town official using divisive, disrespectful, or "non-constructive" language; including records of any actions taken by Town Council in response to those complaints;
3. All records related to complaints made against Kylie Clark and the Town Council's response;
4. All records related to the Town of Los Gatos's rules, policies, and practices regarding censure or removal of a public official.

We look forward to receiving your response to this record request within ten days. Thank you in advance for your assistance.

Sincerely,



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¹⁶ Cal. Gov't Code §§ 7920.000 *et seq.*

¹⁷ Cal. Const. art. I, § 3(b)(2).