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PEOPLE'S HOMELESS TASK FORCE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

30-2019-01062485-CU-CR-CJC

PEOPLE'S HOMELESS TASK FORCE,

Plaintiff-Petitioner,

v.

COUNTY OF ORANGE, ORANGE COUNTY BOARD OF SUPERVISORS,

Defendants.

Case No. Judge Sheila Fell

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE

INTRODUCTION

1. "Democracy Dies in Darkness." This became *The Washington Post*'s new slogan in 2017. The statement is as true in Orange County as it is in Washington, D.C., for a government that turns its back on the people is not one of, by, and for the people. When elected officials attempt to shield their actions from public scrutiny and shut down public discourse and criticism, they violate the sovereign right of the people to hold their elected officials accountable and ensure that the powers delegated to them are not abused. Embodying this principle, California's Ralph M. Brown Act states that "the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business" and that the "people of this State do not yield their sovereignty to the agencies which serve them." Cal. Gov. Code § 54950. These agencies, including the Orange County Board of Supervisors, are the "instruments" of the people; the people of this State "retain control over the instruments they have created." *Id.* When the people's instruments fail to heed the concerns of their constituents, the people have no choice but to act.

2. The Orange County Board of Supervisors has not only ignored the pleas of its constituents, it has also actively attempted to silence the people, stifle debate, and shield its members from criticism by erecting barriers to the people's participation in Board meetings and abusing the power vested in the Board.

3. In a pressing example of the failure of local government to address the concerns of the people, the government of Orange County has consistently ignored the voices of community members who are concerned about the County's homelessness crisis. Homelessness has reached epidemic proportions in Orange County over the past several years, exacerbated by a shortage of affordable housing and inadequate shelter space. The scope of the problem and the attendant human suffering has drawn the attention of not only the residents of Orange County, but also the nation and the world. Despite the intense focus on this most pressing of local issues, the elected officials of Orange County have done little to address the growing problem.

4. Indeed, the recently evicted encampment along the Santa Ana River in Orange County became a symbol of the crisis, yet even that did not spur Orange County politicians into action. Until the encampment was cleared in early 2018, nearly 1,000 people resided there in tents and makeshift shelters.[1] Encampment residents included children, veterans, people with disabilities, people suffering from addiction or mental illness, individuals unable to work, and people with incomes too small to afford Orange County's sky-high rents.[2] The encampment lacked basic sanitary facilities during a time when hepatitis A was spreading across California's vulnerable homeless communities.[3]

5. Dissatisfied with their elected officials' inaction, a group of concerned community members, including local advocates and people who had experienced or are experiencing homelessness, banded together to advocate for a solution to the problem.

6. This group, the People's Homeless Task Force, began appearing regularly at meetings of the Orange County Board of Supervisors (the "Board"). Members used public comment periods during Board meetings to press their elected officials for action, propose

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[1] Jeff Goertzen, *Santa Ana River Trail Homeless People: Where They Are, How They Live, What They're Saying*, Orange County Register (Jan. 11, 2018), https://www.ocregister.com/2018/01/11/santa-ana-river-trail-homeless-people-where-they-are-how-they-live-what-theyre-saying/.

[2] Theresa Walker, *6 People Who Left the Santa Ana River Homeless Camps, and the Different Paths Their Lives Took*, Orange County Register (June 4, 2018), https://www.ocregister.com/2018/06/04/6-people-who-left-the-santa-ana-river-homeless-encampments-and-the-different-paths-their-lives-took/; Benjamin Oreskes, *More Than 500 Homeless People Wonder Where They'll Go as O.C. Clears Out Largest Encampment Near Angel Stadium*, L.A. Times (Jan. 21, 2018), https://www.latimes.com/local/lanow/la-me-ln-santa-ana-riverbed-homeless-20180122-story.html; Theresa Walker, *Everyone Agrees: the Santa Ana River Trail Is No Place to Raise Homeless Children*, Orange County Register (May 16, 2017), https://ocregister.com/2017/05/16/santa-ana-river-trail-is-no-place-to-raise-children/.

[3] Scott Wilson, *Hepatatis A Outbreak Among Homeless a Byproduct of California's Housing Crunch*, Washington Post (Oct. 25, 2017), https://www.washingtonpost.com/national/hepatitis-a-outbreak-among-homeless-a-byproduct-of-californias-housing-crunch/2017/10/25/e9038a62-acf9-11e7-be94-fabb0f1e9ffb_story.html?noredirect=on&utm_term=.e73f47e64580.

solutions, and hold the officials accountable for their inaction. But the Board wasn't interested in listening.

7. Specifically, the Board uses its Rules of Procedure to limit the right of the public to address the Board during public meetings, thus violating the California and U.S. Constitutions and the Ralph M. Brown Act. The Board has gone so far to insulate itself from criticism that its Rules of Procedure even prohibit members of the public from addressing individual Supervisors at meetings, each of whom represents distinct districts. In effect, constituents are barred from speaking directly to *their* representative.

8. The Board also enforces its Rules of Procedure in ways that discriminate against those who express views critical of the Board's handling of the homelessness crisis. The prohibition on addressing individual Supervisors is enforced only against those who are critical of the Board's actions, and not those who are complimentary.

9. The Rules of Procedure also vest the Chair with almost unlimited discretion to limit public comment—a power that is often exercised arbitrarily at the whim of the Chair. The Board uses these speaker time limits to restrict the public's ability to address homelessness, while taking a more lenient approach toward speakers on other subjects. Board members have even interrupted speakers on homelessness to criticize their views, ensuring that these speakers are unable to fully deliver their messages before time expires.

10. The Board has further shielded itself from public scrutiny by authorizing the immediate destruction of documents in violation of California Government Code Section 26202. This policy robs the public of its right to access government records, subverting both the California Public Records Act and California Constitution. It also ensures that certain documents showing the manner in which the Board and the County conduct the people's business will never see the light of day. These documents—requested by, but never produced to, the People's Homeless Task Force—potentially reflect the Board's action *and inaction* in addressing the homelessness crisis.

11. If the government of Orange County is actually expected to work for the people, then it must be accountable to the people. Through this action, the People's Homeless Task Force seeks to protect the right of all Orange County residents to freely address their elected officials on issues of concern to them and to preserve the right of the public to oversee the manner in which government carries out the people's business.

PARTIES

12. Plaintiff-Petitioner the People's Homeless Task Force (the "Task Force") is an association of Orange County residents concerned about the growing crisis of homelessness in Orange County, the conditions under which homeless residents are forced to live, the lack of permanent supportive housing and other resources available to residents experiencing homelessness, the criminalization of homelessness, and local government's inaction in the face of these issues.

13. The Task Force formed in the fall of 2016 after members Jeanine and Mike Robbins observed Lou Noble, another Task Force member, addressing the Anaheim City Council with an elderly homeless woman who had had her belongings confiscated by law enforcement. Shocked at how the woman had been treated, Mr. and Mrs. Robbins joined Mr. Noble, Linda Lehnkering, David Duran, and others to create the Task Force.

14. Initially, the Task Force advocated for the rights of homeless individuals and against the criminalization of homelessness. The Task Force focused its advocacy efforts on the Anaheim City Council, attending those meetings to voice its concerns with the city's approach to the homelessness crisis. The Task Force ultimately determined, however, that it could achieve a broader impact by advocating to the Orange County Board of Supervisors.

15. Task Force members attend every public meeting of the Orange County Board of Supervisors and use what limited time is allotted for public comments to advocate for policies that would improve the lives of people experiencing homelessness in Orange County. As such, the Task Force and its members are both directly injured by the policies and practices complained of herein and beneficially interested in Defendants' compliance with constitutional and statutory

law. There is also a substantial public interest in ensuring that Defendants comply with the California and U.S. Constitutions, Brown Act, and California Public Records Act.

16. Defendant County of Orange (the "County") is a county in Southern California comprising more than three million residents.[4] On any given night in Orange County, more than 4,400 people experience homelessness.[5] In recent years, the County's growing homelessness crisis has been frequently reported in the local, national, and international news, and has even drawn the attention of the United Nations Special Rapporteur on extreme poverty and human rights.[6] Many of the people experiencing homelessness in Orange County sleep in cars or in the County's too-few shelter beds, but about half of Orange County's homeless residents live outdoors.[7] Until their recent eviction by the County, many of them made their homes in tents and makeshift shelters along the Santa Ana riverbed.[8]

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[4] https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml.

[5] American Civil Liberties Union of Southern California, *Nowhere to Live, the Homelessness Crisis in Orange County and How to End It* (Aug. 2016), https://www.aclusocal.org/sites/default/files/field_documents/nowhere-to-live-aclu-socal-report.pdf [hereinafter "*Nowhere to Live*"].

[6] Carla Green, *California County Evicts Hundreds from Homeless Camp – With Few Beds to Offer*, The Guardian, (Jan. 22, 2018), https://www.theguardian.com/us-news/2018/jan/22/california-orange-county-anaheim-homeless-eviction; Tori Richards, *The Unsettling Normalcy of this Orange County Homeless Encampment*, N.Y. Post (Dec. 13, 2017), https://nypost.com/2017/12/13/the-unsettling-normalcy-of-this-orange-county-homeless-encampment/; CBS Los Angeles, *UN Poverty Expert to Tour SoCal, 'Investigate' Efforts to Fight Homelessness*, (Dec. 4, 2017), https://losangeles.cbslocal.com/2017/12/04/homelessness-un-poverty-los-angeles/; Anh Do & Hannah Fry, *Orange County Moves to Evict Homeless from 'Skid Row' Along Santa Ana River*, L.A. Times (Nov. 6, 2017), https://www.latimes.com/local/lanow/la-me-ln-river-trail-access-20171031-story.html; Jose Pimentel & Theresa Walker, *After Anaheim Declares State of Emergency, Santa Ana River Homeless Wonder What's Next*, Orange County Register (Sept. 13, 2017), https://www.ocregister.com/2017/09/13/after-anaheim-declares-a-state-of-emergency-homeless-along-river-bed-ponder-whats-next/.

[7] *Nowhere to Live*.

[8] Jordan Graham, *Santa Ana River Homeless Encampment's Last Residents Move Out*, OC Register (Feb. 26, 2018), https://www.ocregister.com/2018/02/26/santa-ana-river-homeless-encampments-last-residents-move-out/.

17. In fiscal year 2017-18, Orange County had a budget of $6.2 billion.[9] At the fiscal year's conclusion, Orange County reportedly had at least $230 million in unspent dollars that could have been used to alleviate the homelessness crisis.[10]

18. Defendant Orange County Board of Supervisors (the "Board") is an elected body governing the five Supervisorial Districts of Orange County. The current Board members are Supervisor Andrew Do (1st District), Supervisor Michelle Steel (2nd District), Supervisor Doug Chafee (4th District), and Supervisor Lisa Bartlett (5th District). As of the filing of this Complaint, the 3rd District Supervisor seat is open; Todd Spitzer last held the seat. Each Supervisor is elected to a four-year term and represents a single geographical district. The Board is charged with overseeing the management of the County government, which includes setting County policy, approving an annual budget and contracts, conducting public hearings on land-use and other matters, and making appointments to boards, committees, and commissions.

19. The Chair of the Board is nominated and elected by the Board at the beginning of each year. The current Chair is Supervisor Bartlett. She was preceded by Supervisor Do, who was preceded by Supervisor Steel. The Chair is responsible for presiding over meetings and ensuring that meetings proceed in accordance with the Board's Rules of Procedure.

JURISDICTION AND VENUE

20. Plaintiff's-Petitioner's claims arise under state and federal law. This Court has authority under California Code of Civil Procedure Sections 525-526 and 1085-1086, and California Government Code Section 54960.

21. Venue is proper in the Superior Court of Orange County under California Code of Civil Procedure Sections 393(b), 394, and 395 because Defendants in this action are the County of Orange and its Board of Supervisors, a local agency, and all of the acts and omissions occurred in Orange County.

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[9] bos.ocgov.com/finance/2018FN/intro_frm.asp.

[10] Nick Gerda, *Orange County Has at Least $230 Million It Could Use to Address Homelessness,* Voice of OC (Mar. 8, 2018), https://voiceofoc.org/2018/03/county-government-has-at-least-230-million-it-could-use-to-address-homelessness/.

FACTUAL ALLEGATIONS

The Board's Rules Of Procedure Impermissibly Restrict Speech

22. The Board promulgates Rules of Procedure governing the conduct of its meetings. The Board adopted its current version of the Rules of Procedure on January 27, 2009, amended on October 25, 2011, December 4, 2012, February 9, 2016, November 8, 2016, April 11, 2017, and February 6, 2018.[11]

23. The Board holds regular public meetings every two weeks on Tuesday mornings. The meetings begin with presentations lasting approximately half an hour. Until recently, the presentations were followed by a public comments period, after which the Board would proceed to the items on the agenda. On February 6, 2018 the Board amended the Rules in several ways, including moving the general public comments period from the beginning to the end of each meeting.

24. Several provisions of the Rules of Procedure infringe upon Plaintiff's-Petitioner's rights under the First Amendment, the California Constitution, the Brown Act, and the California Public Records Act.

The Board's Rules Prevent Constituents from Addressing their Elected Officials and Are Designed to Shield Officials from Criticism

25. Rule of Procedure 46 ("Rule 46") requires members of the public to address "[a]ll remarks and questions" to "the Board as a whole and not to any individual Board member." The Rule states that "[n]o question shall be asked of any Board or staff member without first obtaining permission of the Chair," but does not call for the Chair ever granting a speaker permission to address a "remark" to a Board member. This Rule directly conflicts with a stated purpose of

[11] Orange County Board of Supervisors, Rules of Procedure, http://www.ocgov.com/civicax/filebank/blobdload.aspx?BlobID=4464.

Board meetings—to allow constituents to communicate with their specific Supervisor—and is thus unreasonable in light of this purpose.[12]

26. Addressing a Supervisor at a Board meeting allows Task Force members to reach not just the Supervisor, but also other interested members of the general public. Because phone calls, emails, and letters to individual Supervisors are inherently private conversations, they do not reach the same audience as do comments directed to individual Supervisors at public Board meetings.

27. Furthermore, efforts to communicate with Supervisors outside of Board meetings are often rendered ineffective by the Board's failure to act on such requests. For example, at a Board meeting on October 17, 2017 Task Force member Tim Houchen explained that he had come to the public meeting for the express purpose of making his request in person after attempting to communicate with the Supervisors via email for weeks without receiving a response.

28. In August 2017, Task Force member Linda Lehnkering corresponded via email with a member of then-Supervisor Shawn Nelson's staff in an attempt to schedule a meeting. The staff member first offered a phone call, and Ms. Lehnkering explained that the Task Force preferred an in-person meeting. Neither materialized. Other Task Force members have had similar experiences, where phone messages go unanswered and promised meetings never occur.

29. Rule 46 also requires a speaker to obtain permission from the Chair of the Board before asking any question of any "Board or staff member." The Rules of Procedure provide no standard or other guidance governing when that permission should or should not be granted. The Chair is thus vested with unbridled discretion whether to grant permission to address a question to a Supervisor or staff member.

30. The Board has demonstrated a clear pattern of enforcing the prohibition on addressing individual Supervisors only against critical speakers, and not against those who are

[12] Orange County, *Board of Supervisors - Overview*, www.ocgov.com/gov/bos ("Community members may contact their Supervisor via phone, in writing or during public comments at a Board meeting.").

complimentary of the Board and its individual members. Such behavior on the part of the Board belies the "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) (emphasis added).

31. The Board's own conduct demonstrates that the real purpose of the prohibition on addressing individual Supervisors is to shield them from criticism. For example, at the November 14, 2017 public meeting of the Board, Task Force member David Duran requested permission from then-Chair Michelle Steel to address one of the Supervisors. Mr. Duran's comments up to that point had included criticism of the Board, generally, for having homeless veterans removed from the Santa Ana riverbed.

32. After Mr. Duran requested permission to address one of the Board members individually, Supervisor Steel responded that he "cannot really attack" the Supervisor. Mr. Duran repeated his request, asking "Madam Chair, may I address one of the Supervisors?" Supervisor Steel sighed, looked to her left at Supervisor Bartlett, and then stated that Mr. Duran's time was almost up, adding "you can talk [sic] whatever you want. Except attacking."

33. Mr. Duran responded that the Chair's statement demonstrated a "presumption" on the part of the Board that because certain speakers represented the homeless, they were there to "attack" the Board. He returned to his planned remarks in the approximately 30 seconds he had remaining to speak, but was unable to directly address a Supervisor as he had requested.

34. Additionally, on May 23, 2017 the Chair interrupted a speaker addressing the Supervisors individually during his public comments to instruct him to address the Board as a whole, and not to address members individually. The speaker in question had been speaking critically of the Board and had accused Supervisor Do of trying to use law enforcement to intimidate him.

The Board Imposes Unreasonable, Arbitrary, and Capricious Limitations on Public Comment

35. Rule of Procedure 47 ("Rule 47") limits speakers to three minutes of public comment unless the Chair exercises his or her discretion "to further reduce the time allotted for each individual speaker if the number of persons desiring to speak would prevent the Board from accomplishing its business in a reasonably efficient manner." The Chair has invoked this authority to limit speakers to as little as one minute of speaking time.

36. The Rules of Procedure permit the Chair to reduce the time allotted per speaker but provide no objective standard for determining when and by how much the time may be reduced, resulting in arbitrary and unpredictable limits. These arbitrary limits make it extraordinarily difficult for members of the public to plan their comments appropriately.

37. For example, on November 14, 2017 then-Chair Steel limited speaker time to two minutes when 72 individuals had signed up to speak. At a January 2018 meeting, then-Chair Do, upon hearing that there were 20 speakers lined up for public comment, restricted public comment to only two minutes per person. Worse still, at the April 10, 2018 meeting, upon hearing that there were seven speakers for public comment, then-Chair Do again only gave two minutes per speaker. Such a severe (a 33% reduction in time) and arbitrary limit (the same 33% reduction whether 72, 20, or seven speakers) is arbitrary, capricious, and unreasonable in light of the purpose of the Brown Act, which is to ensure that elected officials remain accountable to the people they serve.

38. At past Board meetings—just as they plan to at those meetings to come—Task Force members have wanted to comment on more than three agenda items. Under Rule 47, however, a member of the public may only address the Board "on up to three occasions" at each meeting, regardless of the number of agenda items. This limit encompasses all items on the agenda, plus the time allotted for general public comments. Thus, a speaker who wishes to address more than three agenda items, or who wishes to speak on three agenda items *and* during the public comment period about a non-agenda item, must relinquish the right to address the Board on one or more issues of concern. This rule violates the Brown Act's requirement that the

Board provide "an opportunity for public comment on *each specific agenda item as it is taken up*." *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1079 (2008) (emphasis added).

The Board Gives Preferential Treatment to Individuals Holding Public Office in Other Jurisdictions

39. The Board discriminates against members of the general public in favor of elected officials from other jurisdictions, thereby arbitrarily and unreasonably denying members of the public equal opportunity to address their elected officials.

40. At the March 27, 2018 meeting of the Board, during which the Board considered rescinding its prior action authorizing the creation of homeless shelters in Irvine, Huntington Beach, and Laguna Niguel, the Chair allotted two minutes of speaking time for elected officials from various cities. The elected officials were almost universally opposed to the homelessness plan and urged the Board to rescind. But for other speakers addressing the same agenda item, the Board allotted only one minute to speak. Following comments, the Board voted to rescind its prior action.

41. Furthermore, several of the elected officials were permitted to exceed their two-minute time limit, which was already greater than the time allotted to other speakers. The Board was not as lenient with the general public. Indeed, when one speaker who was not an elected official exceeded her time limit, the Chair cut her off and scolded "You are not more important than other speakers. I know you think you are."

42. There's more. When a speaker identifying herself as a member of the Santa Ana School Board addressed the Board, the Chair stated that he had given her "extra time" because she presumably represented a group. However, only one of the at least 24 individuals who represented groups or organizations but who were *not* elected officials was granted additional time. Donta Harrison, who identified herself as part of the United Domestic Workers Union and did not address homelessness, was given an extra minute, bringing her total time to two minutes. But speakers representing Housing is a Human Right OC, the ACLU of Southern California, the Council on American Islamic Relations, Asian Americans Advancing Justice, the LGBT Center

of Orange County, and several other organizations with a substantial number of members—who came to speak on the issue of homelessness and/or to support the state's "sanctuary" law, which the Board opposed—were allotted only one minute.

The Board Misuses and Defies Its Own Rules to Suppress Critical Speech

43. The Board has a long practice of enforcing its Rules of Procedure in a discriminatory way, particularly against Task Force members, individuals advocating on behalf of the homeless, and speakers who are critical of the Board or of individual Board members. This discriminatory enforcement is designed to suppress speech that is critical of the Board and the Board's agenda.

44. The prohibition on addressing individual Supervisors has not been equally enforced against speakers who are complimentary rather than critical. For example, at the October 17, 2017 meeting, several speakers addressing a proposed revitalization project at Dana Point Harbor addressed Supervisors individually, thanking them for their efforts. The Board did not reprimand any of these laudatory speakers. By contrast, at the May 23, 2017 meeting, a member of the public addressed Supervisors directly and accused Supervisor Do of using law enforcement to try to intimidate him. The Chair interrupted and instructed him to address the Board as a whole rather than any individual members.

45. The Board also enforces or threatens enforcement of the prohibition on addressing individual Supervisors to suppress or penalize critical speech. For example, at the September 12, 2017 meeting, Supervisor Spitzer responded to advocate Mohamed Aly's remarks criticizing Supervisor Do's actions related to the opening of the Courtyard homeless shelter. This triggered an attempt by Mr. Aly to respond after his allotted time had elapsed. Supervisor Spitzer then called on the Chair to "restore order," which resulted in a break in the meeting and Mr. Aly's removal by Sheriff's deputies. Following the break, Supervisor Spitzer resumed his remarks by saying "first of all, he [Aly] attacked a colleague—Supervisor Do."

46. The November 14, 2017 meeting offers another example of the Board using the threat of having Sheriff's deputies remove a member of the public to suppress critical speech.

The speaker criticized the Board, remarking that it was ignoring public comments and suggesting that the Board members were browsing Facebook during public comments. Then-Chair Michelle Steel called for the Sheriff's deputies; Supervisor Do, visibly upset, called for them to "restore order." Previous calls to "restore order" have resulted in threatened or actual removal of individuals from Board meetings. Supervisor Do went on to say, "don't denigrate the work we do up here."

47. The Board has also enforced its time limits in a discriminatory fashion. The Board strictly enforces time limits against Task Force members and speakers addressing homelessness, but is more lenient with speakers on other subjects. For example, at the August 8, 2017 meeting a representative of the Orange County Fire Chief's Association addressing EMS services spoke for nearly four minutes notwithstanding the three-minute limit. At the October 17, 2017 meeting, a speaker discussing the Dana Point Harbor revitalization project exceeded the time limit without reprimand, as did a speaker discussing workers' compensation for the Sheriff's Department. But at that same meeting, Task Force member Lou Noble was held strictly to the time limit.

48. The Board has also misused these rules to reduce Task Force members' speaking time while they are in the middle of their comments. At the February 6, 2018 meeting, David Duran, a Task Force member, criticized the Board's inaction on homelessness and the restrictions on public comments. During his remarks, Mr. Duran paused to observe that Supervisor Spitzer had given him eye contact and thanked him, addressing him as "Mr. Spitzer." Supervisor Spitzer then interrupted Mr. Duran, accused him of being "disrespectful," and began arguing with him.

49. Although Rule 47 provides that "[a] speaker's time will be tolled by the Clerk if the speaker is questioned or interrupted by the Chair, or by members of the Board, including the time for the speaker to respond to such questioning," Mr. Duran's time was not tolled when Supervisor Spitzer interrupted and argued with him. Mr. Duran was consequently deprived of more than 20 seconds of his mere two minutes of allotted speaking time, effectively censoring his speech.

50. At that same meeting, Supervisor Spitzer interrupted another speaker addressing homelessness after the speaker suggested that the Board may have been influenced by racial bias. Supervisor Spitzer interjected to express his disagreement with the comment, going so far as to suggest that the speaker did not have the First Amendment right to express his opinion. As with Mr. Duran, this speaker's time was not tolled on account of Supervisor Spitzer's interruption, thereby depriving the speaker of a substantial amount of his limited time.

51. Because of this practice, Board members are able to slash the speaking time of individuals with whom they disagree by interrupting them and engaging them in debate until their time runs out.

The Board Moved the Time for "General" Public Comments to the End of Meetings, Making Public Participation Unreasonably Difficult

52. When it revised its Rules in February 2018 to allow comment periods for agenda items and for other "general" non-agenda issues, the Board set the "general" public comments section for the very end of the meeting under Rule of Procedure 23. Because any given meeting can last several hours, even up to a full day, this revision of the Rules deprives the public of their right to address the Board before or during the Board's consideration of a particular action.

53. Moreover, this change makes it unreasonably difficult for the public to address the Board at all. 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. This discourages public participation and forces members of the public to choose between civic engagement and keeping up with responsibilities such as jobs or child care.

54. That unpredictability manifested itself in the average number of public comments per meeting in the six months before and after the change: participation declined from an average of 24 public comments per meeting to an average of fewer than eight.

55. This chilling effect on speech is also evident through comparisons of the number of completed speaker forms to the number of people who actually speak. For example, at the June 26, 2018 Board meeting the Clerk received 19 speaker request forms. However, only nine individuals actually spoke during public comments. This drop suggests that the long wait for the public comments period to begin deterred individuals who had signed up to speak from actually making their comments.

56. Moreover, on information and belief, the Board has shown a greater inclination to cut the amount of comment time when it is at the end, instead of the beginning, of the meeting. Moving public comments to the end of Board meetings has effectively reduced the amount of time available for public comments. Before this change took effect, approximately 14 to 24 percent of Board meeting time was devoted to public comments. After the change, the time allotted for public comments dropped to less than 10 percent and was often as low as two or three percent.

The Board Infringes Upon the First Amendment Right to Engage in Expressive Conduct

57. Despite the First Amendment right of the public to engage in expressive conduct, such as applause, the Board regularly attempts to suppress such conduct when the audience at Board meetings expresses support for speakers with whom the Board disagrees. *See, e.g.*, *In re Kay*, 1 Cal. 3d 930, 939 (1970) ("Audience activities, such as heckling, interrupting, harsh questioning, and booing" may "advance the goals of the First Amendment"). The Board has reprimanded the public for expressive conduct even when that conduct has not actually disrupted the Board meeting.

58. For example, at the March 13, 2018 meeting, following applause in support of a speaker, then-Chair Do stated "I don't want to hear from the audience anymore." The audience's applause in no way interfered with the Board's ability to conduct the meeting, nor had any previous applause caused actual disruption. Similarly, in April 2017 when the public applauded a speaker who commented on homelessness, the Chair instructed the public not to clap, calling it "very disruptive." Pursuant to Rule of Procedure 46, an individual that the Chair has deemed

disruptive may be removed from the meeting. Thus, by criticizing applause as "disruptive," the Board makes a not-so-subtle threat of removal.

59. The Board has inconsistently and arbitrarily applied this policy in that it has allowed applause in other circumstances, such as during scroll presentation ceremonies.

The Rules Infringe on the Public's Right to Engage in Anonymous Speech

60. The First Amendment protects the public's right to engage in anonymous speech because requiring a speaker to disclose her identity creates a chilling effect. "The chilling effect arises from the negative consequences (whatever they might be) to the anonymous speaker that could flow from the disclosure of that individual's identity." *Awtry v. Glassdoor, Inc.*, No. 16-mc-80028-JCS, 2016 U.S. Dist. LEXIS 44804, at *48 (N.D. Cal. Apr. 1, 2016). The Board infringes upon the right to speak anonymously by requiring members of the public to provide identifying information as a condition of addressing the Board, thereby chilling political speech.

61. Rule of Procedure 44 ("Rule 44") requires members of the public who wish to address the Board during the meeting's public comments period or during the discussion on a public hearing agenda item to fill out a speaker request form. Individuals who do not submit a speaker request form are not permitted to speak and may be removed from the meeting for attempting to do so.

62. Members of the public are instructed to complete a speaker request form to speak during public comments at the beginning of each meeting. Slides projected above the dais instruct speakers to "state [their] name and city of residence" after approaching the podium. The names of speakers, along with summaries of the speakers' comments, are sometimes published in the minutes of the Board's meetings, which are publicly available on the Board's website.

63. The use of speaker forms and the associated instructions given at Board meetings violate the right of the public to engage in anonymous political speech by implying that self-identification is mandatory. Requiring speakers to provide their personal information can have a chilling effect on political speech.

64. The word "optional" appears in fine print under the blanks on the form, but the Rules of Procedure, the projections, and the verbal instructions given at meetings do not contain any language explaining that providing personal information is optional. Indeed, the speaker request form contains blanks for the speaker's name and address.

65. Furthermore, members of the Board and County representatives have made statements and engaged in conduct that suggest self-identification is mandatory. For example, at the June 26, 2018 meeting, Brian Sutter made prepared remarks as a representative of the ACLU. He began his remarks without providing his name. Shortly after he began, the County Counsel interrupted him and asked him to state his name. By requesting identification from a speaker who had opted not to give his name at the beginning of the remarks, the County Counsel affirmed that identification is, for all intents and purposes, mandatory—which has a chilling effect on other members of the public who may wish to speak anonymously.

66. If members of the public are required to identify themselves when making remarks in front of the Board, they risk retaliation or other negative consequences that can chill free speech. Some members of the public have expressed a belief that individual Supervisors have used law enforcement to intimidate them outside of the Board meeting setting. The fear that their identity may be made readily available to law enforcement, to an employer, or to anyone who might retaliate against the speaker chills political speech.

Requiring Members of the Public to Complete Speaker Cards Before Both Discussion on Agenda Items and General Public Comment is Unreasonable

67. Rule 44 also contains a temporal requirement. A member of the public who wants to address the Board on a public hearing agenda item must complete the speaker request form and give it to the Clerk *before* the Clerk reads the agenda item.

68. Likewise, under Rule 44 a member of the public who wants to address the Board during the public comments portion of a Board meeting must complete the speaker request form and give it to the Clerk *before* the start of the public comments period.

69. A member of the public who fails to do so may be declared "out of order" and could be subject to removal from the meeting.

70. Requiring members of the public to submit a completed speaker request form before the public comments period begins or before the Clerk reads an agenda item is unreasonable for many reasons. 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 Board 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 Board member to a public comment, is barred from doing so. This discourages public participation in representative government.

71. The Board has no legitimate interest in restricting comments by the public *before* the public hearing period on an agenda item or the public comments period even begins. For instance, it requires minimal effort on the Clerk's part and does not detract from the Board's work for the Clerk to introduce a meeting attendee who submitted a request form after the Clerk has read the agenda item or after the public comments period has begun. Similarly, in instances when the number of interested speakers is limited, allowing a meeting attendee to address an agenda item or participate in the public comments period even if she did not submit a speaker form in advance of the relevant discussion does not hinder any legitimate government interest.

The Board's Authorization Of The Immediate Destruction Of Public Records Violates State Law

72. Not only has the Board consistently restricted the ability of members of the public to comment at its meetings, but it has also actively sought to conceal County records from them. Government Code Section 26202 governs retention of County records. It generally requires the County to retain records for two years. The Board may authorize the destruction of records that are more than two years old if the records were "prepared or received in any manner other than pursuant to a state statute or county charter." Cal. Gov. Code § 26202.

73. Even then, the Board may only authorize the destruction of records that were "prepared or received pursuant to state statute or county charter" that are older than two years if (1) the records are not "expressly required by law to be filed and preserved" and (2) the Board determines by a four-fifths vote that the retention of the records "is no longer necessary or required for county purposes." *Id.*

74. Recognizing the fundamental importance of access to information about government operations, the California Public Records Act ("CPRA") grants the people the right to inspect public records. The general policy of the CPRA "favors disclosure, and all public records are subject to disclosure unless the CPRA provides otherwise." *L.A. Unified Sch. Dist. v. Super. Ct.*, 228 Cal. App. 4th 222, 237 (2014). A government agency can only "justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record." Cal. Gov. Code § 6255(a) (emphasis added); *see also id.* § 6254(a).

The Board's Efforts to Circumvent the CPRA and Records Retention Requirements

75. On December 1, 2017 a new County Records Management Policy (the "Policy") took effect.[13] The Policy created two categories of records: (1) "official records," which are subject to retention under California Government Code Section 26202; and (2) "transitory records," which, subject to some exceptions, may be destroyed immediately.

76. The Policy further defines "transitory records" as "[p]reliminary drafts, working notes, or inter- or intra-agency memoranda not kept in the ordinary course of business and the retention of which is not necessary for the discharge of a County officer's official duties." This definition incorporates some language from a CPRA exemption, but lacks the portion of that section that only exempts the record from disclosure "if the public interest in withholding those

[13] County Records Management Policy, http://cams.ocgov.com/Web_Publisher/Agenda09_26_2017_files/images/O00717-000875A.PDF.

records *clearly outweighs* the public interest in disclosure." Cal. Gov. Code § 6254(a) (emphasis added).

77. The Policy, which allows for destruction of an entire class of records, renders it impossible for any court to conduct the balancing required to determine whether the records are exempt from disclosure under the CPRA. The Board has thus unilaterally deprived the public of the right to access a vast number of public records and has usurped the role of the courts in determining which records must be disclosed.

78. The Policy likewise circumvents the two-year retention period set forth in Government Code Section 26202 by allowing for the *immediate* destruction of records that are classified as "transitory." But Section 26202 does not distinguish between "official" and "transitory" records and, thus, does not authorize the immediate destruction of any County record falling within the purview of Section 26202, no matter what label the Board may bestow upon it.

79. The Policy does not specify who has the authority to destroy these records. This allows County agencies, employees, and other individuals to determine which records should be destroyed—a violation of Government Code Section 26202's requirement that the Board, and only the Board, may authorize such destruction.

The Board Prohibits Disclosure Of All Security Camera Footage

80. The Board has taken the extraordinary step of declaring all security footage to be exempt from disclosure, even though the CPRA expressly states that video recordings of meetings made for *any* purpose are subject to inspection.

81. Rule of Procedure 48 (hereinafter "Rule 48") declares that "[a]ll recordings from security cameras are confidential and are not public records." The Board has thus grossly overstepped its authority and declared an entire category of records that the State has expressly declared to be public records as "not public records."

82. Consistent with this position, the Board flatly refuses to produce any security camera footage. For example, when Task Force member Jeanine Robbins submitted a CPRA request on the Task Force's behalf, the County refused to produce any security camera footage.

The Task Force's request expressly sought "[a]ll recordings made by security and other cameras operated by the County of meetings of the Orange County Board of Supervisors, including, but not limited to, recordings of meetings at which a recess was declared, a meeting was prematurely ended, or audience members were cleared from the meeting room in response to purportedly disruptive behavior from one or more audience members." But the County refused to produce any security camera recordings whatsoever. The County offered no explanation for its refusal, other than a general reference to California Government Code Section 6254(f), which exempts "records of intelligence information or security procedures of" law enforcement. The County offered no explanation as to how video footage of a public Board meeting constitutes "records of . . . security procedures."

83. This policy represents yet another effort by the Board to conceal from public scrutiny the way it conducts the people's business and to avoid the efforts of its constituents to hold the Board accountable for its actions.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of the First Amendment to the U.S. Constitution; 42 U.S.C. § 1983)

84. Plaintiff-Petitioner realleges and incorporates by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

85. Defendants have violated Plaintiff's-Petitioner's right to freedom of speech and to petition their elected officials for redress of grievances by enacting Rules of Procedure that place an impermissible prior restraint on speech.

86. Defendants' Rules of Procedures have placed impermissible prior restraints on the right of members of the public to speak without revealing their identities by both requiring disclosure of this information as a condition of speech and/or by creating an impression that disclosure is required in order to speak and requiring that people obtain permission before making a comment to or asking a question of a member of the Board or staff.

87. Defendants have also violated these rights by enforcing the Rules of Procedure in ways that discriminate on the basis of the speaker's viewpoint.

88. Defendants have further infringed on the right of the public to engage in expressive conduct and other protected speech by unconstitutionally classifying such conduct and speech as disruptive.

89. Unless enjoined, Defendants will continue to violate these rights, and Plaintiff-Petitioner and the general public will suffer irreparable harm.

90. Defendants took all actions complained of under the color of state law.

91. Declaratory relief is proper here because Plaintiff-Petitioner is informed and believes that Defendants will deny that they have violated and continue to violate Plaintiff's-Petitioner's rights under the First Amendment.

SECOND CAUSE OF ACTION

(Violation of Article I, Sections 2 and 3 of the California Constitution)

92. Plaintiff-Petitioner realleges and incorporates by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

93. Defendants have violated Plaintiff's-Petitioner's right to freedom of speech and to petition their elected officials for redress of grievances by enacting Rules of Procedure that place an impermissible prior restraint on speech.

94. Defendants' Rules of Procedures have also placed impermissible prior restraints on the right of members of the public to speak without revealing their identities by both requiring disclosure of this information as a condition of speech and/or by creating an impression that disclosure is required in order to speak and requiring that people obtain permission before making a comment to or asking a question of a member of the Board or staff.

95. Defendants have also violated these rights by enforcing the Rules of Procedure in ways that discriminate on the basis of the speaker's viewpoint.

96. Defendants have further infringed on the right of the public to engage in expressive conduct and other protected speech by unconstitutionally classifying such conduct and speech as disruptive.

97. Unless enjoined, Defendants will continue to violate these rights, and Plaintiff-Petitioner and the general public will suffer irreparable harm.

98. Declaratory relief is proper here because Plaintiff-Petitioner is informed and believes that Defendants will deny that they have violated and continue to violate Plaintiff's-Petitioner's rights under Article I, Sections 2 and 3 of the California Constitution.

THIRD CAUSE OF ACTION

(Violation of the Ralph M. Brown Act, Cal. Gov. Code § 54950, et seq.)

99. Plaintiff-Petitioner realleges and incorporates by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

100. Defendants have violated the right of the public to participate in Board meetings under the Ralph M. Brown Act by: enacting Rules of Procedure that restrict the ability of the public to address their elected officials; providing more time to elected officials to speak during public comment than other members of the public; restricting the time allocated to public comment in an unreasonable, arbitrary, and capricious manner; moving the period for public comment to the end of its meetings; limiting the number of times that a member of the public may speak during a Board meeting; restricting a member of the public from speaking on an agenda item if she does not submit a completed speaker request form before the Clerk reads the agenda item; restricting a member of the public from participating in the public comments period if she does not submit a completed speaker request form before the start of the public comments period; and enforcing the Rules of Procedure in ways that discriminate on the basis of viewpoint.

101. Rule of Procedure 48, which declares that "[a]ll recordings from security cameras are confidential and are not public records," also violates the Brown Act, because "[a]ny audio or video recording of an open and public meeting made for whatever purpose by or at the direction

of the local agency shall be subject to inspection pursuant to the [CPRA]." Cal. Gov. Code § 54953.5(b).

102. Unless enjoined, Defendants will continue to violate these rights, and Plaintiff-Petitioner and the general public will suffer irreparable harm.

103. Declaratory relief is proper here because Plaintiff-Petitioner is informed and believes that Defendants will deny that they have violated and continue to violate the Ralph M. Brown Act.

FOURTH CAUSE OF ACTION

(Writ of Mandamus; Violation of Cal. Gov. Code § 26202)

104. Plaintiff-Petitioner realleges and incorporates by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

105. Defendants have violated clear and mandatory duties under Section 26202 of the California Government Code by enacting a policy that authorizes the immediate destruction of documents that are subject to a two-year retention period under Section 26202. On information and belief, Defendants continue to violate Section 26202 by destroying documents subject to the two-year retention period before that period has elapsed and without following the procedures required to authorize such destruction.

106. Unless enjoined, Defendants will continue to violate these rights, and Plaintiff-Petitioner and the general public will suffer irreparable harm.

107. Declaratory relief is proper here because Plaintiff-Petitioner is informed and believes that Defendants will deny that they have violated California Government Code Section 26202.

FIFTH CAUSE OF ACTION

(Violation of the California Public Records Act, Cal. Gov. Code § 6250, et seq.)

108. Plaintiff-Petitioner realleges and incorporates by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

109. Defendants have violated the California Public Records Act ("CPRA") by enacting a document destruction policy that circumvents the CPRA. The policy unilaterally and prospectively declares certain records exempt from disclosure and authorizes their immediate destruction, thereby infringing on the right of the public to inspect such documents and usurping the role of the courts in determining whether documents and other records, including security camera footage, are exempt from disclosure under the CPRA.

110. Rule of Procedure 48, which declares that "[a]ll recordings from security cameras are confidential and are not public records," also violates the CPRA, because "[a]ny audio or video recording of an open and public meeting made for whatever purpose by or at the direction of the local agency shall be subject to inspection pursuant to the [CPRA]." Cal. Gov. Code § 54953.5(b).

111. Unless enjoined, Defendants will continue to violate the CPRA, and Plaintiff-Petitioner and the general public will suffer irreparable harm.

112. Declaratory relief is proper here because Plaintiff-Petitioner is informed and believes that Defendants will deny that they have violated the CPRA.

REQUEST FOR RELIEF

Plaintiff-Petitioner respectfully requests that the Court:

A. Issue a declaratory judgment that Defendants' actions complained of herein:

   a. Violate the First Amendment to the United States Constitution;

   b. Violate Article I, Sections 2 and 3 of the California Constitution;

   c. Violate the Ralph M. Brown Act, Cal. Gov. Code Section 54950, et seq.;

   d. Violate the California Public Records Act, Cal. Gov. Code Section 6250, et seq.;

   e. Violate Section 26202 of the California Government Code.

B. Preliminarily and permanently enjoin Defendants, and each of them, their agents, servants, and employees from restricting the rights of the public to speak at Board meetings as guaranteed by the First Amendment to the United States Constitution.

C. Preliminarily and permanently enjoin Defendants, and each of them, their agents, servants, and employees from restricting the rights of the public to speak at Board meetings as guaranteed by the California Constitution.

D. Preliminarily and permanently enjoin Defendants, and each of them, their agents, servants, and employees from restricting the rights of the public to speak at Board meetings as guaranteed by the Brown Act.

E. Preliminarily and permanently enjoin Defendants from violating the California Public Records Act.

F. Issue a peremptory writ of mandate ordering Defendants to comply with California Government Code Section 26202.

G. Grant Plaintiff-Petitioner reasonable attorneys' fees and costs of litigation under California Code of Civil Procedure § 1021.5, California Government Code § 54960.5, 42 U.S.C. § 1988, and any other applicable provisions of law.

H. Award such other relief as the Court may deem just and proper.

Dated: April 9, 2019

ACLU OF SOUTHERN CALIFORNIA
Peter J. Eliasberg & Brendan Hamme

KIRKLAND & ELLIS LLP
David I. Horowitz, P.C. & Zachary W. Byer

By: _____
David I. Horowitz (SBN 248414)

Attorneys for Plaintiff
PEOPLE'S HOMELESS TASK FORCE

VERIFICATION

I, Jeanine Robbins, declare:

1. I am a founding member of the People's Homeless Task Force.

2. I have read the foregoing Complaint and know the contents thereof.

3. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 19th day of March, 2019, at Orange County, California.

Jeanine Robbins
Jeanine Robbins
Declarant