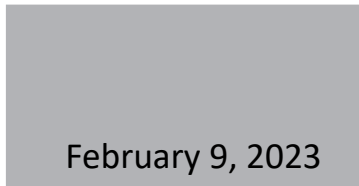


FIRST AMENDMENT: RULES OF DECORUM, COUNCIL CONDUCT AND SOCIAL MEDIA

Deborah J. Fox, Meyers Nave
Chair First Amendment Practice Group



February 9, 2023

Introduction

Overview

- Rules of Decorum for Public
- Running Council Meetings
- Rules of Decorum for Council
- Remedies for Outlier Council Members
- Use of Social Media



Rules of Decorum for Public

Actual Disruption Standard

- City Council meetings are a special type of public forum
- While subject to time, place and manner restrictions, the courts have explained that a member of the public can be ejected only for “actually disturbing or impeding a meeting”



(Norse v. City of Santa Cruz, 629 F.3d 966, 976 (9th Cir. 2010); Acosta v. City of Costa Mesa, 718 F.3d 800, 811 (9th Cir. 2013); Ribakoff v. City of Long Beach, 27 Cal.App.5th 150 (2018).)

Rules of Decorum for Public



Actual Disruption Standard

- Actual disruption measured by effect on audience (not individual councilmembers)
- First Amendment meaningless if councilmember's reaction to speech justified removal of a speaker
- Assess if language or action has impeded the ability of the body to get through the agenda, i.e. disrupted the meeting

Rules of Decorum for Public

Actual Disruption Standard

- Standard is relatively low, but a disruption must have occurred
- Must be more than a mere violation
- but not to the level of breach of the peace or fighting words
- Cannot pre-determine what type of language or statements will equate to a disruption
- Line between an actual and potential disruption may be difficult to draw



Rules of Decorum for Public



Actual Disruption, Case Examples

- Permissible to remove man who had previously disrupted proceedings when his cohort made an obscene gesture which threatened to re-start previous disruption (*Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995).)
- Triable issue of fact as to whether a silent Nazi salute caused an actual disruption and thus Court reversed grant of summary judgment (*Norse*, 629 F.3d at 970.)

Rules of Decorum for Public

Actual Disruption, Case Examples



- City of Los Angeles, Dowd example:
“your president is pathetic and hopeless and is not doing a very good job and need to get together and lose her.”
(*Dowd v. City of Los Angeles*, 2013 WL 4039043, *38 (C.D. Cal. 2013).)
- Hateful words, costumes and clothing –
e.g. KKK outfit, t-shirts with N word

Rules of Decorum for Public

Actual Disruption, Closing Council Chambers



Los Angeles Times

The Seattle Times

San Francisco Chronicle

Patch

Running Council Meetings

Going Through The Chair

- Power to determine when a disruption has occurred is with the meeting chair or moderator
(See *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990); see *Acosta*, 718 F.3d at 810 n. 5.)
- Abuse of the meeting chair's discretion to eject people simply because of a disagreement with their speech or choice of words



Running Council Meetings

Timing Issues

- City Council may set time limits for public speakers
(*Ribakoff*, 27 Cal.App.5th 150.)
- Must ensure evenhanded enforcement
- Violation of time limit can be the basis for an actual disruption



Running Council Meetings

Practice Pointers

- Evenhandedly enforce time limits
(may be easier to let time run than determine if certain speech rises to the level of an actual disruption)



- Chair of meeting in partnership with City Attorney and City Manager should monitor public comments to determine if they rise to the level of an actual disruption

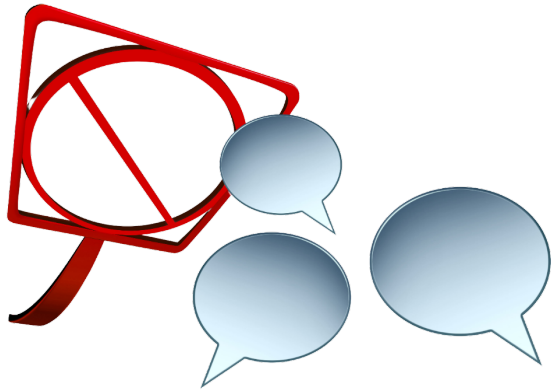
Rules of Decorum for Council



- Cases review rules of decorum in the context of public speech
- But the same metrics and First Amendment framework most prudent course in determining whether to restrict Councilmembers' comments
- Courts have consistently held that the First Amendment requires that “legislators be given the widest latitude to express their views on issues of policy.”

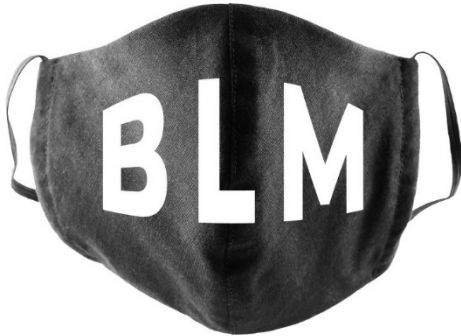
(Bond v. Floyd, 87 S.Ct. 339, 349 (1966); Degrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000).)

Rules of Decorum for Council



- Best approach is to only prohibit speech of Councilmembers that causes an actual disruption
- To preclude and/or restrict the speech of a sitting Councilmember short of an actual disruption is uncharted legal territory
- Policies for aspirational goals for civility will not run afoul of the First Amendment

Rules of Decorum for Council



Hypotheticals

- Respectful language?
- Prohibiting comments on staff?
- Prohibiting articles of clothing (e.g. Blue Lives Matter pin; Black Lives Matter items)?

Remedies for Outlier Councilmembers

Considering the Options:



Censure, permissible



Stripping of titular roles and membership on committees, permissible

Remedies for Outlier Councilmembers

Considering the Options:

- Ejecting from meeting, only permissible where there is an actual disruption
- Attempting to remove from elected office, not permissible



Remedies for Outlier Councilmembers



- Assessing Council action taken against members for their speech is not analyzed as a typical First Amendment retaliation case
- If Councilmember retains full range of rights and prerogatives that come with having been publicly elected (such as voting and attending meetings) remedy will likely pass muster

(See *Blair v. Bethel School Dist.*, 608 F.3d 540, 544 (9th Cir. 2010).)

Remedies for Outlier Councilmembers

Courts consider the following:

- was the action taken against the elected official “a rather minor indignity, and de minimis deprivation of benefits and privileges”;
- “more is fair in electoral politics than in other contexts”; and
- Elected officials are entitled to “a protected interest in speaking out and voting their conscience on the important issues they confront.”

(*Blair*, 608 F.3d at 545.)



Remedies for Outlier Councilmembers

- Plaintiff, Board member of the community college system, disagreed with other Board members and brought lawsuits challenging the Board's actions
- The Board publicly reprimanded plaintiff and then also censured him
- Supreme Court held that plaintiff did not possess an actionable First Amendment claim arising from the Board's purely verbal censure

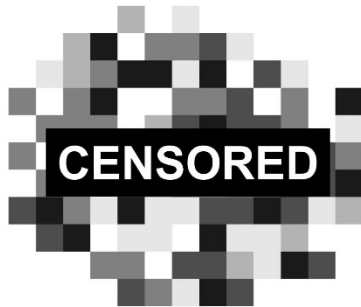


(Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022).)

Remedies for Outlier Councilmembers

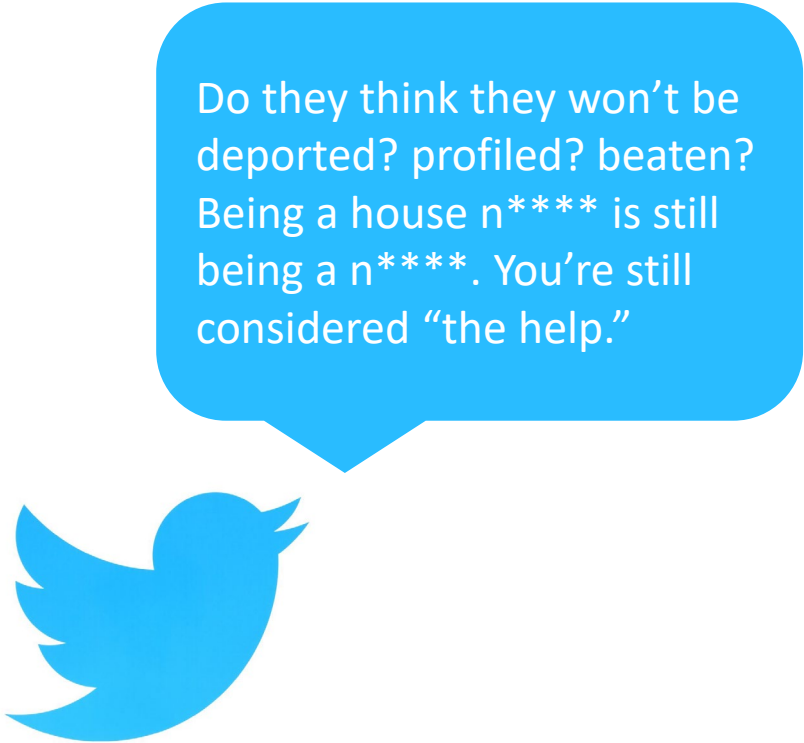
SCOTUS ruled that:

- Plaintiff had a First Amendment right to speak out on questions of government policy, but other Board members also had a First Amendment right to speak out
- Censure itself was protected speech under the First Amendment
 - The censure at issue did not prevent plaintiff from doing his elected job nor did it deny him any privilege of office
 - Censure is not akin to exclusion from office



(Houston Community College System, 142 S.Ct 1253.)

Remedies for Outlier Councilmembers



Do they think they won't be deported? profiled? beaten? Being a house n**** is still being a n****. You're still considered "the help."

Case Study, *Collins v. SFUSD*:

- Old tweets by Collins resurfaced that were seen as anti-Asian and racist. School Board passed resolution calling for Collins' resignation

(*Collins v. SFUSD*, 21-cv-02272-HSG.)

Remedies for Outlier Councilmembers

Case Study, *Collins v. SFUSD*:

- The School Board resolution also removed Collins from her role as Vice President and her committee assignments
- Board member Collins sued for First Amendment retaliation
- Court ruled in favor of the School District on a motion to dismiss



Use of Social Media



First inquiry, is the social media account **official** or **personal**?

- Courts evaluate the totality of the facts
- If the facts show that officials use their social media pages to conduct government business, then it will be treated as a public forum where their ability to restrict users or delete comments is circumscribed by the First Amendment

Use of Social Media

Official Accounts, Case Examples



- Facebook page of Board member found to be official account and blocking and deleting comments violated the First Amendment
(*Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019))



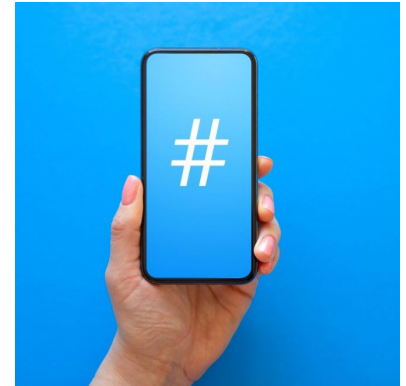
- School Board members' Facebook and Twitter pages were public fora and blocking users violated First Amendment
(*Garnier v. Poway Unified Sch. District*, 2019 WL 4736208 (S.D. Cal. 2019).)

Use of Social Media

Personal Accounts, Case Example

(*Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).)

- State representative's Twitter campaign page was not a public forum as it was not being used as a tool of governance
- Thus, blocking users from account did not violate the First Amendment
- First Amendment only applies to government action and the act of a public official taken in "the ambit of their personal pursuits" does not trigger First Amendment concerns



Use of Social Media

Restricting Postings of Elected Officials

- No direct case on point but likely to be governed by the same rules that apply to speech of citizens in general, namely:
 - Content-neutral restrictions must be reasonable and supported by a legitimate government interest (i.e. time, place and manner)
 - Content-based restrictions must be supported by a compelling government interest to pass muster



Social Media

Hypotheticals
about...

Social Media &
Elected Officials

Harsh comments
regarding staff

Doxing





Questions

Thank You



Deborah J. Fox
Meyers Nave
DFox@meyersnave.com