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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

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Subject: Legal Considerations for Remote Public Participation at Commission Meetings

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QUESTION PRESENTED

What, if any, legal restrictions should be taken into account in crafting a plan to allow remote public participation at Commission meetings?

SHORT ANSWER

When crafting a system to allow remote public participation, the Commission should be aware of the requirements of the Bagley-Keene Act and the First Amendment of the United States Constitution. The Commission is not required to implement a system for remote public participation, but once such a system is implemented, remote public participants are entitled to many of the same protections afforded to members of the public who participate in-person. Specifically, a remote participant and his or her electronic comment cannot be removed from a Commission meeting due to the viewpoint the participant has expressed.

METHODS OF REMOTE PARTICIPATION

The Commission could employ various methods for incorporating remote public participation into Commission meetings. Specifically, the Commission has inquired about "live," "delayed," and "delayed and aggregated" remote public comments. Remote comments could conceivably be made "live" through real-time video, audio, or written "chat" web applications. Alternatively, comments could be "delayed" and submitted, reviewed, and prepared for discussion ahead of time. Finally, some comments could be "delayed and aggregated"—that is, if numerous remote public participants submitted substantially similar questions, those comments could potentially be reviewed and aggregated, such that the Commission is able to address multiple comments with a single answer.

Before selecting a manner of remote public participation during Commission meetings, the Commission should be cognizant of two separate sets of requirements—the statutory requirements established under the Bagley-Keene Act ("Bagley-Keene"), as well as constitutional requirements, specifically relating to the First Amendment. By establishing a policy permitting remote public participation, the Commission would likely be expanding the scope of Commission meetings as a limited public forum. In other words, the Commission could permit remote public participation via traditional mail, e-mail, online comments (via Twitter, YouTube, etc.), but in doing so would be expanding the number of acceptable methods of public

speech that would be guaranteed First Amendment protections. (See *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010).) Thereafter, the remote public participants would essentially be afforded the same First Amendment guarantees afforded to those who physically attend a Commission meeting. (See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829.) The risk of viewpoint discrimination allegations, along with other factors, should be given significant consideration before the Commission selects a particular method for remote public participation.

LAW

The Bagley-Keene Act

Bagley-Keene requires, "the state body shall provide an opportunity for members of the public to directly address the state body of each agenda item before or during the state body's discussion or consideration of the item." (Section 11125.7(a).) However, "[t]he state body may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker." (Section 11125.7(b).) Additionally, Bagley-Keene provides, "[t]he state body shall not prohibit public criticism of the policies, programs, or services of the state body, or of the acts or omissions of the state body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law." (Section 11125.7(d).)

Bagley-Keene also provides, "agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act . . . and shall be made available upon request without delay." (Section 11125.1(a).) Relatedly, "[w]ritings that are public records under subdivision (a) and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person." (Section 11125.1(b).)

In the event of a violation of Bagley-Keene, a court may issue an order stopping or preventing violations and, in some instances, may nullify an action taken by a state body. (Sections 11130 and 11130.3.) The court also may order the agency to pay plaintiff's costs and attorneys' fees. (Section 11130.5.)

The First Amendment of the United States Constitution

Creating a forum for public participation triggers First Amendment considerations if limits are placed on public participation. "[W]hen the government intends to grant only 'selective access,' by imposing either speaker-based or subject-matter limitations, it has created a limited public forum." (*Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 497 (9th Cir. 2015). The United States Supreme Court has held, "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech

where its distinction is not ‘reasonable in light of the purpose served by the forum,’ . . . nor may it discriminate against speech on the basis of viewpoint.” (*Rosenberger*, *supra*, 515 U.S. at p. 829.)

For example, in *Norwalk v. City of Santa Cruz*, 900 F.2d 1421 (9th Cir. 1990), a city council had implemented and enforced a “Rule of Decorum” that provided:

> Persons Addressing the Council . . . Each person who addresses the Council shall not make personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public. Any person who makes 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 shall, at the discretion of the presiding officer or a majority of the Council, be barred from further audience before the Council during that meeting . . . .

(*Id.* at p. 1424.) The plaintiffs argued that the proscription against “personal, impertinent, slanderous or profane remarks” were fatally vague and overbroad. (*Ibid.*) The Ninth Circuit rejected that argument, agreeing with the City that the ordinance was not overbroad because removal could only be ordered when someone making a proscribed remark *actually* disturbed or impeded the meeting. (*Ibid.*) The court concluded “[w]hile 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.” (*Id.* at p. 1426 (citation omitted).)

The constitutionality of the rule ejecting members of the public who violated the “Rule of Decorum” was premised on the fact that it only prohibited speech that caused an “actual disruption.” (See *Dowd v. City of Los Angeles*, 2013 U.S. Dist. LEXIS 111435, *46-47 (C.D. Cal. 2013) (“The restrictions on personal, impertinent, and slanderous remarks therefore serve no purpose in the Rule; they are remnants of unconstitutional restrictions saved from invalidity only by the qualification of ‘actual disruption’ that arguably applies to them. Those restrictions on speech are thus at best superfluous. At worst, they chill constitutionally protected political speech.”).)

The Ninth Circuit has subsequently stated, “city council meetings, once open to public participation, are limited public forums. A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way.” (*Norse*, *supra*, 629 F.3d at p. 975.) While *Norwalk* recognized that a city’s “Rules of Decorum” are not facially overbroad where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting, the *Norse* court emphasized that “[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk*.” (*Ibid.*)

Limited Public Forums in the Digital Age

Case law regarding digital public forums is still in the early stages of development. However, the few cases analyzing the applicability of forum doctrine to digital mediums, such as Twitter and Facebook, have generally found that blocking a user from a forum due to the political views expressed by that user violates the First Amendment. (See, e.g., *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv (2d Cir., Jul. 9 2019).)

Even outside the realm of digital forums, "[t]he constitutional limits on the government's attempts to preserve civility within limited public forums are not entirely clear. For example, the Supreme Court has never directly addressed the scope of the government's authority to eliminate profanity from limited public forums." (Stephen C. O'Connell, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 1999 (2011).) The "question about how much deference to give government actors in regulating profane or 'abusive' speech in online forums is particularly pressing because computer mediated communications are more likely than those in the 'real world' to become profane or abusive, particularly when speakers believe they are anonymous." (*Id.* at pp. 2001-2002.)

"In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence." (*Madsen v. Women's Health Ctr.*, 512 U.S. 753, 778 (1994).) In general, however, a claim alleging viewpoint discrimination in violation of the First Amendment would likely seek injunctive and/or declaratory relief. (*See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541, 549, 577-578 (S.D.N.Y. 2018).)

ANALYSIS

Potential Methods of Remote Public Participation

I. "Live" Remote Public Comment System

A "live" remote public participation method is legally permissible and technically feasible, but the Commission should be aware of several potential issues the FPPC would face in implementing such a system.

The major concern with a "live" remote public participation system is our ability to efficiently implement it without running afoul of any statutory or constitutional requirements. If we were to implement a system that would permit members of the public to remotely participate in a Commission meeting in much the same way that a member of the public could participate in-person in a Commission meeting, we would be expanding the scope of Commission meetings as a limited public forum. Navigating the rights of remote public participants, with respect to the First Amendment and Bagley-Keene could present several challenges.

The ease of access afforded by remote participation, combined with the faster pace at which comments can be made in a digital chatroom (as compared to the more orderly fashion of in-person public comments), could result in the Commission receiving more comments than it

ordinarily receives. The Commission would likely have to allow remote participation on all agenda items to comply with Section 11125.7(a). If the need to moderate the participants or comments were to arise, the Commission would need to be cognizant of First Amendment concerns, particularly "viewpoint discrimination." The majority of Ninth Circuit cases analyzing government restrictions on speech in the context of limited public forums, such as government meetings, focus on the speech's *actual* effect—that is, whether the speech actually disrupted, disturbed, or otherwise impeded the orderly conduct of the government meeting. (See *Norwalk*, *supra*, 900 F.2d at p. 1426.) If the speech did have such an effect, the government agency may be justified in ejecting the user from the meeting. (*Ibid.*) In the digital context, a reasonable analogy would involve muting or blocking that user for the duration of the meeting. There is no bright-line rule in determining exactly when a meeting has been disrupted, disturbed, or otherwise impeded, in the digital context. Based on a review of the available case law, it would seem reasonable to mute or block a chatroom user who "spams" the chatroom with gibberish, so that other messages by members of the public seeking to participate are difficult to find and respond to. Outside of such scenarios, however, it is difficult to gauge when an electronic message would foreseeably disrupt, disturb, or impede a Commission meeting because there is relatively little case law regarding the First Amendment in digital contexts.[1]

Additionally, allowing anonymous live remote public participation via video or audio may make Commission meetings a target for internet pranks or profanity. "Studies reveal that speakers are more prone to be profane or abusive when communication is 'computer-mediated.'" (O'Connell, *supra*, 91 B.U. L. Rev. at p. 2025.) With that in mind, it is important to note Bagley-Keene's requirement that "writings" distributed to the Commissioners "pertaining to any item to be considered during the meeting" not only become disclosable public records under the California Public Records Act, but the FPPC is required to make those writings available for public inspection during or after the meeting. (See Section 11125.1(a), (b).) Thus, under Bagley-Keene, it would seem that electronic comments made during a meeting would only have to be made available if those comments "pertain[ed] to any item . . . considered during the meeting." Irrelevant comments could seemingly be excluded from the materials subsequently made available to the public, but profane or lewd comments that were on-topic would seemingly have to be made available. And, as with determinations of when an internet user may be muted or blocked, we found no case law that provides substantive guidance as to when an electronic comment may permissibly be deleted without violating the First Amendment.

Beyond statutory and constitutional concerns, a "live" remote participation system could potentially involve technical difficulties beyond the FPPC's control. The FPPC would only be able to ensure equipment was running properly on our end. Although a technical hindrance to public participation would not implicate any First Amendment or Bagley-Keene issues, as the Commission would not intentionally be discriminating against any particular speech, it could

[1] As the Supreme Court has observed, "[w]hile we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." (*Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1736.)

delay and inconvenience the Commission and the members of the public attempting to participate.

In sum, a "live" remote public participation system would need to be carefully devised and policies and/or regulations would likely need to be implemented to ensure the system operated legally and efficiently. For example, the Commission could request or require that remote public participants clearly identify the agenda item or subject matter that their comments pertain to in order to facilitate discussion. The Commission may place a reasonable time restriction on comments by the public. (*See*, *e.g.*, *Kindt v. Santa Monica Rent Control Bd.*, 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*, Section 11125.7 (permitting reasonable regulations pertaining to public comments, including limiting the total amount of time allocated for public comment).) The Commission could also create reasonable, neutral, and narrowly-tailored rules relating to the content of messages, taking steps to ensure that any such rules are not overbroad, viewpoint discriminatory, or otherwise impermissible. (*See, id.* ("The fact remains that limitations on speech at [limited public forum] meetings must be reasonable and viewpoint neutral, but that is all they need to be."); *see also*, *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 500 (9th Cir. 2015) (*SeaMAC*) ("'[C]ommunity standards of decency' may play a role in the regulation of limited public forums, so long as such standards are 'reduced to objective criteria set out in advance.'").) Ultimately, a "live" system could be implemented, but would require caution in implementing, as we would be operating in relatively uncharted legal territory.

II. "Delayed" Remote Public Comment System

A "delayed" approach to remote public participation, in which communications are submitted before a meeting would mitigate many of the concerns applicable to a "live" remote participation system, but would not offer any significant change to how Commission meetings are currently conducted. In other words, the Commission already accepts letters and emails prior to Commission meetings, and a "delayed" approach could extend that offering to include audio or video submissions, but such an approach would obviously not allow for real-time interactions between the Commission and members of the public. Ultimately, the benefit of a "delayed" approach is giving the Commission, FPPC staff, and the rest of the general public a greater opportunity to prepare for a meeting. For instance, the Commission (and the public) would be able to know the number of remote submissions received and prepare for meetings accordingly. Similarly, incorporating pre-recorded video and audio recordings would presumably present fewer logistical challenges than live video and audio, as we would be able to ensure ahead of time that the recordings would play correctly during the meeting.

III. "Delayed and Aggregated" Remote Public Comment System

Although a potential "delayed and aggregated" system of remote public participation is possible, it is inadvisable due to the potential for perceived viewpoint discrimination. As discussed, in the context of a limited public forum, the Constitution permits a state body to

control the content of its meetings, but does not permit viewpoint discrimination. (*Norse*, *supra*, 629 F.3d at p. 975.) Although it may be possible for staff to consolidate and summarize several public comments into a single comment[2], the likely omission of additional material from each comment could be important to the respective member of the public who took the time to fashion his or her comment in a specific way. In going through the aggregation and summary process, staff could inadvertently alter or remove the viewpoint that a particular public comment was intended to express, thereby potentially leading to perceptions of viewpoint discrimination.

CONCLUSION

Ultimately, either a "live" or "delayed" system of remote public participation is feasible, and the basic trade-off between the two systems is essentially ease-of-access and interactivity versus preparation time, which includes the time necessary to read, consider, and potentially prepare a response to public comments. Complicating the decision, particularly with respect to a "live" system that could require real-time moderation, are unanswered questions regarding how the government may moderate its limited public forums that exist in the "digital" realm without violating the First Amendment. With an appropriate amount of caution and preparation in designing, implementing, and operating a new system for remote public participation, however, either a "live" or "delayed" approach should be feasible.

[2] A Commissioner likely could not perform the aggregation and consolidation process without disclosing each of the original messages to the public. Under Bagley-Keene, writings "distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person." (Section 11125.1(b).)