ACLU FOUNDATION
AMERICAN CIVIL LIBERTIES UNION of SOUTHERN CALIFORNIA
STAND FOR JUSTICE

March 13, 2017

Leon J. Page
County Counsel – Orange County
Office of Orange County Counsel
P.O. Box 1379
Santa Ana, CA 92702-1379
Email: leon.page@coco.ocgov

Re: Brown Act and First Amendment Violations at Board of Supervisors' Meetings

Dear Board and County Counsel Page,

We are deeply concerned by the continual limitation of public participation at the Orange County Board of Supervisors meetings. The Brown Act makes clear 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... The people of this State do not yield their sovereignty to the agencies which serve them." Government Code Section 54950 [emphasis added]. These agencies, including this Board, are the "instruments" of their communities and, as such, the community "retain[s] control over the instruments they have created." *Id*. Instead of acknowledging its role as servants of the community, however, over the last several years, the Board has treated the community as an impediment to conducting its own business and has systematically restricted members of the community's ability to bring their concerns before the Board. These actions not only run counter to sound public policy and politics, but also violate California's Brown Act and the U.S. and California Constitutions. We urge you to promptly rescind your illegal policies and practices and adopt new policies that rightly emphasize the place of the Board vis-à-vis the community and the necessary and valuable insight of community members in informing the decisions of their purported representatives.

I. Restricting Comments to the Public Comment Period Only Violates the Brown Act

In the past, the Board allowed members of the public to speak for three minutes on each agendized item, in addition to speaking during a general public comment period. Then, in November of 2016, the Board voted to restrict each comment from a member of the public to a total of three minutes, limited to the initial public comment period and doing away with the right of the public to comment on each agendized item as considered by the Board. While a notice of a special meeting still confusingly indicated that "Opportunity will be provided for members of the public to directly address the Board of Supervisors on any item of business considered, either before or during the consideration of that item…," on February 9, 2017, your Chief Deputy Clerk of the Board confirmed the limitation. The agenda for your upcoming meeting and others indicate this restriction as well.

The Board's limitations on public comment violate the Brown Act. Government Code Section 54954.3(a) mandates that "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body...." This language "mean[s] that for each agenda of a regular meeting, there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, *as well as* an opportunity for public comment on each specific agenda item as it is taken up by the body." *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1079 (2008) (emphasis added) (citing *Chaffee v. San Francisco Library Commission*, 115 Cal.App.4th 461, 468–69 (2004)). Thus, the Board must restore comment periods for each agendized item and maintain a public comment period; if it does not, it will be in clear violation of the Brown Act.

II. The Insignificant Amount of Time Allocated to Public Comment is Not Reasonable

The restriction of speech to only the public comment period is just one of many ways the Board has systematically insulated itself from the public, however. Beginning in 2012, the Board restricted each speaker to a total of nine minutes regardless of the number of agenda items on which they planned to speak. As noted above, this time was further restricted to a mere three minutes in November of last year. As if this were not restrictive enough, the Board's current policy provides for only twenty minutes of public comment total, which can be extended only at the Chairperson's sole discretion. Furthermore, under Board Rule 47, the Chair is empowered to limit public comments to under three minutes if the comment period would exceed twenty minutes.

At the January 24, 2016 meeting, for example, the Board restricted public comment to one minute in light of the 58 speakers who filled out comment cards. Making matters worse, this rule was not universally applied. The president of a corporate airline, for example, was allowed to speak for more than two minutes. Likewise, a manager for another company was permitted to continue speaking about their services, including "a VIP wine tour and limo for a group of 20," for over a minute without interruption. Others, such as those who assembled to discuss poverty, homelessness, and other issues, were brusquely admonished or outright silenced when they exceeded one minute.

The restrictions promulgated by the Board, including a presumptive total cap of twenty minutes on comments and, even in the exercise of the Chair's discretion, a cap of an hour, are plainly unreasonable. Again, it is the Board's sole purpose to "conduct [] the *people*'s business…" As such, it is your duty as Supervisors to listen to your constituents. Listening to your constituents is not an inconvenience to be endured; it is your job. Although "[t]he legislative body of a local agency may adopt reasonable regulations…, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker," these restrictions must be *reasonable*. Government Code Section 54954.3(b).

In interpreting the Brown Act, the California Attorney General concluded that "The legislative body of a local public agency may limit public testimony on particular issues at its meetings to five minutes or less for each speaker, depending upon the circumstances such as the number of speakers." 75 Ops. Cal. Atty. Gen. 89 (1992). If the ability of a public agency to limit public comment to five minutes or less per speaker on a particular agenda item is contingent on the number of speakers present, then a flat limitation of three minutes total per speaker, in which the public must present their opinions on potentially dozens of items cannot be reasonable. The same is true of the single minute provided to speakers at the January 24th meeting. While we acknowledge that there may be circumstances in which such a limitation may make sense, certainly the Board can listen to its constituents for more than one hour. In the same way, regardless of the discretion provided to the Chairperson, as to which the treatment of corporate interests compared to those addressing poverty gives us pause, a presumptive twenty minute public comment period is likewise not reasonable, especially in light of the inability of the public to comment on each item as called on the agenda.

III. Requiring Individuals to Fill out a Comment Card before Speaking Deters Public Participation and Violates the Brown Act and Constitution

It is not only poor public policy, but also a violation of the Brown Act and Constitution to require individuals to identify themselves before speaking to the Board. Board Rule 44, however, requires speakers to "complete a speaker request form and deposit the completed form with the Clerk prior to the end of the public comments portion of the meeting" before being allowed to speak. In fact, "the Chair may deem 'out of order' any member of the public who attempts to address the Board without having first submitted to the Clerk a completed speaker request form." Requiring individuals to identify themselves before giving public comment has a stifling effect on speech. Individuals addressing the Board, such as those who are critical of government employees, may already be hesitant to do so out of fear of retaliation or harassment.

Government Code Section 54953.3 evidences a clear intent that members of the public cannot be required to identify themselves in order to participate in a meeting. As the League of California Cities, an association of California city officials, wrote in its guide to the Brown Act for officials, "Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker's desire for anonymity." Open & Public V: A Guide to the Ralph M. Brown Act, at 37, *available at*: https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx.

The Constitution provides independent support for this principle as well. There can be no doubt that anonymous speech is protected under the Constitution as a time honored tradition stretching back to our country's inception. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent."); *Talley v. California*,

362 U.S. 60, 65 (1960)(invalidating a California statute prohibiting the distribution of "any handbill in any place under any circumstance" that did not contain the name and address of the person who prepared it, holding that identification and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance"); *Doe v. 2themart.com Inc*., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate.").

IV. Preventing the Public from Addressing Individual Supervisors Violates the Brown Act and the First Amendment

We are also concerned about restrictions prohibiting the public from addressing individual supervisors and staff. The Board's agendas state that "Members of the public desiring to speak should address the Board as a whole through the Chair. Comments to individual Supervisors or staff are not permitted."

These restrictions violate the First Amendment and the Brown Act. Meetings of the Board of Supervisors 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). And 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 supervisors with regards to issues within the Board's jurisdiction are no doubt covered by these principles.

Preventing the public from addressing an individual supervisor directly leads to absurd and plainly unreasonable results. For example, it would prevent a person from directly responding to a remark made by a particular supervisor except through a needlessly complicated contrivance. It also ignores the fact that the Board 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 supervisors who voted in the way the constituent preferred. The rule also ignores the fact that individual supervisors function as representatives for particular districts; preventing a person from addressing their representative subverts the entire district based representation scheme.

"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).

V. Prohibiting People from Bringing in Any Signs Violates the First Amendment and the Board's Own Written Policies

The Board's de facto policy prohibiting signs in the Boardroom violates the First Amendment and its own rules. Board Rule 48 provides that "Signs, posters, banners or other hazardous objects which could impair the safety of individuals in the event of an emergency are prohibited in the Board Room." Likewise, in the Board's materials displayed onscreen at the outset of each meeting, the public is informed that "For the safety of all, signs, banners and objects that block walkways or the view of other attendees are not permitted in the Boardroom." Despite the Board's own rules and representations, however, members of the public have consistently had signs of all types confiscated from them. Our Community Engagement and Policy Advocate, Eve Garrow, for example, was told that she could not bring in her 11"x14" sign that said "Housing First." The sign, no larger than her shirt, did not pose a safety hazard to any person in the room. Nor did the sign block anybody's view because she was not even permitted to bring the sign into the room; if held to her chest, the sign would have been, for all intents and purposes, indistinguishable from message bearing t-shirts, which are not and could not be prohibited.

As discussed above, Board meetings are limited public forums and, as such, any limitations on speech must be reasonable in light of the purpose of the forum. Because the purpose of an open, public government meeting is to allow the public to understand, inform, and influence its government, it is unreasonable to prohibit reasonably sized signs that do not disrupt the meeting by, for example, blocking the public's view for a prolonged period of time. *See, We the People, Inc., of the U.S. v. Nuclear Regulatory Comm'n*, 746 F. Supp. 213, 216-18 (D.D.C. 1990).

Under the federal constitution, only rules of decorum that prohibit actual disturbance or impeding of a meeting are reasonable. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) ("a city's 'Rules of Decorum' are not facially over-broad where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting.") (citing *White v. City of Norwalk*, 900 F.2d 1421, 1424-26 (1990). California law, on the other hand, is even more protective of speech and requires an intentional, substantial disruption of the meeting in violation of the customs and usages of the meeting. *In re Kay*, 1 Cal.3d. 930, 943 (1970). Because no signs were ever allowed into the meeting, it cannot be said that they caused an actual, substantial disruption in violation of the meeting norms.

VI. The Board's Secrecy Surrounding Security Camera Footage Violates the Brown Act and the California Public Records Act

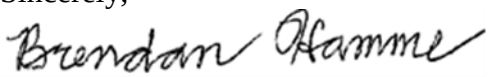
Finally, the Board's rule on the public availability of security camera footage runs afoul of the Brown Act as well. Board Rule 48 provides that "All recordings from security cameras are confidential and are not public records, but copies of such recordings shall be provided to any or all Board Members at their request, absent any state law that may prohibit such distribution."

This rule directly contradicts the Brown Act's requirements, which state "Any 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 California Public Records Act." 54953.5(b). The Act's language applies to recordings "made for whatever purpose," which plainly includes footage taken for security purposes.

*****

The Board of Supervisors must immediately begin the process of rescinding and replacing its illegal policies and practices and fundamentally change its approach to the community it purports to serve. Your constituents are not obstacles to be avoided—listening to and addressing their concerns is the very purpose of this Board. Unfortunately, the actions of the Board over time have not demonstrated this perspective. If you do not agree to rescind your illegal rules and implement legal rules and policies, the ACLU of Southern California will consider all legal means to respond to your refusal. Please respond by March 17, 2017 by contacting me at 714-450-3963 or at BHamme@aclusocal.org. I look forward to hearing from you.

Sincerely,



Brendan Hamme
Staff Attorney
ACLU Foundation of Southern California

CC: ORANGE COUNTY BOARD OF SUPERVISORS:
TODD.SPITZER@OCGOV.COM;
LISA.BARTLETT@OCGOV.COM;
MICHELLE.STEEL@OCGOV.COM;
ANDREW.DO@OCGOV.COM;
SHAWN.NELSON@OCGOV.COM