AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

Sent via email

May 22, 2025

Mayor Pat Burns
Honorable Members of the City Council
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
SupplementalComm@Surfcity-hb.org
City.Council@surfcity-hb.org

RE: Brown Act Cease and Desist Letter

Dear Mayor Burns and Members of the Huntington Beach City Council:

I write on behalf of Wendy Rincon to notify you of violations of the Brown Act committed by Mayor Burns during the public comment period at the May, 6 2025 Huntington Beach City Council meeting and to seek commitments from Mayor Burns and the City Council to prevent similar violations in the future. Mayor Burns violated the Brown Act, Government Code §§ 54950 et seq., along with the United States and California Constitutions, by announcing that "making crude gestures or use of foul language" would be considered disruptive conduct that would place audience members at risk of removal or even arrest, by prohibiting speakers from addressing individual councilmembers by name during the public comment period, and by cutting off Ms. Rincon and others when they when they did attempt to address individual councilmembers by name. Additionally, the City Council's published "Meeting Decorum" rules are overbroad, and any attempt to enforce them as written would violate the public's statutory and constitutional rights.

Summary of Events

As he addressed the audience before the public comment period opened[1], Mayor Burns stated that

[1] These statements from Mr. Burns can be found starting at approximately 21minutes and 45 seconds into the video of the May 6 meeting, found here: https://www.youtube.com/watch?v=TtcEsV8YMXU. Subsequent references to timestamps on the meeting video refer to the same video and link.

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> the penal code provides that every person who, without authority or lawful, uh, willfully disturbs or breaks up a meeting may be guilty of a misdemeanor… yelling from the seating gallery, making crude gestures or use of foul language at the podium from the seating area or within the council chambers is considered disturbing the meeting…. If it is determined that your behavior is disruptive to the council conducting the City business, police are prepared to escort you out, and you may be arrested. Your act of disruption [will] be considered, uh, cause for you to be, uh, removed. And should you have cause or want to directly address a councilmember one on one, don't do it from the podium we're one council up here, and address the council as a whole. And if you want to do that one on one, please fill out a blue slip and arrange that meeting with that council member… And if you want to use foul language or anything, I've got this little red button that'll mute ya…Disruptive behavior, impeding or delaying our ability to conduct the council's business will not be tolerated. California Penal Code Section 403 prohibits disrupting this meeting and enforcement action will be taken for violations of this law.

As the meeting progressed, Mayor Burns made good on his threat to prevent speakers from addressing councilmembers directly:

- At approximately the 38-minute mark of the video, after a speaker had referred to a councilmember by name, claiming that he had misled the public about the City's library policies, Mayor Burns interrupted her to say "Ma'am, remember, address us as one unit…the Council." When the speaker went on to mention another councilmember by name, Mayor Burns silenced her microphone, saying "Ma'am, you were warned. You're done. Next speaker."
- At approximately the 1:11:30 mark on the video, after a speaker referred to a councilmember by his first name to critique his stance on the City's library policies and on library ballot measures that will soon be voted on by the public, Mayor Burns interrupted her saying "Please don't address ... Address the whole council, as one unit," making clear that she was prohibited from referring to a councilmember by name. The speaker then tried referring to that councilmember without using his name, and instead referencing specific actions she accused him of engaging in (yelling at her at 1am in the morning that he was going to put his library ballot measure campaign signs on top of hers, to obscure her signs, and then proceeding to "actually … do that"). When the speaker went on to start to accuse another councilmember of related actions, using his first name, Mayor Burns muted her microphone and interrupted her saying "Now, hold on, take a break." Mayor Burns then addressed the City Attorney saying "Point of order, can, are we not, is the rule not that they address the complete council?" The City Attorney responded "You should just address the Council, but to the extent they need to mention names, they can." Mayor Burns appeared to have heard and acknowledged this admonition, saying "Ok." He then allowed the speaker to continue, though she did not address anyone by name in her continued comments.
- Nevertheless, and despite the City Attorney's affirmation of the public's right to mention individual councilmembers' names, Mayor Burns stopped Ms. Rincon from addressing specific councilmembers by name less than an hour later. At approximately the 2:09:25 mark on the video, after Ms. Rincon addressed specific councilmembers' use of library measure campaign signs, referring to them by name, Mayor Burns interrupted her saying "If you can, Ma'am, please address the council," advising her to "fill out a blue card," presumably to request an individual meeting with the councilmembers whose conduct she

wished to critique," making clear that she would not be permitted to address individual councilmembers during the public comment period.

- At approximately 2 hours and 35 minutes into the video, former Huntington Beach City Councilmember sums up Mayor Burns' conduct during the meeting, stating that "cutting off speakers for naming councilmembers is unconstitutional. The First Amendment protects our right to criticize elected officials by name during public comment. Mayor, censorship doesn't just happen at our library, it's happening right here at this microphone."

Brown Act and Constitutional Violations

First, Mayor Burns violated the Brown Act by informing the public that "making crude gestures or use of foul language" would be considered disruptive behavior that would place them in jeopardy of ejection or even arrest and prosecution. A core Brown Act requirement is that, during a regular meeting of a legislative body, members of the public "must be allowed to speak … 'on any item of interest to the public, ... that is within the subject matter of the legislative body." Gov't. Code § 54954.3. While the Brown Act does allow for the removal of individuals who are "disrupting" a meeting, as long as the presiding officer follows appropriate procedures, the authority to remove applies only to people who are "engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting." Gov't Code § 54957.95. Warning members of the public that they may be removed from a meeting or even arrested and prosecuted for conduct that does not begin to rise to this level impermissibly chills their rights to address their elected officials.

Each of the speakers that Mayor Burns silenced or warned were addressing aspects of the City's library policies when Mayor Burns prevented them from speaking. These are matters that are clearly within the subject matter of the City Council, and there can be no question that they are matters of immense public interest. None of the speakers that Mr. Burns silenced or warned was engaged in disruptive conduct as contemplated by Section 54957.95. The video instead makes clear that they were all calm and measured as they addressed the Council. The Mayor had no legitimate basis for preventing these speakers from providing their public comments, and he certainly had no legitimate basis for indicating that their speech was in any way "disruptive."

The Mayor and Council may not silence speech, or deem it disruptive of a meeting, merely because they believe it is offensive. *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); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("[A] speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing."). This is true even if the speaker wishes to use words the Mayor or counsel disapproves of. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (noting "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well" and "words are often chosen as much for their emotive as their cognitive force").

Under the First Amendment, "speech cannot be restricted simply because it is upsetting or arouses contempt," and "in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (cleaned up); *see also, e.g.*, *Dworkin*

v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir. 1989) (holding "speech is not actionable simply because it is base and malignant" and "speech may not be suppressed simply because it is offensive") (cleaned up). As the Supreme Court has recognized, one cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.*

To the extent that Mayor Burns may have been attempting to enforce the City Council's published "Meeting Decorum" rules, it is important to note that those rules are also unconstitutionally overbroad. The rules state, in relevant part, that "[n]o person in the audience at a City Council meeting shall engage in conduct that disrupts the orderly conduct of any City Council meeting, including, but not limited to, the utterance of loud, threatening or abusive language, whistling, clapping, stomping of feet, repeated waving of arms or other disruptive acts."[2] The Council may enact rules of decorum for its open meetings, but those rules will be facially overbroad in violation of the First Amendment if they allow a presiding officer to "eject an attendee" for anything short of "'actually disturbing or impeding a meeting.'" *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013) (quoting *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (en banc). There may be circumstances where some of the behaviors listed in the Council's decorum rules would "actually" disturb or disrupt a meeting, but the Council may not impose a blanket prohibition on those behaviors or deem them inherently disruptive. "Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The [Council] cannot define disruption so as to include non-disruption." *Norse*, 629 F. 3d. at 976. The Council's decorum rules constitute precisely the sort of re-definition prohibited by *Norse*.

Because "crude gestures" and "foul language" are *not* inherently disruptive, the Mayor has no legitimate basis for prohibiting them. The First Amendment reflects "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). A "core postulate of free speech law" is that the "government may not discriminate against speech based on the ideas or opinions it conveys," no matter how "offensive to a substantial percentage of the members of any group" the speech might be. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). The First Amendment protects speech that is "deeply offensive to many." *United States v. Eichman*, 496 U.S. 310, 318 (1990).

Mayor Burns' explanations of his policies, and the Council's decorum rules themselves, also violate the First Amendment because they are vague and fail to provide adequate notice of the type of conduct they prohibit.[3] "It is a basic principle of due process than an enactment is void for vagueness if its prohibitions are not clearly defined . . . [W]here a vague statute abuts

[2] The City Council's "Meeting Decorum" rules can be found at https://www.huntingtonbeachca.gov/government/city_clerk/meeting_decorum_agenda_comments.php#:~:text=No%20person%20in%20the%20audience,arms%20or%20other%20disruptive%20acts.

[3] Courts are also highly suspicious of attempts to regulate speech under the guise of regulating conduct. *See Cohen*, supra, 403 U.S., at 18 (reversing criminal conviction for disturbing the peace for wearing jacket that had the words Fuck the Draft on it and stating "[t]he only 'conduct' which the State sought to punish is the fact of communication.")

upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972) (cleaned up). Vague restrictions on speech are inherently likely to discourage people from exercising their First Amendment rights. "In the vagueness inquiry, like in the context of overbreadth, the requirement that laws be precise is aimed at preventing 'chill': rather than risk sanctions, citizens will steer far wider than necessary to avoid engaging in prohibited speech; the First Amendment, however, needs breathing space to survive. Accordingly, standards of permissible statutory vagueness are strict in the area of free expression." *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158, 1170 (C.D. Cal. 2009), aff'd in part, remanded in part on other grounds, 638 F.3d 703 (9th Cir. 2011) (citations and quotation marks omitted). "[W]here First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required, and courts ask whether language is sufficiently murky that speakers will be compelled to steer too far clear of any forbidden areas." *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019) (cleaned up).

While prohibitions against "making crude gestures or use of foul language" and against the use of "loud" or "abusive language" are impermissible because they allow for expulsions for conduct that is not "actually" disruptive, *Norse*, 629 F.3d at 976, they are also unconstitutionally vague because it is impossible for a member of the public to decipher and determine what types of conduct the Council or Mayor Burns might decide fit into these categories. It is not clear what kinds of gestures they might deem "crude" or what type of language they might decide is "foul" or "abusive." After all, "one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. *See, e.g.*, *id*. at 26 ("we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process") (reversing conviction of individual charged with disturbing the peace by wearing a jacket with the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse); *Duran v. Arizona*, 904 F.3d 1372, 1378 (9th Cir. 1990) (First Amendment protects person making obscene gesture towards, and directing obscenities at, police officer).

Finally, The Mayor's prohibition against naming individual councilmembers, and his requirement that all comments be directed to the Council as a whole violates the First Amendment and the Brown Act. Meetings of the City Council constitute limited public forums. *See White v. City of Norwalk*, 900 F.2d 1421, 1425 (1990). In a limited public forum, the government may enact reasonable restrictions to preserve the space for its intended purpose. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 131 (2001). The Mayor's prohibition, however, is plainly unreasonable. Preventing the public from addressing an individual councilmember directly leads to absurd results. For example, it would prevent a person from directly responding to a remark made by a particular councilmember except through a needlessly complicated contrivance. It also ignores the fact that the Council does not always act as a cohesive body. In the case of a split vote, it makes no sense for a member of the public to castigate councilmembers who voted in the way the constituent preferred rather than directly addressing the members of the council who voted the other way.

"Debate over public issues, including the qualifications and performance of public officials [], lies at the heart of the First Amendment. Central to these principles is the ability to question and challenge the fitness of the administrative leader of a [government body], especially in a forum created specifically to foster discussion about [issues within the body's purview]." *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997) (citing *Schenck v.*

Pro–Choice Network, 117 S.Ct. 855, 858 (1997); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344–45 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1987); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *New York Times v. Sullivan*, 376 U.S. 254 (1974). The Mayor may not impose a prohibition preventing members of the public from engaging in this type of questioning and challenging of individual councilmembers.

Moreover, the Brown Act itself indicates that the public shall have the right to speak on "any item of interest…within the subject matter jurisdiction of the legislative body." Government Code Section 54954.3(a). Critiques of the actions or inactions of individual councilmembers on issues within the Council's jurisdiction constitute items of interest.

Conclusion and Cease and Desist Demand

The Mayor's threats to remove members of the public who make "crude gestures or use of foul language," or to have them arrested or prosecuted violated the Brown Act, as did his decision to silence speakers who addressed individual councilmembers by name, including Ms. Rincon. Additionally any attempt to enforce the Council's published "Meeting Decorum" rules would violate the Brown Act, the First Amendment to the United States Constitution, and the Liberty of Speech Clause of the California Constitution. Accordingly, pursuant to Government Code section 54960.2(a), I hereby notify Mayor Burns and the City Council that the Mayor and the Council must immediately cease and desist from: 1) warning members of the public that they may not "make crude gestures" or use "foul language" when they provide public comment; 2) warning members of the public that they may not address individual councilmembers by name when they provide public comment; 3) silencing, muting, or ordering the removal of members of the public who "make crude gestures," use "foul language," or refer to individual councilmembers by name when they provide public comment; or 4) enforcing the portion of the Council's "Meeting Decorum" rules that prohibits purportedly "abusive" language, "whistling, clapping, stomping of feet, repeated waving of arms" as inherently and automatically "disruptive."

Pursuant to Government Code section 54960.2(b), Ms. Rincon may take legal action if the City does not respond to this letter within 30 days, providing its unconditional commitment to cease, desist from, and not repeat the violations described here. In that eventuality, Ms. Rincon would be entitled to court costs and attorney fees. *Id.*

Please let me know if you have any questions or would like any additional information. I look forward to your response. I can be reached via email at jmarkovitz@aclusocal.org.

Sincerely,

Jonathan Markovitz
Free Expression and Access to Government Staff Attorney

Cc:

City Attorney Michael Vigliotta
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