



Hate Bombing and Poetry Recitations: Handling Disruptive Public Comment

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Hate-Bombing and Poetry Recitations: Handling Disruptive Public Comment

Amy Ackerman¹

Introduction²

When the pandemic hit, city councils held their meetings remotely, using zoom and similar technologies. Even as councils returned to in-person meetings, many continued to allow residents to attend and make public comment remotely. Residents enjoy the convenience of remote attendance, and many councils saw greater attendance at their meetings. Unfortunately, in the past year, many councils in California and nationwide have had their meetings disrupted by groups of remote attendees spewing racist and antisemitic vitriol. These events have been referred to as “zoom-bombing,” but more properly should be termed “hate-bombing.” In response to these incidents, many councils, believing that the Brown Act and the First Amendment require councils to allow these speakers to speak, stopped remote attendance or stopped allowing remote public comment. This article argues against the necessity of abandoning remote attendance and comment, and that there remains a path consistent with First Amendment jurisprudence, to control hate-speech at Council meetings. That path is not entirely without legal risks but should be considered when balanced against the potential of losing a valuable means of encouraging public participation in governance.

I. The Legal Framework

A. The Brown Act

The Brown Act governs the conduct of meetings of legislative bodies of local agencies.³ This article discusses the provisions of the Brown Act that address participation by members of the public at the meetings of legislative bodies and removal of disruptive persons from meetings.⁴ In enacting the Brown Act, the Legislature declared that public commissions, boards, and councils exist to “aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”⁵

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² This article draws on an article written by our late colleague, Randy Riddle, a leader in the field of municipal law. We were honored to work with him and miss him every day.

³ Gov. Code § 54950 *et. seq.* “Legislative body” is defined in Government Code section 54952. City councils are legislative bodies. (Gov. Code § 54952(a).)

⁴ For a more comprehensive guide to the Brown Act, see “Open & Public VI: A Guide to the Ralph M. Brown Act “(Revised 2024), published by the League of California Cities, available at: <https://www.calcities.org/resource/open-public-v-a-guide-to-the-ralph-m.-brown-act>

⁵ Gov. Code § 54950.

1. Public Comment

Along with requiring most actions to be taken at public meetings, the Brown Act requires a council to take comments from members of the public before or during each item of business.⁶ In addition, at regular meetings, a council must also allow the public to comment on anything within the subject matter jurisdiction of the council that is not on the agenda (often referred to as “general public comment”).⁷

The Brown Act expressly provides that a “legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.”⁸

2. Restrictions on Public Comment

The Brown Act applies some restrictions to public comment.

a. Committee exception.

First, if an item has been considered at a public meeting of a committee composed exclusively of members of the legislative body, where “all interested members of the public” were permitted to comment on the item, the “parent” legislative body need not take public comment.⁹ This exception does not apply if the item has been “substantially changed” since the Committee heard the item.¹⁰ The legislative body makes the determination if the item has been substantially changed.¹¹

b. Reasonable Regulations

Next, a legislative body may adopt “reasonable regulations” to ensure that members of the public have an opportunity to address the legislative body. Reasonable regulations include, but are not limited to, “regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.”¹² We discuss what regulations are reasonable, below.

⁶ Gov. Code § 54954.3(a).

⁷ Gov. Code § 54954.3(a).

⁸ Gov. Code § 54954.3(c).

⁹ Gov. Code § 54954.3(a).

¹⁰ *Id.*

¹¹ *Id.*

¹² Gov. Code § 54954.3(b)(1). The Act requires that if the legislative body limits time for public comment, it must provide at least twice the allotted time to a member of the public that uses a translator. This requirement does not apply if the agency uses simultaneous translation equipment. Govt. Code § 54954.3(b)(2),(3).

3. Removal of Disruptive Persons

The Brown Act contains two provisions addressing the removal of disruptive persons.

a. Disruptive Groups

A council may order the meeting room “cleared” if a meeting is “willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting[.]”¹³

The Council must require representatives of the press or other news media to remain in the meeting room, unless they participated in the disturbance.¹⁴ The Council may establish a procedure for readmitting persons not responsible for the disturbance.¹⁵

b. Disruptive Individuals

In 2022, the Legislature enacted SB 1100, which added section 54957.95 to the Brown Act. Section 54957.95 allows for the removal of an individual for “disrupting the meeting.”¹⁶ “Disrupting” means engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting[.]”¹⁷ Disruption includes “[e]ngaging in behavior that constitutes use of force or a true threat of force.”¹⁸ A “true threat of force” means “a threat that has sufficient indicia of intent and seriousness, that a reasonable observer would perceive it to be an actual threat to use force by the person making the threat.”¹⁹

“Disrupting” also means “[a] failure to comply with reasonable and lawful regulations adopted by a legislative body[.]”²⁰ Before removing a person, unless the removal is due to their making a true threat of force, the presiding member or their designee, must “warn the individual that their behavior is disrupting the meeting and that their failure to cease their behavior may result in their removal.”²¹

In the course of enacting section 54957.95, the Legislature declared its intent not to prohibit criticism of the policies, procedures, programs, or services of the agency, or of the acts or

¹³ Gov. Code § 54957.9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Gov. Code § 54957.95(a)(1).

¹⁷ Gov. Code § 54957.95(b)(1).

¹⁸ Gov. Code § 54957.95(b)(1)(B).

¹⁹ Gov. Code § 54957.95(b)(2).

²⁰ Gov. Code § 54957.95(b)(1)(A).

²¹ Gov. Code § 54957.95(a)(2).

omissions of the legislative body, as provided for in section 54954.3(c).²² In addition, the Legislature declared its intent to “codify the authority and standards for governing public meetings in accordance with *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013), in which the court explained that an ordinance governing the decorum of a city council meeting is not facially overbroad if it only permits a presiding officer to eject an attendee for actually disturbing or impeding a meeting.” We discuss the *Acosta* case below.

B. Other Statutory Provisions

1. Penal Code section 403.

Penal Code section 403 states: “[e]very person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character . . . is guilty of a misdemeanor.”²³

In *In re Kay*, the California Supreme Court overruled the conviction of four protestors at an Independence Day celebration, where an invited speaker, a congressman, who had declined to support a consumer boycott of non-union table grapes, spoke.²⁴ During the candidate’s speech, a “comparatively small part of the total crowd . . . engaged in rhythmical clapping and some shouting for about five or ten minutes.”²⁵ The demonstration did not affect the program.²⁶

The Court observed that in analyzing Penal Code section 403, it must be guided by the First Amendment. It noted that, “[s]ince the Constitution indubitably affords some measure of protection to the free expression of all those present at a meeting – speakers, officials, and audience – section 403’s prohibition of ‘disturbances’ potentially may collide with safeguarded First Amendment interests. Nonetheless, the state retains a legitimate concern in ensuring that some individuals’ unruly assertion of their rights of free expression does not imperil other citizens’ rights of free association and discussion. Freedom of everyone to talk at once can destroy the right of anyone effectively to talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship.”²⁷

The Court concluded that it was required to adopt an interpretation of Penal Code section 403 that eliminates doubts as to the provision’s constitutionality and held it authorizes the imposition

²² 2022 Cal. Legis. Serv. Ch. 171 (S.B. 1100.)

²³ Penal Code section 403 excludes from its purview disruptions to meetings referred to in Penal Code section 302 (addressing disturbances of religious assemblies) and Elections Code section 18340 (public meetings of electors), which are addressed in distinct statutes.

²⁴ *In re Kay* (1970) 1 Cal. 3d 930, 934.

²⁵ *Id.* at p. 935.

²⁶ *Id.*

²⁷ *Id.* at p. 941.

of criminal sanctions only when “the defendant’s activity itself—and Not [sic] the content of the activity’s expression—substantially impairs the effective conduct of a meeting.”²⁸

Subsequently, in *McMahon v. Albany Unified School District*, the court of appeal upheld the arrest of the plaintiff who dumped gallons of garbage on the floor of a schoolroom during a school board meeting.²⁹ The presiding officer warned the plaintiff not to dump the trash in the room, which was also used as the school’s cafeteria, assembly room, and for an after-school program.³⁰ The court concluded that the plaintiff’s action disrupted the meeting because if he were allowed to “continue dumping his trash in the middle of the meeting, one of two outcomes would necessarily have transpired. Either the meeting would have been further delayed at some point while McMahon picked up the garbage or other speakers would have had to stand near the trash in order to address the board and audience members would have been forced to peer over a mound of garbage in order to watch a public body perform its duty.”³¹

2. Government Code section 36813.

Government Code section 36813 states, that a council “may establish rules for the conduct of its proceedings. It may punish a member or other person for disorderly behavior at a meeting.” Of course, when exercising this authority, a council must act within constitutional constraints.³²

C. The First Amendment

The First Amendment is the primary law that dictates what limits may be placed on the public at council meetings.

In *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Commission*, the U.S. Supreme Court held that the First Amendment required that a teacher be permitted to speak at a public meeting of the school board, despite the board’s contention that such action by the teacher would be unlawfully engaging in negotiations with a member of the bargaining unit other than the exclusive collective bargaining representative.³³ The Court stated that, “[w]hatever its duties

²⁸ *Id.* at p. 942, capitalization in the original.

²⁹ *McMahon v. Albany Unified School District* (2002) 104 Cal. App. 4th^h 1275, 1279.

³⁰ *Id.* at p. 1280-1281. In *CPR for Skid Row v. Khan* (9th Cir. 2015) 779 F.3d 1098, the Ninth Circuit held that Penal Code section 403 did not apply to the protests to walks through the Skid Row neighborhood sponsored by business improvement districts attended by public officials, law enforcement, and other members of the public. The court upheld the constitutionality of Penal Code section 403 from a facial challenge noting that the statute “does not prevent all protests or means of protest. It requires only that a protest not be so disruptive as to break up or substantially impair the meeting.” (*Id.* at p. 1111.)

³¹ *Id.* at p. 1289.

³² See *Nevens v. City of Chino*, 233 Cal. App. 2d 775, 778 (1965) (in invalidating prohibition on tape recording legislative body meetings, court explained that rules adopted under section 36813 cannot be “too arbitrary and capricious, too restrictive and unreasonable.”).

³³ *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Commission*, (1976) 429 U.S. 167.

as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.”³⁴

In a concurring opinion, Justice Stewart noted, “[a] public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public. Such a body surely is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others and in trying to best serve its informational needs while rationing its time.”³⁵

Following the Supreme Court opinion, the Ninth Circuit has considered the application of the First Amendment to meetings of legislative bodies in the following major cases.

1. *White v. City of Norwalk*³⁶

In *White v. City of Norwalk*, the plaintiffs challenged the constitutionality of the city’s municipal code provision that prescribed rules for persons addressing the city council.³⁷ The ordinance prohibited public speakers from making “personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public” and permitted the presiding officer, or a majority of the council, to remove a person who made such remarks, “or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting.”³⁸ Significantly, the ordinance required that the presiding officer issue a warning to the speaker that they are “breaching the rules of decorum” and permitted the removal of the speaker only if the speaker “persists in disturbing the meeting.”³⁹ The Court held that, under the challenged ordinance, “[s]peakers are subject to restriction only when their speech ‘disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.’ So limited, we cannot say that the ordinance on its face is substantially and fatally overbroad.”⁴⁰

³⁴ *Id.* at p. 176.

³⁵ *Id.* at p. 427.

³⁶ *White v. City of Norwalk* (9th Cir. 1990) 900 F. 2d 1421.

³⁷ Plaintiffs had been removed from council meetings for violation of the rules. (*Id.* at p. 1423.)

³⁸ *Id.* at p. 1424.

³⁹ *Id.* at p. 1424.

⁴⁰ *Id.* at p. 1426. In *Reza v. Pierce* (9th Cir. 2015) 806 F. 3d 497, the Ninth Circuit Court of Appeals reversed the trial court’s grant of summary judgment on a First Amendment claim against a state senator who had barred the plaintiff from entering the state capital building. The Court noted that the capital building was a limited public forum, like a city council meeting. (*Id.* at pp. 502-503.) The Court concluded that the senator’s restrictions on the plaintiff “which attempted to preserve the ability of the Senate to hold uninterrupted legislative hearings, were viewpoint neutral,” but there were material issues of disputed fact concerning whether the plaintiff actually disrupted the proceedings, and whether the

The Court recognized that: “City Council meetings like Norwalk’s, where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests. Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones.”⁴¹

But the Court added that:

On the other hand, a City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.

Similarly, the nature of a Council meeting means that a speaker can become “disruptive” in ways that would not meet the test of actual breach of the peace, or of “fighting words” likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.⁴²

senator had legitimate concerns that, if the plaintiff were allowed into the building in the future, he would interrupt legislative debate. (*Id.* at p. 503.)

⁴¹ *Id.* at p. 1425.

⁴² *Id.* at pp. 1425-1426. Most other Federal Circuits have similarly held that Council meetings are limited public forums and have upheld similar limitations. (See *Tyler v. City of Kingston* (2nd Cir. 2023) 74 F. 4th 57, 63 [Upholding prohibition on signs at council meetings as reasonable restriction: “[I]n limited public fora such as city council meetings, government entities are permitted to restrict the form or manner of speech offered by members of the public, even if such speech addresses the topic or agenda of that forum.”]; *Galena v. Leone* (3rd Cir. 2011) 638 F.3d 186, 199, citation omitted [“In a limited public forum, such as the Council meeting, “content-based restraints are permitted, so long as they are designed to confine the forum to the limited and legitimate purposes for which it was created. The government may not regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”]; *Fairchild v. Liberty Independent School Dist.* (5th Cir. 2010) 597 F. 3d 747, 760 [School board meeting is a limited public forum and rule prohibiting criticism of named teachers or individual employees at public comment in favor of using the dispute resolution process a reasonable restriction because the Board has “a strong and speech-neutral interest in setting an agenda and paths to Board hearings to avoid irrelevant topics or extended contentious debate.”]; *Ison v. Madison Local*

2. *Kindt v. Santa Monica Rent Control Bd.*⁴³

Next, in *Kindt v. Santa Monica Rent Control Board*, a rental property owner alleged that the rent control board violated his First Amendment rights when ejecting him from public board meetings. The Court first addressed the nature of forum, stating that, “it seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche. But, as we intimated in *City of Norwalk*, the important thing is not whether we call the meetings highly regulated limited public fora or nonpublic fora. The fact remains that limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be.”⁴⁴

The Court concluded that, “[t]he Board regulations restricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings.”⁴⁵

3. *Norse v. City of Santa Cruz*⁴⁶

In *Norse v. City of Santa Cruz*, the Ninth Circuit reversed the District Court’s dismissal of plaintiff’s claim that the City Council violated his First Amendment rights when he was ejected from a Council meeting for giving the Council a “silent Nazi salute” and arrested.⁴⁷ The Court reversed the decision, because it found that the procedure the District Court used to summarily dispose of the plaintiff’s claims was deficient and unfair to him.⁴⁸

In discussing the First Amendment’s application to council meetings, the Court first rejected the City’s contention that only certain portions of its meetings are limited public forums and that no members of the public have any First Amendment rights at all once the public comment period has concluded. The Court stated, “[a]s we explained in *Norwalk* the entire city council meeting held in public is a limited public forum. But the fact that a city may impose reasonable time

School District Bd. of Educ. (6th Cir. 2021) [Finding Board meetings limited public fora and upholding a requirement that members of the public preregister to make public comment, but finding Board’s policy restricting abusive,” “personally directed,” and “antagonist” statements unreasonable restrictions.]; *McDonough v. Garcia* (11th Cir. 2024 --- F.4th ---- 2024 WL 4195557 [Council meetings are limited public forums where restrictions must not discriminate against speech based on viewpoint and be reasonable in light of the purpose served by the forum.])

⁴³ *Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266.

⁴⁴ *Id.* at pp. 270-271.

⁴⁵ *Id.* at p. 271; see, also, *Ribakoff v. City of Long Beach* (2018) 27 Cal. App. 5th 150, 170-176 [upholding three minute time limit on public speakers even where staff members and invited guests are permitted to speak for longer periods of time.])

⁴⁶ *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966.

⁴⁷ *Id.* at p. 969.

⁴⁸ *Id.* at p. 971.

limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights.”⁴⁹ Thus, the plaintiff’s First Amendment rights were protected even after the public comment period was closed.

Next, the Court rejected the City’s argument that it may define “disturbance” in any way it chooses and here, it defined “any violation of its decorum rules to be a ‘disturbance.’”⁵⁰ The Court stated, “[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption.”⁵¹

Significantly, as noted in Judge Kozinski’s concurring opinion, the evidence provided to the court -- the video of the meeting -- “clearly shows that Norse’s *sieg heil* was momentary and casual, causing no disruption whatsoever. It would have remained entirely unnoticed, had a city councilman not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting.”⁵² Judge Kozinski stated that the Councilmember wanted the plaintiff expelled because “the ‘Nazi salute’ is ‘against the dignity of this body and the decorum of this body’” and not because of any disruption. But, unlike *der Führer*, government officials in America occasionally must tolerate offensive or irritating speech.”⁵³

4. *Acosta v. City of Costa Mesa*⁵⁴

More recently, in *Acosta v. City of Costa Mesa*, the Ninth Circuit held that the City’s ordinance that made it a misdemeanor for members of the public who speak at Council meetings to “engage in ‘disorderly, insolent, or disruptive behavior’” was facially overbroad in violation of the First Amendment, because it did not limit proscribed activity to only actual disturbances.⁵⁵

The Court noted that the text of the ordinance differed from that of the ordinance considered in *White v. City of Norwalk*. In *White*, the Court upheld the ordinance because while it prohibited making “personal impertinent, slanderous or profane remarks,” the ordinance contained additional language limiting its potential application to speech that caused an actual disturbance. “The requirement of actual disruption meant the ordinance was valid.”⁵⁶

The Court also distinguished *Costa Mesa*’s ordinance from *Norwalk*’s because the qualifiers used in *Costa Mesa*’s ordinance – “disorderly, *insolent*, or disruptive behavior” -- were broader than

⁴⁹ *Id.* at pp. 975-976.

⁵⁰ *Id.* at p. 976.

⁵¹ *Id.* at p. 976.

⁵² *Id.* at p. 979 (Kozinski concurring opinion.)

⁵³ *Id.* at p. 979.

⁵⁴ *Acosta v. City of Costa Mesa* (9th Cir.) 718 F.3d 800.

⁵⁵ *Id.* at pp. 806-807.

⁵⁶ *Id.* at p. 813.

those in the Norwalk ordinance – “disrupts, disturbs, or otherwise impedes.”⁵⁷ The Court found that “insolent” behavior (which was undefined in the ordinance) “could, and often likely would, fall well below the level of behavior that actually disturbs or impedes a City Council proceeding.”⁵⁸

The Court noted that the ordinance could have been written narrowly, citing to a Costa Mesa ordinance that makes it unlawful for any person in attendance to “[e]ngage in disorderly, disruptive, disturbing, delaying or boisterous conduct, such as, but not limited to, handclapping, stomping of feet, whistling, making noise, use of profane language or obscene gestures, yelling or similar demonstrations, which conduct substantially *interrupts, delays, or disturbs* the peace and good order of the proceedings of the council.”⁵⁹

5. *Project for Open Government v. County of San Diego.*

While no longer binding in federal court, we include a discussion of the following case, because its analysis is persuasive, particularly regarding disruptive hate speech.

In *Project for Open Government v. County of San Diego*, the plaintiffs alleged that the Board of Supervisors’ meeting rules violated the First Amendment.⁶⁰ The Board’s rules provided that if a person makes discriminatory or harassing remarks at a public meeting, “the Chairperson may interrupt and admonish the speaker by taking the following actions: (1) stating the County’s policy prohibiting discrimination and harassment, (2) stating that comments in violation of County policy will not be condoned, and (3) inform the speaker that their language is unwanted, unwelcome and/or inappropriate, and that they interfere with the ability of those present to listen and understand.”⁶¹ The Rules defined “discriminatory or harassing remarks,” and provided that during the admonishment, the speaker’s time is held, the speaker is allowed to resume, and if the speakers’ comments “continue to disturb, disrupt, or impede the orderly conduct of the meeting,” the Chairperson may have the speaker removed from the meeting.⁶²

The court first found that the Board’s admonishment of the speaker’s discriminatory and harassing remark constituted government speech, which was protected under the First

⁵⁷ *Id.* at pp. 814-815.

⁵⁸ *Id.* at p. 815, emphasis in the original.

⁵⁹ *Id.* at p. 816, emphasis in the original.

⁶⁰ *Project for Open Government v. County of San Diego* (2022) 2022 WL 4181008, vacated and remanded to state court in *Project for Open Government v. County of San Diego* (9th Cir. 2024) 2024 WL 20068.

⁶¹ *Id.* at p.*2. The Board of Supervisors’ rules are available at:
<https://www.sandiegocounty.gov/content/sdc/bos/boardrules.html>

⁶² The rules defined “discriminatory or harassing remarks” as including “legally protected speech in a Board meeting that disparages an individual or group based on their perceived race, religion, sexual orientation, ethnicity, gender, disability, etc. or other hate speech but does not rise to the level of a criminal threat or inciting violence.” *Id.*

Amendment.⁶³ The court then concluded that the rule did not violate the First Amendment, relying on *White v. City of Norwalk*, because the “Chairperson’s ability to stop a speaker’s discriminatory or harassing remarks is limited to instances where the comments actually ‘interfere with the ability of those present to listen and understand’ and ‘continue to disturb, disrupt, or impede the orderly conduct of the meeting.’”⁶⁴

The Plaintiffs appealed the decision to the Ninth Circuit Court of Appeals, which found that the plaintiffs failed to establish Article III standing, because the plaintiffs did not allege that they had suffered an actual injury traceable to the defendant that is likely to be redressed by a favorable judicial decision.⁶⁵ The Court vacated the district court’s dismissal and directed the district court to remand the case to state court.⁶⁶

While the case may not be relied upon in federal court, the opinion is persuasive and generally consistent with existing case law. It suggests that similar actions by agencies to counter hate speech would withstand First Amendment challenges.

D. Harassing Conduct

Because council meetings occur in a public workplace with public employees present, we briefly address discriminatory and harassing conduct.

California employers have a duty to take “all reasonable steps necessary to prevent discrimination and harassment from occurring.”⁶⁷ Harassment in the form of a hostile work environment constitutes unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, California’s Fair Employment and Housing Act, and 42 U.S. Code section 1983.⁶⁸ “Although commonly alleged in connection with sex and gender, a hostile work environment claim may also be based on other protected characteristics such as race.”⁶⁹ “To prevail on a hostile work environment claim under Title VII, a plaintiff must show (1) that she was subjected to verbal or physical conduct because of a protected characteristic such as sex or race, (2) the

⁶³ *Id.* at p.*2.

⁶⁴ *Id.* at p. 4. (See also *Dyer v. Atlanta Independent School System* (11th Cir. 2021) 852 Fed. App’x. 397 [Upholding school board’s multiple suspensions of plaintiff from speaking at, and later attending, school board meetings for use of “racially charged, derogatory epithets like the ‘N-work’” because that offensive speech was disruptive to the meeting.]; *Moms for Liberty v. Brevard Public Schools* (N.D. Iowa 2022) [“[P]rohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption, preserve ‘reasonable decorum,’ and facilitate an orderly meeting—which the Eleventh Circuit has held on multiple occasions is permissible.”].)

⁶⁵ *Project for Open Government v. County of San Diego* (9th Cir. 2024) 2024 WL 20068.

⁶⁶ *Id.*

⁶⁷ Gov. Code § 12940(k).

⁶⁸ *Lelaind v. City and County of San Francisco* (N.D. Cal. 2008) 576 F. Supp. 2d 1079, 1100.

⁶⁹ *Id.* at p. 1100.

conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.”⁷⁰

An employer's duty to prevent employees from discrimination and harassment includes protecting employees from harassment from third parties. In the Ninth Circuit, “employers are liable for harassing conduct by non-employees ‘where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.’”⁷¹

While determining whether persistent racist, sexist, or other public comment related to a protected characteristic meets the standard of hostile work environment is beyond the scope of this article, certainly the agency has a duty to protect employees from such harassment. The duty to protect agency employees is a factor to consider when managing public comment that constitutes harassment and underscores the potentially disruptive nature of such conduct.

II. Hate-Bombing Disrupts Council Meetings

Based on the reported responses to hate bombing at council and board members, the evidence demonstrates that hate bombing has been disruptive to meetings. For those of us who have experienced hate-bombing, we experienced that it disrupted the meeting. Public comment consisting solely of disparaging hate speech is irrelevant to city business, time-consuming, chills the First Amendment rights of other attendees, and delays a council's ability to accomplish its business in a reasonably efficient manner.

We want to clearly distinguish incidents of hate-bombing from a situation where due to a particular business item before a council, such as discussions of a diversity, equity, and inclusion policy, public comments regarding race, gender or other protected classes may be relevant to the item. Even when an agenda item may involve those topics, public comment may be made without using terms that disparage individuals based on membership in a protected class. Councils should take care when discussing those items not to prohibit speech based on viewpoint, such as comments criticizing those policies.

Hate-bombing disrupts council meetings because it is jarring and traumatic to those, including councilmembers, employees, and other members of the public, who must hear it, and distracts all attendees from the council business. After experiencing an incident at a San Jose City Council meeting, a Councilmember stated that, “I find the slurs that are being used by some of the public commenters to be very disruptive, and frankly, anxiety inducing for some of us.”⁷² At a City of

⁷⁰ *Little v. Windermere Relocation, Inc.* (9th Cir. 2002) 301 F. 3d 958, 966.

⁷¹ *Id.* at p. 968.

⁷² Silicon Valley meetings disrupted by virtual hate speech,” San Jose Spotlight (October 12, 2023), available at: [Silicon Valley meetings disrupted by virtual hate speech - San José Spotlight \(sanjosespotlight.com\)/](https://sanjosespotlight.com/).

La Mesa Council meeting, after callers made “antisemitic hate speech,” “[s]ome people sitting in the audience gasped. [A Councilmember] stood up and walked out.”⁷³ The Councilmember stated, “I got up in a huff and left the room, both in anger, but also because I wanted to make sure that people knew that at least I didn't think that the comments we were hearing were appropriate or welcome[.]”⁷⁴ At a Bend, Oregon meeting of its Human Rights & Equity Commission, the hateful bombing “left many in tears and derailed the meeting, as many needed to reflect on what had just occurred.”⁷⁵

When the Capitola, California, City Council called a recess after enduring hate speech at a meeting, a Councilmember stated, “[t]here wasn’t much discussion during the break, just a lot of hugs, and asking ourselves, can we do this? Can we take this anymore [tonight?] . . . The audience was shook. The council had previous discussions about how to address this. But as much as we could prepare, there is nothing like it when it actually happens. And it was awful.”⁷⁶ These reactions support the view that such conduct interferes with a council’s ability to conduct its business.

Responding to hate bombing also lengthens Council meetings and, therefore, disrupts the ability of Council to carry out business efficiently. Many councils, like those in Capitola and Hermosa Beach, have called recesses in response to hate-bombing.⁷⁷ In addition, councilmembers, reasonably, feel the need to counter the hate speech. Councilmembers respond by informing the public that the harassment is not consistent with the city’s anti-discrimination and anti-harassment policies and city values of inclusivity. In response to antisemitic and threatening speech at a Walnut Creek, California Council meeting, a Council member “apologized to the

⁷³ “La Mesa, Cal. Suspends Virtual Comments After Zoom Bombs, San Diego Union Tribune (March 11, 2024), accessed on govtech.com at: [La Mesa, Calif., Suspends Virtual Comments After Zoom Bombs \(govtech.com\)](https://govtech.com/news/la-mesa-california-suspends-virtual-comments-after-zoom-bombs/)

⁷⁴ *Id.*

⁷⁵ “City of Bend reacts to racist ‘Zoombombing’ of Human Rights & Equity Commission meeting, seeks to avoid repeat,” Harley Coldiron, KTVZ.com (March 28, 2024) at: <https://ktvz.com/news/government-politics/2024/03/27/city-of-bend-reacts-to-racist-zoombombing-of-human-rights-equity-commission-meeting-seeks-to-avoid-repeat/>

⁷⁶ “‘Zoom bombing’ tests the boundaries of free speech and access in local government meetings,” Christopher Neely (Nov. 6, 2023) Lookout Santa Cruz at: [‘Zoom bombing’ tests the boundaries of free speech and access in local government meetings - Lookout Santa Cruz](https://lookoutsantacruz.com/2023/11/06/zoom-bombing-tests-the-boundaries-of-free-speech-and-access-in-local-government-meetings/)

⁷⁷ “‘Zoom bombing’ tests the boundaries of free speech and access in local government meetings,” Christopher Neely (November 6, 2023) Lookout Santa Cruz at: [‘Zoom bombing’ tests the boundaries of free speech and access in local government meetings - Lookout Santa Cruz](https://lookoutsantacruz.com/2023/11/06/zoom-bombing-tests-the-boundaries-of-free-speech-and-access-in-local-government-meetings/).

“Anonymous callers make racist, antisemitic comments at Hermosa Beach council meeting,” Michael Hizon, Daily Breeze (July 26, 2024) at: <https://www.dailybreeze.com/2023/10/02/anonymous-callers-make-racist-antisemitic-comments-at-hermosa-beach-council-meeting/>.

community.”⁷⁸ The Mayor of Palo Alto issued disclaimers after hateful speech from remote attendees.⁷⁹ To counter the hate speech during a meeting, a Sunnyvale City Councilmember “showed a slideshow of locations he visited in Vienna, Austria, including photos from Judenplatz, a town square central to the city’s Jewish community, and the Jewish Museum.”⁸⁰ Spending the time to respond to these disruptions impacts the ability of a council to efficiently carry out its business.

And some cities have had to end meetings early, preventing them from accomplishing their business entirely. The City Council of Laguna beach ended a meeting early after remote speakers “unleashed antisemitic, homophobic, transphobic and racist tirades” during the public comment period.⁸¹ “We couldn’t get any work done,” [said the Mayor]. “It just wasn’t productive.”⁸²

As discussed above, agencies also have a duty to protect their employees from discriminatory and harassing conduct. To protect them, the council must allow employees to leave the meeting during hate speech. Attempting to run a meeting without a clerk to take minutes, a city manager to answer questions from Councilmembers, and an attorney to respond to legal questions, undoubtedly disrupts the meeting and prevents a council from accomplishing its business in a reasonably efficient manner.

Hate speech also chills the speech of others. In the meeting in Matthews, North Carolina, members of the public left the meeting in response to the harassment.⁸³ Causing people to leave council meetings interferes with their rights to freedom of association, free speech, and the right to petition government. It surely chills the rights of members of protected classes from participating in meetings. Attendees who are subjected to such hate are, reasonably, intimidated and less likely to make their own public comments or to attend future meetings.

⁷⁸ “Man spews antisemitism, does Nazi salute, at Walnut Creek City Council meeting,” Miabelle Salzano, Kron 4 (February 20, 2024) at: <https://www.kron4.com/news/bay-area/man-spews-antisemitism-does-nazi-salute-at-walnut-creek-city-council-meeting/>.

⁷⁹ “Faced with Hate Speech, Palo Alto to curb zoom for public comments,” Gennady Sheyner. Palo Alto On line (May 14, 2024) at: <https://www.paloaltoonline.com/news/2024/05/14/faced-with-hate-speech-palo-alto-to-curb-zoom-for-public-comments/>

⁸⁰ “Silicon Valley meetings disrupted by virtual hate speech,” San Jose Spotlight (October 12, 2023), available at: [Silicon Valley meetings disrupted by virtual hate speech - San José Spotlight \(sanjosespotlight.com\)/](https://www.sanjosespotlight.com/silicon-valley-meetings-disrupted-by-virtual-hate-speech/).

⁸¹ See “Laguna Beach shuts down council meeting after ‘Zoombombing’ incident,” Los Angeles Times (February 14, 2024), available at: [Laguna Beach council meeting halted by 'Zoombombing' incident - Los Angeles Times \(latimes.com\)](https://www.latimes.com/california/story/2024-02-14/laguna-beach-council-meeting-halted-by-zoombombing-incident/).

⁸² *Id.*

⁸³ “Matthews town meeting becomes heated after ‘disgusting’ Zoom-bombing incident,” Jason Puckett. WBTV.com (February 27, 2024) at: <https://www.wbvtv.com/2024/02/27/matthews-town-meeting-becomes-heated-after-disgusting-zoom-bombing-incident/>

At the Matthews Town Commission meeting, a Jewish Commissioner left the meeting, explaining, “[t]he language that I heard last night ... I am fortunate that I lived my entire life without hearing it. . . It was transphobic, homophobic, antisemitic and it reached a point where I heard things that I cannot unhear. That is when I knew that I had to step out, not because I didn’t believe they had a right to say it, but because I have to protect my mental health and my emotional well-being.”⁸⁴

At a San Bernardino City Council meeting, a member of the public was subjected to racist slurs by a remote caller. The speaker, who was African American, stated, “It took me aback; I was angry, I was scared. I didn’t know if I was being verbally assaulted, and if this would be followed by a physical assault.”⁸⁵

Finally, there is overwhelming evidence that verbal conduct that disparages protected classes has chilled the First Amendment rights of other attendees. Many cities including Crescent City, Palo Alto, and San Francisco have ended remote participation in meetings entirely, or allow remote attendance but now prevent remote attendees from addressing comments to the Council.⁸⁶

A 2024 Common Cause report, in which 119 cities responded to their survey (albeit before the rash of hate bombing), found that “[a] majority of city respondents believe remote public comment options made it easier for the public to participate, improved city council meetings and civic engagement, and that its benefits justify its costs.”⁸⁷ Remote participation allows those who cannot easily leave home for meetings – including older adults, the disabled, those who lack transportation, and parents of young children – to participate in meetings. At a La Mesa City Council meeting at which ending remote public comment was discussed, participants spoke of the benefits of virtual participations “like providing access for caregivers of children and elders, people with disabilities and those unable to drive. One La Mesa resident spoke while in New

⁸⁴ *Id.*

⁸⁵ “San Bernardino City Council meeting derailed by racist slurs from caller,” Shelby Nelson. KTLA.com (October 20, 2023) at: [San Bernardino City Council meeting derailed by racist slurs from caller \(ktla.com\)](https://www.ktla.com/news/politics-government/san-bernardino-city-council-meeting-derailed-by-racist-slurs-from-caller/).

⁸⁶ “Crescent City Discontinues Virtual Public Comment After Zoombombing Attack,” Jessica Cejnar Andrews. Wild Rivers Outpost (March 19, 2024) at: <https://wildrivers.lostcoastoutpost.com/2024/mar/19/crescent-city-discontinues-virtual-public-comment/>
“Faced with Hate Speech, Palo Alto to curb zoom for public comments,” Gennady Sheyner. Palo Alto Online (May 14, 2024) at: <https://www.paloaltoonline.com/news/2024/05/14/faced-with-hate-speech-palo-alto-to-curb-zoom-for-public-comments/>.

“Facing ‘intolerable’ bigotry, SF Supes end remote public comment,” Adam Shanks. San Francisco Examiner (October 17, 2023) at https://www.sfexaminer.com/news/politics/sf-supervisors-end-comment-policy-after-bigoted-callers/article_61b2e522-6c69-11ee-8ed8-63fc5a33a00a.html.”

⁸⁷ “Opening California’s Democracy: A Survey on Remote Participation at Government Meetings,” Common Cause (2024) at: <https://www.commoncause.org/california/wp-content/uploads/sites/29/2024/01/CA-Remote-Accessv2.pdf>.

Mexico, one person said his two children were sick, and another participated virtually because he was sick.”⁸⁸

Hate-bombing has limited the access of many remote attendees to participate in their government. That certainly chills their First Amendment Rights.

III. Managing Disruptive Conduct at Public Meetings

Based on the Ninth Circuit decisions, a public agency cannot limit public comment based on the viewpoint of the speaker. An agency may, however, remove a speaker – and therefore, limit the speaker from speaking – if the speaker’s conduct disrupts the orderly process of the meeting. That disruption may include violating the council’s rules, provided that the rules are reasonable. Before limiting the speech of a speaker, the presiding officer must warn the speaker they are violating the council’s rules, and the violation is disrupting the meeting. If the speaker continues to disrupt the meeting, removal of the speaker, or terminating the speaker’s ability to speak should survive First Amendment scrutiny.

The following strategies help councils to manage disruptive public conduct.

A. Adopt and Implement Effective Rules

One of the most important tools in handling disruptive conduct is the council’s rules. Having specific rules that regulate council meetings and public comment can allow the council to manage disruptive conduct in a way that comports with the First Amendment. We recommend the following:

- 1. Address Conduct Not Speech**

Ensure that removal procedures address disruptive conduct, and not the content of the speech.

- 2. Include the Agency’s Harassment-free Workplace Policy**

Ensure that the agency’s anti-discrimination and harassment-free workplace policy is included, as a whole or by reference, in the council’s rules. Include a statement that the meetings of the council (and other legislative bodies) are part of the city’s workplace subject to those policies.

- 3. Allow Public Criticism**

Ensure that rules do not prohibit or expressly permit public criticism of the policies,

⁸⁸ “La Mesa, Calif., Suspends Virtual Comments After Zoom Bombs,” Lauren J. Mapp. San Diego Union-Tribune (March 11, 2024) at: <https://www.govtech.com/security/la-mesa-calif-suspends-virtual-comments-after-zoom-bombs>

procedures, programs, or services of the agency, or of the acts or omissions of the council.

Notably, while the Brown Act prohibits a council from prohibiting criticism of policies, procedures, programs, services and acts or omissions of the council, it does not prohibit a council from limiting criticism of individuals. In *Baca v. Moreno Valley Unified School District*, the District Court granted a preliminary injunction preventing the enforcement of the school district's policy that prohibited oral or written presentations in open session that included "charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee."⁸⁹ The court found that the policy was a content-based prohibition what could not be justified on employees' right to privacy or liberty interests.⁹⁰ The court acknowledged the district had an interest in regulating its meetings, but found that "the policy here, which focuses on content and not only conduct, is not narrowly drawn so as to achieve District's purported compelling interest without impinging upon the public's First Amendment rights, which rights include the right to be passionate and even uninformed in the expression of one's views."⁹¹

Given the *Baca* case, meeting rules that prohibit criticism of employees likely violate the First Amendment. We think, however, a presiding officer can work to ensure that criticism focuses on the acts or omissions of employees, rather than ad hominem attacks (impugning a person's character rather than their acts or omissions), and does not disparage an employee's race, gender, religion or other membership in a protected class.. (See below.)

4. Set Reasonable Time Limits

Include reasonable time limits on the total time allotted for public comment on each item of business and total time per speaker, subject to the presiding officer or majority of the council's ability to establish a time limit. Apply the time limits in an unbiased and uniform manner to avoid allegations of bias and favoritism.

5. Establish Reasonable Conduct Standards for Attendees and Speakers

As discussed above, the Ninth Circuit has upheld objective conduct standards for attendees of city council meetings, provided that attendees are removed only when they

⁸⁹ *Baca v. Moreno Valley Unified School District* (C.D. Cal. 1996) 936 F. Supp. 719.

⁹⁰ *Id.* at pp. 730-731, 731-734. (But see *Davison v. Rose* (4th Cir. 2021) 19 F.4th 626, 635 [Upholding school board policy prohibiting comments "that are harassing or amount to a personal attack against any identifiable individual" including board members "as necessary to further the forum's purpose of conducting good business."].)

⁹¹ *Id.* at p. 734.

violate the conduct standards *and* actually disrupt the meeting. Objective standards (for both remote and in-person attendees) include prohibiting use of profanity, threatening language, whistling, stamping feet, clapping, yelling, speaking over or interrupting the recognized speaker, and speech that violates the city's anti-discrimination and harassment-free work environment. The Rules should also state that public comment is accepted only on matters within the subject matter of the council.

6. Establish a Warning and Removal Process

The Rules should state that violating the council's rules is disruptive to the meeting and provide an explanation of why the violations are disruptive: Rule violations interfere with the council's ability to accomplish its functions in a reasonably efficient matter by causing a delay or distraction from Town business, interfere with other attendees' ability to listen and understand the business and proceedings of the city council, chill the participation by other attendees, and may violate the city's anti-discrimination and harassment-free work environment policy.

The Rules should also provide a process for warning and removing participants (whether virtually or in person) for disruptions caused by continued violations of the Rules. Establishing a process, and following it consistently, shields a council from allegations of bias or unfair treatment based on viewpoint. The Rules should require the presiding officer to stop the timeclock, warn the speaker that they are in violation of the Rules and they are disrupting the meeting, explain that the speaker may continue speaking if the speaker refrains from violating the rules, restart the clock and allow the speaker to continue. If the speaker continues to disrupt the meeting after being warned, the presiding officer can stop the speaker and have the speaker physically removed or by muting the speaker if the speaker is attending remotely.

7. Address Hate Speech.

Either as part of the warning and removal process described directly above or separately, the Rules should address verbal conduct denigrating individuals based on a protected category.

As explained above, the Rules should inform attendees that the city has a discrimination and harassment-free workplace policy, the meetings of the council (and other city legislative bodies) are part of the city's workplace, and that verbal conduct denigrating individuals based on a protected category violates that policy.

If a speaker violates the anti-harassment policy, the presiding officer should stop the timeclock and the speaker. The presiding officer should read relevant portions of the anti-harassment policy and state that speaker is in violation of both the council rules and

the city's anti-harassment meeting; the speech does not pertain to anything within the subject matter jurisdiction of the council; the city does not condone the speaker's comments; the speaker's harassing conduct is impeding the orderly conduct of the meeting by interfering with the Council's ability to accomplish its functions in a reasonably efficient matter by causing a distraction from Town business, chilling participation from other members of the public, interfering with the ability of those present to listen and understand the business and proceedings of the Town, and may constitute or contribute to employment or other forms of discrimination. The presiding officer should inform the speaker that if they refrain from their disruptive conduct, they may continue to speak, but if they cannot, they will be removed for disrupting the meeting. If the speaker continues to engage in harassing conduct, the presiding officer may remove them from the meeting.

B. Meeting Preparation

Preparing for meetings, particularly when there may be controversial items on the agenda, is essential for managing disruptive conduct. All officers and employees should be informed when there is a controversial matter on the agenda. The city attorney should educate the presiding officer, city manager, and if necessary, the police department or security representative, on the protocols for disruptions and the requirements of the First Amendment.

In addition, in our experience, the organized groups often sign on and off during the same meeting using different names. In some cities, the IT staff were able to limit remote speakers based on their web addresses, so that they were able only to speak once. Explore whether this is an option in your city.

C. Effective Presiding Officer

The presiding officer, likely the mayor, plays the most important role in managing a meeting.⁹² City attorneys can work with the presiding officer to ensure that they are familiar with council rules, procedural rules, and their role in managing a meeting and procedures for removing disruptive members of the public.

1. Consider the Order of Items on the Agenda

Consider the order of items on the agenda. If there is a particularly controversial item on the agenda, consider whether to hear the item at the start of the meeting if most members of the public will be attending for that item. Alternatively, if there are items that must be heard on that date, schedule them first to ensure the necessary business is completed.

⁹² The Institute of Local Government maintains resources for chairing a meeting on its website at: <https://www.ca-ilg.org/chairing-meeting>.

2. Inform the Public of the Rules

Where there are a lot of members of the public present (in person or on zoom) or there are contentious items on the agenda, it's often helpful for the meeting chair to provide an overview of meeting procedures and explain the rules regarding public comment at the start of the meeting so that the public is aware that the council has rules prohibiting disruptions and the consequences for disruptions. The presiding officer should also remind attendees that they will take public comment only on matters within the subject matter of the council.

3. Take In-person Public Comment First

We recommend that councils take in-person public comment before taking comments from remote attendees. Those in person are more likely to be residents of the community and council can hear substantive comments first. Making hate-bombers wait through more meeting time may make them decide not to speak.

4. Intervene

Next, the presiding officer should be prepared to intervene when a speaker's comments criticizing officers or employees veer into ad hominem attacks, criticism based on the officers or employee's status as a member of a protected class, or address matters outside of the council's subject matter jurisdiction. A presiding officer can interrupt the speaker, hold the speaker's time, tell the speaker that the Council welcomes criticisms of the acts or omissions of employees, but request that they refrain from ad hominem attacks or disparagement based on their race, religion, sexual orientation, or other protective class.

The presiding officer should also be prepared to deal with disruptive comment. The city attorney can provide a script for the presiding officer to follow in the event of disruptions.

5. Remain Calm

Finally, the presiding officer should remain calm and focused to help keep the meeting as calm as circumstances permit and enforce council rules in an unbiased manner.

D. Call a Recess

The presiding officer should call a recess if the meeting is threatening to become disorderly. The recess might allow tempers and the room temperature to cool a bit. Smaller jurisdictions who do not have a routine police presence at their meetings can call the police to ensure officers are present when the meeting resumes.

Conclusion

Effective rules, training on Brown Act and First Amendment requirements, and coordination between the presiding officer, city manager, clerk, city attorney, and the police department can all assist in preventing disruptive meetings. Where these fail, however, we believe that a Council has the right to cut off a speaker who engages in certain kinds of hate speech, using the procedures described above. While many will argue that eliminating all remote public comment is a lower risk option legally, that point should be balanced against what is lost by making participation in local democracy less accessible. Preserving accessible and non-discriminatory public discourse is worth it.