STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: TJ Jones, Executive Director

Subject: Proposed Rules for FPPC Public Participation

Date: August 5, 2019

California state law requires that the FPPC provide an opportunity at public meetings for members of the public to address "each agenda item before or during the [FPPC]'s discussion or consideration of the item." (Section 11125.7 (a)). The FPPC can, however, place reasonable limitations on the public participation allowed at FPPC meetings. At present, the FPPC does not have any rule or regulation that enunciates any limitation on public participation. Because the agency is considering expanding the means through which members of the public can address the FPPC at meetings, the Commission may wish to consider the adoption of rules expressing reasonable limitations on public comment. See, e.g., Hopper v. City of Pasco, 241 F.3d 1067, 1082 (9th Cir. 2001) ("[W]hile Pasco may have blundered into the controversy that ended its arts program, it could have avoided this problem by establishing and enforcing a clearly articulated policy that would pass First Amendment muster.")

As more fully discussed in the Legal Memorandum of July 29, 2019 ("Legal Considerations for Remote Participation at Commission Meetings," hereinafter, "Legal Memo"), there are constitutional limitations on the rules that can be enacted by the FPPC. Case law is clear, however, that the Commission can place reasonable "time, place, and manner" restrictions on public comment at Commission meetings. See, e.g., *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 271 (9th Cir., 1995) ("The 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."); see also *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) (stating that, for a limited public forum, "'restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible'").

The general litmus test for whether the restrictions are "reasonable" for a limited public forum such as a Commission meeting is whether the public comment that is being restricted is otherwise "disruptive" to the meeting or the conducting of agency business, or it infringes upon the rights of other speakers. See *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990) ("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."). Viewpoint-neutral restrictions typically have a greater chance of surviving constitutional scrutiny. Examples of such viewpoint-neutral rules that have passed constitutional muster include rules that:

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- Limit the speaking time of each speaker (*Chaffee v. Chiu*, 2012 WL 1110012 (N.D. Cal) (2 minutes per person found "reasonable") (*Kindt, supra; Ribakoff v. Long Beach*, 27 Cal.App.5th 150 (2018) (3 minutes per person found "reasonable")
- Limit the scope of comments to the specific agenda item (see *White, supra*) ("in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand")
- Limit the total amount of time for all comments (Section 11125.7 (b))
- Limit repetitious comments (see *White, supra*) (a governing body "certainly may stop [a public commenter] if his speech becomes irrelevant or repetitious")
- Limit irrelevant comments (*Id.*)
- Mandate that the speaker stop speaking when a member of the agency wants to respond or ask questions (*Shapiro v. Carlsbad*, 2014 WL 443841 (Cal App, 4th Dist., Div. 1) (February 4, 2014)) ("When a speaker is unwilling to recognize the authority of a presiding officer or moderator, the speaker is per se disrupting proceedings. Public comments that are not subject to such rudimentary controls by a presiding officer or moderator invite useless chaos, which in no way serves the public interest or public discourse.")

Although the FPPC cannot restrict the viewpoints expressed by any speaker, the Commission can provide certain viewpoint-neutral limitations on the *manner* in which the viewpoint is presented (but only insofar as the manner of presentation causes a disruption to the Commission's proceedings or business). See, e.g., *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 499 (9th Cir. 2015) ("A subject-matter or speaker-based exclusion must meet two requirements to be reasonable in a limited public forum. First, it must be reasonable in light of the purpose served by the forum. This requirement focuses on whether the exclusion is consistent with limiting [the] forum to activities compatible with the intended purpose of the property. Second, exclusions must be based on a standard that is definite and objective. That requirement has been developed most prominently in the context of time, place, and manner restrictions in traditional public forums.") (citations and quotations omitted).

The majority of cases that uphold so-called "rules of decorum" against facial challenges have looked at such rules after a disruption has, in fact, already taken place, and the speaker has been denied a chance to speak. Types of rules that have been upheld, following such disruption, are rules that prohibit[1]:

- "abusive" comments (see, e.g., *Thornton v. Kirkwood*, 2008 WL 239575 (E.D. Mo.)) (Public speaker's ejection from meeting was not a violation of 1st Amendment rights where speaker began remarks by continually repeating the word "jackass")
- Comments that solicit response or activity from members of the public (see, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 733-34 (1990))
- Nudity (see, e.g., *Taub v. San Francisco*, 696 Fed.Appx. 181 (9th Cir. 2017))

[1] Often, such presentations, under the specific facts, could also have been found to have been irrelevant to the issue at hand, thereby offering a secondary reason to prohibit the presentation.

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Certain content is not entitled to constitutional protection – obscenity; words that tend to incite physical violence ("fighting words"); child pornography – and can be prohibited, provided that the content meets the legal definition of these terms.[2] *Ralphs Grocery v. United Food & Commercial Workers Union Local 8*, 55 Cal.4th 1083, 1114 (2012) ("The high court has further held that some categories of speech, defined on the basis of content, are of such low value that they do not merit First Amendment protection. ["Obscenity, fighting words, and child pornography are well-known examples of generally unprotected categories"].) (citation and quotation omitted)

In addition to a policy that sets forth the limits of public comment, the FPPC may wish to consider procedural rules that will allow it to better anticipate the scope of comments in advance:

- Requirement that commenters fill out a "speaker card" (either paper or on-line) prior to the meeting, expressing a desire to speak, and identifying the topic on which the speaker intends to speak[3]
- Allowing any individual speaker the ability to cede his or her time to another speaker, such that a group of speakers on the same topic could designate one spokesperson (the Commission could also then enact a specific time limit applicable to spokespeople. For example, if the Commission has a 3 minute limitation for individuals, it might enact a 5 minute limitation for a spokesperson).

Of additional importance in crafting a constitutionally viable policy, it is important that the rules adopted by the government agency by clear enough to give notice to participants of the restrictions. Also, most courts have looked to whether it is "reasonably foreseeable" that the proscribed conduct could lead to a "disruption" of the meeting. See *Seattle Mideast Awareness Campaign, supra* (upholding "reasonably foreseeable" disruption standard).

[2] Under the U.S. Constitution, defamatory speech is not entitled to First Amendment protection, and may be prohibited. However, the First Amendment of the California Constitution does not allow for such a prohibition. See *Baca v. Moreno Valley Unified School District*, 936 F.Supp. 719, 727-28 (CD Cal 1990) ("Thus, under the California Constitution, District's Board may not censor speech by prohibiting citizens from speaking, even if their speech is, or may be, defamatory"). Defamatory speech may, however, be prohibited if it is disruptive.

[3] If the Commission pursues this avenue, it may not forbid comments by those who seek anonymity, unless the Commission can identify an important government interest that justifies the prohibition. See *Berger v. City of Seattle*, 569 F.3d 1029, 1045 (9th Cir. 2009) ("[T]he requirement that potential speakers identify themselves to the government, and the concomitant loss of anonymity, is one of the primary *evils* the Supreme Court cited when it struck down the permitting requirement in *Watchtower Bible*."). Per Government Code Section 11124, the Commission may not require mere attendees to fill out any type of "speaker card," survey, attendance sheet, questionnaire, etc. as a condition of attendance.