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June 1, 2017

Darold Pieper, Esq.
City Attorney
City of Vista
200 Civic Center Drive
Vista, CA 92084

Re: Protests at Representative Issa's District Office

Dear Mr. Pieper:

I represent Ellen Montanari, the organizer of a weekly protest at the district office of Representative Darrell Issa, located at 1800 Thibodo Road in the City of Vista. I am writing to discuss certain First Amendment issues arising from the City's response to the protest, in the hope of making litigation unnecessary.

I understand the protest has taken place on the public sidewalk adjacent to the building containing the office. The sidewalk typically has little if any pedestrian traffic. The number of people attending the protest has varied from approximately 50 to 800, with a current average of around 300. Ms. Montanari does not control the number of people who choose to attend. She has worked cooperatively with the City and law enforcement officers and taken reasonable steps to ensure the protest is peaceful and safe, including the use of volunteer monitors and pylons and safety tape.

Ms. Montanari sought a permit to hold the protest on Tuesdays from 10:00 a.m. to 11:00 a.m. On April 3, 2017, the City issued a permit effective through April 25 for the protest to take place in "the right-of-way in the vicinity of 1800 Thibodo Road." On May 15, the City issued a permit effective through May 31 for the protest to take place in "the right-of-way across the street from 1800 Thibodo Road."

Today, the City issued a permit for the protest effective through June 30, although Ms. Montanari has asked for a permit through the end of the summer. The current permit carries the following conditions:

- The protest is limited to "the right-of-way across the street from 1800 Thibodo Road," approximately 100 feet away from Representative Issa's office, and "must adhere to the location … limits on the permit."
- "Participants must follow the traffic laws concerning roadway safety and stay out of the street."
- "Participants must not impede access for non-participants using the sidewalks."
- "If the activity results in the presence of law enforcement, the organizer will be billed for those costs."
- "Participants must avoid the use of amplified sound in a manner that disturbs the peace."

As stated in a letter from the City dated today, the permit "may be extended based upon your compliance with the conditions identified above."

To obtain permits, Ms. Montanari has been required to sign the City's standard application, which states:

> To the maximum extent permitted by law, the permit holder shall indemnify and hold harmless the City of Vista, its officers, agents and employees, from any and all claims, causes of action, penalties, losses, expenses (including reasonable attorney's fees) and any other liability for injuries or damage to persons or property which relate to the special event (collectively "losses"), including, without limitation, losses attributable or caused by those attending the special event, resulting from the manner in which the street event is conducted or which were caused by the omissions or authorized acts of the Permittee's officers, agents or employees. If City property is destroyed or damaged by reasons of Permittee's use, event or activity, the Permittee shall reimburse the City for the actual replacement or repair cost of the destroyed property.

Based on these facts, I am concerned the City has improperly (1) banned the protest from the sidewalk; (2) imposed conditions relating to the conduct of third parties; (3) reserved the right to recoup costs of law enforcement; (4) imposed an overbroad indemnification requirement; and (5) restricted amplified sound.

Legal Analysis

By organizing a protest on a public sidewalk, Ms. Montanari is engaging in political speech that is guaranteed the highest level of protection. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011); *Buckley v. American Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *Carey v. Brown*, 447 U.S. 455, 467 (1980). Though some may claim the protest is "disruptive" or makes people "uncomfortable," Teri Figueroa, *As protests continue, restrictions tighten*, San Diego Union-Tribune, May 22, 2017, the "principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it

induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (citation and quotation marks omitted).

As traditional public forums, public "sidewalks are uniquely suitable for public gatherings and the expression of political or social opinion," and "the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially "core First Amendment speech." *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1022 (9th Cir. 2009) (citation and quotation marks omitted). "Consistent with the traditionally open character of public streets and sidewalks," the Supreme Court has "held that the government's ability to restrict speech in such locations is very limited." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation and quotation marks omitted). The City may "enforce reasonable time, place, and manner regulations" only if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983).

Assuming the motivation for the City's actions is content-neutral, I have the following concerns with the City's response to the protest.

1. The City may not ban the protest from the public sidewalk adjacent to Representative Issa's office.

Although the protest initially took place on the public sidewalk adjacent to Representative Issa's office, the City conditioned the May and June permits on moving the protest to "the right-of-way across the street," which contains no sidewalk, approximately 100 feet away from the building. Given the size of the protest, Ms. Montanari faces significant risk that she would be prosecuted for holding the protest without a permit on the sidewalk. Vista Municipal Code §§ 12.12.010(A), 12.12.170. By exposing Ms. Montanari to such risk, the City is effectively banning the protest from the sidewalk and violating the First Amendment.

I recognize that for one hour a week the protest may have at times effectively occupied the sidewalk. However, the purpose of a permit is precisely to gain the right to monopolize part of a public forum for a limited time.[1] "Although the public safety interests in regulating street [or sidewalk] use are substantial, those interests must give way on occasion to the temporary dedication of the streets [or sidewalks] to picketing and parading." *Long Beach*, 574 F.3d at 1024. While the City may have significant interests at

[1] Otherwise, a permit would be unnecessary and unconstitutional. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006) (holding "the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks," and without "limiting the permitting requirements" to circumstances "significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny"). I assume the event permit provisions of the Vista Municipal Code comply with that standard, but that issue is not necessarily conceded.

stake, the relocation of the protest across the street is not narrowly tailored to serve those interests and unjustifiably burdens the protesters' free speech rights.

"The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency." *McCullen*, 134 S. Ct. at 2534 (citation and quotation marks omitted).

In *McCullen*, the Supreme Court struck down restrictions effectively banning speech on the sidewalk in front of an abortion clinic because they were not "narrowly tailored to serve a significant governmental interest." *Id.* Although the Court recognized legitimate interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, [and] protecting property rights," it held the restrictions "burden substantially more speech than necessary to achieve the [government's] asserted interests." *Id.* at 2535, 2537. Any "public safety risk created when protestors obstruct driveways" or trespass on private property can "readily be addressed through existing local ordinances" or "generic criminal statutes" forbidding obstruction or trespass. *Id.* at 2538. If protestors inadvertently block access "simply by gathering in large numbers," the government "could address that problem through more targeted means" than banning speech. *Id.* Those principles apply here and demonstrate that the City "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id.* at 2539.

As a practical matter, the sidewalk at issue ordinarily has little if any pedestrian traffic. To the extent there may be valid "complaints and safety concerns" about the protest, Figueroa, *As protests continue*, *supra*, the City has readily available alternatives to forcing the protest to relocate across the street. If necessary, the City may enforce "various other laws at its disposal that would allow it to achieve its stated interests" without compelling relocation of the protest. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011). Assuming that individuals act unlawfully by obstructing traffic or otherwise, they may be warned or cited for violating applicable laws. Therefore, "[o]bvious, less burdensome means for achieving the City's aims are readily and currently available by employing traditional legal methods." *Foti v. City of Menlo Park*, 146 F.3d 629, 642–43 (9th Cir. 1998) (noting that "picketer who uses a sign to block traffic or obscure drivers' views may also be cited under existing ordinances or other traffic laws"). Because "there are a number of feasible, readily identifiable, and less-restrictive means of addressing" the City's interests, the City's decision to ban the protest from the sidewalk "is not narrowly tailored" to serve those interests. *Comite de Jornaleros*, 657 F.3d at 950.

Apart from the lack of narrow tailoring, the "location of the expressive activity is part of the expressive message." *Long Beach*, 574 F.3d at 1025. Just as "speakers may generally control the presentation of their message by choosing a location for its importance to the meaning of their speech, they may ordinarily—absent a valid time, place,

and manner restriction—do so in a public forum." *Galvin v. Hay*, 374 F.3d 739, 751 (9th Cir. 2004). As explained above, there is no valid basis to ban the weekly protest from the sidewalk, and the effectiveness of the protest is unfairly diminished by forcing it across the street, approximately 100 feet away from the building.

It is no answer to suggest that relocating the protest across the street would make matters "easier" for law enforcement. *McCullen*, 134 S. Ct. at 2540. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* A ban on protesting "on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.* "Given the vital First Amendment interests at stake, it is not enough for [the City] simply to say that other approaches have not worked." *Id.* In any event, it is not plausible to suggest that a pre-scheduled weekly one-hour protest significantly burdens the capacity of law enforcement officers to protect vehicular or pedestrian access or otherwise ensure public safety.

Likewise, it is no answer to suggest that individuals suffer no First Amendment violation because they may protest from across the street. The Supreme Court long ago rejected any contention that "liberty of expression" in a public forum may necessarily be "abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The First Amendment protects the right of speakers—not the government—to decide where and how to speak on a public sidewalk, unless the government meets the strict test for restricting speech in a public forum, which is not the case here. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988); *Galvin*, 374 F.3d at 751. The Supreme Court applied that test to strike down a rule against protesting on the Supreme Court's sidewalks, even though an officer told one of the plaintiffs she could protest "across the street." *Grace*, 461 U.S. at 174. For similar reasons, it is unconstitutional to require the weekly protest to move across the street.

Please confirm that the weekly protest may resume on the public sidewalk, with or without a permit.

2. The City may not impose conditions relating to the conduct of protest participants beyond Ms. Montanari's control.

The City may not condition the permit or its renewal on compliance by all participants with "traffic laws" or other requirements. The Ninth Circuit held that a similar requirement to "promise that no trespassing would occur" during a protest was not "sufficiently narrowly tailored to constitute a valid First Amendment restriction." *United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999). "Organizers of protests ordinarily cannot warrant in good faith that all the participants in a demonstration will comply with the law. Demonstrations are often robust. No one can guarantee how demonstrators will behave throughout the course of the entire protest." *Id.*

Instead of restricting speech due to potential acts of some individuals, the proper "way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct." *Id.* at 1044. Therefore, as the court held, "in lieu of restraining the expressive activity by refusing to issue the permit," the government "should have issued the permit for the lawful expressive activity and then arrested the demonstrators if and when they trespassed." *Id.*

The same principle applies here. The City may not condition the permit on compliance by all protesters with traffic or other rules or refuse to renew the permit if some individuals violate those rules. *See Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 507 (6th Cir. 2001) ("[W]here a law sets out primarily to arrest the future speech of a defendant as a result of his past conduct, it operates like a censor, and as such violates First Amendment protections against prior restraint of speech."). Instead, the City must issue the permit, allow the protest to proceed, and if necessary, take appropriate action against particular individuals as may be warranted.[2]

Please amend the permit conditions to ensure compliance with the First Amendment requirement that protest organizers cannot be held responsible for the conduct of others.

3. The City may not recoup costs arising from law enforcement response.

The City may not charge protest organizers for costs "[i]f the activity results in the presence of law enforcement." First, such a requirement effectively holds organizers responsible for the conduct of others beyond their control, which the First Amendment does not allow. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Second, the government cannot shift costs of security to the organizer of a political demonstration. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130, 134 (1992); *The Nationalist Movement v. City of York*, 481 F.3d 178, 186 (3d Cir. 2007); *Church of the American Knights v. City of Gary*, 334 F.3d 676, 680-81 (7th Cir. 2003). As the Supreme Court has explained, the government may not "recoup costs that are related to listeners' reaction to the speech,"

[2] I note that merely stepping into or crossing the street are not necessarily unlawful. While "[n]o pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard," and "[e]very pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard," Vehicle Code §§ 21950(b), 21954(a), those provisions do not make it illegal merely to enter the street. As far as I know, the location of the protest is not "[b]etween adjacent intersections controlled by traffic control signal devices or by police officers" such that pedestrians "shall not cross the roadway at any place except in a crosswalk." Vehicle Code § 21955. The prohibition of "pedestrians from walking on roadways" only applies "outside of business or residential districts." *People v. Cox*, 168 Cal. App. 4th 702, 708 (2008) (discussing Vehicle Code § 21956). To the extent any provision of the Vista Municipal Code "attempts to regulate pedestrian traffic on public roads," it is generally preempted by state law. *Id.* While cities may adopt "ordinances prohibiting pedestrians from crossing roadways at other than crosswalks," Vehicle Code § 21961, I am not aware of any such ordinance in Vista. Please let me know if you know of any other statutes or ordinances on point.

because speech "cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth County*, 505 U.S. at 134-35 & n.12. Please confirm that the City will not seek reimbursement for such costs.

4. The City's indemnification requirement is overbroad and unconstitutional.

The special event permit application imposes a sweeping requirement to indemnify the City for "any and all claims, causes of action, penalties, losses, expenses (including reasonable attorney's fees) and any other liability for injuries or damage to persons or property which relate to the special event (collectively 'losses'), including, without limitation, losses attributable or caused by those attending the special event, resulting from the manner in which the street event is conducted." The wide scope of that language violates the First Amendment, because it goes far beyond Ms. Montanari's actions or those she has directed.

First, it contains "no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity" and thus impermissibly allows the City "to shift some of the costs related to listeners' reaction to speech from the City to permittees." *Long Beach*, 574 F.3d at 1040. Second, it improperly "requires permittees to assume legal and financial responsibility" for actions of others attending the event "that are outside the control of the permittee." *Id.* Even a narrower requirement, limited to "suits brought by third parties," violates the First Amendment because "sovereign immunity and traditional agency and tort principles make it difficult to imagine how [the City] could be liable to third parties," and because of "the possibility of a heckler's veto, by which third parties who disagree with the content of [an] organization's speech could … punish the organization" through forcing it to bear the costs of meritless litigation.[3] *iMatter Utah v. Njord*, 774 F.3d 1258, 1270-71 & n.8 (10th Cir. 2014).

The requirement to reimburse the City for property damaged or destroyed "by reasons of Permittee's use, event or activity" carries similar problems, because it is not limited to damage caused by Ms. Montanari's actions or those she has directed. The same is true for Vista Municipal Code § 12.12.080(B)(1) ("applicant shall agree to bear the costs and compensate the City for … damage to the public property") and § 12.12.100(C) ("If City property is damaged by reasons of applicant's use, event or activity, the applicant shall reimburse the City for the actual replacement or repair cost of the City property.").

[3] A requirement to provide insurance can present similar problems. *See, e.g., iMatter Utah*, 774 F.3d at 1269-70; *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1029-30 (C.D. Cal. 2002); *Courtemanche v. General Services Admin.*, 172 F. Supp. 2d 251, 268 (D. Mass. 2001); *Invisible Empire v. Mayor*, 700 F. Supp. 281, 285 (D. Md. 1988); *cf. Long Beach*, 574 F.3d at 1030-31 (upholding insurance requirement that exempted expressive activity if organizers indemnified city for their own acts or worked with city to redesign event in response to specific health or safety concerns). I understand the City has waived insurance for the weekly protest. Please confirm the waiver will remain in effect.

For these reasons, please confirm the City will not seek to enforce the indemnification or reimbursement requirements except as they apply to Ms. Montanari's own conduct or that which she has directed.

5. The City must respect the right to use amplified sound in aid of the weekly protest.

The permit requires that amplified sound not be used "in a manner that disturbs the peace." I write to confirm this condition will not interfere with First Amendment rights.

The use of amplified sound for political speech is protected by the First Amendment because microphones and loudspeakers are "indispensable instruments of effective public speech." *Saia v. New York*, 334 U.S. 558, 561 (1948). In addition, as a practical matter, the use of amplified sound promotes the peace and safety of the protest, as it enables organizers to communicate easily and effectively with participants.

The noise level associated with protected speech cannot be restricted unless it is materially "above and beyond the ordinary noises associated with the appropriate and customary uses" of the location. *United States v. Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992). Perhaps the City can permissibly restrict "noise that exceeds what is usual and customary in a particular setting," *Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006), but the setting of this protest is far from a quiet zone. Representative Issa's office is on a busy thoroughfare that runs alongside Route 78 and has no neighboring residences.[4] It is difficult to see how the ordinary use of amplified sound during a weekly one-hour protest would "disturb the peace" of that location.

Please confirm the City will not restrict the use of amplified sound that is not "basically incompatible with the normal activity" of the location. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). In particular, please confirm that the mere use of amplified sound for the weekly one-hour protest will not result in citation for violating Vista Municipal Code § 8.32.010 or § 8.32.040, which would be unconstitutional as applied to this protest. *Doe*, 968 F.2d at 87 (invalidating conviction for engaging in political speech in urban park that involved noise level of "60 decibels measured on the A-weighted scale at 50 feet"); *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 413 (4th Cir. 1977) (where "ordinance curtails the amplification of political expression solely because the number of decibels, as measured within a few feet of the speaker, exceeds the permissible sound level," it "prohibits amplification that creates no more noise than a person speaking slightly louder than normal"); *Lionhart v. Foster*, 100 F. Supp. 2d. 383, 387-88 (E.D. La. 1999) (noting that when "government chooses to prohibit sound levels in public places that are not demonstrably disturbing, the courts will reject the regulation as overly broad," and striking down 55-decibel limit as "unreasonably overbroad in the context of normal activities on public streets and in public parks").

[4] Freeway noise can range from 70 to 90 decibels. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 86 (D.D.C. 2006); *Dina v. People ex rel. Dep't of Transp.*, 151 Cal. App. 4th 1029, 1036 (2007).

Thank you for your attention to these matters. This letter may not list all potential claims, and all rights and remedies are reserved. Please let me know if you have any questions. I look forward to resolving this matter without litigation if possible, but if necessary I am prepared to seek appropriate judicial relief in defense of my client's First Amendment rights.

Sincerely,

David Loy
Legal Director

cc: Robert Faigin
Chief Legal Counsel
San Diego County Sheriff's Department