

Communication from Public

Name: Michael Ackerman

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Council File No: 16-1104-S2

Comments for Public Posting: Dear Councilmembers, The motion dated 9/29/2018 has an attached single page of "facts and findings" purportedly prepared by the City Attorney, however it does not itself contain the name or signature of the author, and is not on letterhead paper. Other than that, I could find no legal analysis associated with council file no. 16-1104-S2. I have attached actual findings by City Attorney Delgadillo which indicate that your recent rules on swear words violate the Constitution. Sincerely, Michael Ackerman



OFFICE OF THE CITY ATTORNEY

ROCKARD J. DELGADILLO

CITY ATTORNEY

REPORT NO. R 0 6 - 0 2 3 5
JUL 12 2006

REPORT RE:

RULES OF DECORUM

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Honorable Members:

On May 31, 2006, Council requested this office to report back with recommendations to "immediately terminate the practice of racist and abusive language during City Council public comment periods." (CM Parks' Motion, Council File No. 06-1205)¹. Council has also asked whether such language may be edited from the live coverage and repeat coverage of Council meetings on LA CityView Channel 35.

SUMMARY OF ANALYSIS

Council's questions raise a number of important issues under the First Amendment's guarantee of the right of free speech. First, we considered whether racial slurs uttered in public meetings fall within any of the limited categorical exceptions to protected speech, and we determined that they do not. Next, we considered the level of scrutiny that would be applied to a rule prohibiting racial slurs in public meetings. Because the public comment portion of a Council meeting is regarded as a designated public forum, any content-based regulation on speech will be subjected to strict scrutiny. Under a strict scrutiny standard, a prohibition on racial slurs is unlikely to survive a challenge under the First Amendment. However, content-neutral regulations on speech in public meetings are likely to be upheld by the courts if appropriately drafted to prevent

¹In 1996, a similar motion was introduced by the late Council President John Ferraro (Council File No. 96-0299). The late Assistant City Attorney Anthony Saul Alperin drafted Report No. R97-0156, and proposed Council Rule 12. Mr. Alperin's report and proposed rule served as a foundation to the current report and proposed rule.

members of the public from disrupting, disturbing or otherwise impeding the orderly conduct of the Council meeting.

Finally, we considered whether Channel 35 may edit racial slurs from its coverage of Council meetings. It does not appear that Congress intended local governments to have a broad degree of editorial control over public access television (public, educational and governmental channels). Further, it appears that courts will analyze content-based regulations of public access cable under at least a "heightened" level of judicial scrutiny. Accordingly, Channel 35 should not edit coverage of those meetings, with the exception of obscene, indecent or profane language. These are the limited areas in which censorship can be exercised over broadcast and cablecast programming.

SUMMARY OF QUESTIONS PRESENTED

QUESTION 1:

Are there means by which Council can discourage the repetitive use of racial slurs during public comment without violating the First Amendment?

ANSWER:

Yes. Council can impose content-neutral restrictions on speech if the restrictions are narrowly tailored to address Council's concern for the orderly conduct of business and if other avenues of communication remain. A content-neutral restriction is one which does not make reference to the *content* of the regulated speech. If Council is disrupted from conducting its business because of loud or unduly repetitive comments, the disruption can be stopped without regard to the content of the speech which resulted in the disruption. This can be accomplished with an appropriately drafted rule of decorum. The Ninth Circuit Court of Appeal has upheld the following rule of decorum as a content-neutral restriction on speech:

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.

Accordingly, we have attached for your review a proposed rule of decorum patterned after the above rule. See Exhibit 1.

QUESTION 2:

May Council impose an outright ban on the use of racial slurs during the public comment portion of a City Council meeting?

ANSWER:

No. In light of both federal and state constitutional guarantees of freedom of speech, Council can not impose a blanket prohibition on racial slurs. Racial slurs do not fall within any of the narrowly delineated exceptions to the First Amendment. A rule specifically prohibiting racial slurs is presumptively unconstitutional under the First Amendment because the rule would be a content-based restriction on speech. Since the public comment portion of a Council meeting is a designated public forum, a content-based restriction on speech would be analyzed under a strict scrutiny standard and thus, would likely be found unconstitutional.

QUESTION 3:

May Channel 35 edit certain language from its live coverage and its repeat coverage of Council meetings?

ANSWER:

Yes, but only obscene, indecent or profane language. The Cable Act permits a local franchising authority to control the operation of public access channels. However, the franchising authority should exercise editorial control of the public access channels within the boundaries of the First Amendment. Accordingly, Channel 35's coverage of Council meetings should not be censored except with respect to obscene, indecent or profane language. These are the limited areas wherein the law provides for censorship of broadcast and cable programming.

DISCUSSION OF QUESTIONS PRESENTED

QUESTION 1:

Are there means by which Council can discourage the repetitive use of racial slurs during public comment without running afoul of the First Amendment?

DISCUSSION:

If Council is disrupted in its ability to conduct its business because of unduly repetitive comments, the disruption can be stopped without regard to the *content* of the speech which resulted in the disruption. This can be accomplished with an appropriately drafted rule of decorum.

Brown Act Requirements

The Ralph M. Brown Act² affords members of the public the right to address a local legislative body and its committees on both agendized matters of a meeting and on non-agendized matters of interest to the public and within the jurisdiction of the body.³ The Act authorizes the legislative body to adopt "reasonable regulations" to effectuate the intent of the Act, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker."⁴ However, the legislative body cannot "prohibit public criticism of the policies, procedures, programs, or services" of the City.⁵ Moreover, the Act does not "confer any privilege or protection for expression beyond that otherwise provided by law."⁶ Commentating on a matter of public concern is a classic form of speech which lies at the heart of the First Amendment.⁷

The Act allows a local legislative body some latitude in how public comment may be made: "So long as the body acts fairly with respect to the interest of the public and competing factions, it has great discretion in regulating the time and manner, as distinguished from the content, of testimony by interested members of the public."⁸

Freedom of Speech: Basic Principles

The First Amendment of the United States Constitution generally prevents government from prohibiting speech or expressive conduct because it disapproves of the ideas expressed.⁹ An order which restricts or precludes a citizen from speaking in

² Cal. Gov't. Code § 54950, *et seq.*

³ Cal. Gov't. Code § 54954.3(a).

⁴ Cal. Gov't. Code § 54954.3(b).

⁵ Cal. Gov't. Code § 54954.3(c). *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719 (U.S.D.C. Central Dist. Cal. 1996).

⁶ *Id.*

⁷ *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1977).

⁸ Cal. Attorney General, *The Brown Act: Open Meetings For Local Legislative Bodies*, p. 28 (2003).

⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Cohen v. California*, 403 U.S. 15, 24 (1971); *New York Times v. Sullivan*, 376 U.S. 254, 269-270 (1964).

advance is a “prior restraint.” Prior restraints are presumptively invalid under both the United States Constitution and the California Constitution.¹⁰ The Supreme Court has frequently indicated that, in public debate, citizens must tolerate insulting and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.¹¹

The government’s ability to regulate speech is particularly limited in a “public forum.” Essentially, the public forum doctrine underscores the fact that government can not readily restrict the content of speech in arenas that have traditionally been open for public discourse or have been so designated by the government. Traditional public fora include streets and parks which have historically been used for purposes of public assembly.¹² Designated public fora consist of public property which the government has opened for use by the public as a place for expressive activity. Although there is no requirement to indefinitely retain the open character of a designated public forum, as long as the government does so it is bound by the same standards as apply in a traditional public forum.¹³ Generally, public meetings subject to the Ralph M. Brown Act are considered designated public fora of a limited nature – *i.e.*, fora open to the public in general, but limited to comments related to the body’s “subject matter.”¹⁴ The Supreme Court and lower federal courts have routinely stated that council meetings and public board meetings are regarded as designated public fora, albeit limited in subject matter.¹⁵

In both traditional public fora and designated public fora, the courts will employ strict scrutiny analysis to determine the constitutionality of any regulation of speech. Under strict scrutiny, the government may enforce a restriction on speech *only* if the restriction is necessary to serve a compelling government interest and is narrowly tailored to achieve that interest.¹⁶ For all practical purposes, content-based restrictions on speech will not survive under a strict scrutiny standard unless they fall within

¹⁰ *R.A.V.*, *supra*, 505 U.S. at 382; *Hurvitz v. Hoefflin*, 84 Cal. App.4th 1232 (2000) (review denied).

¹¹ *Boos v. Berry*, 485 U.S. 312, 322 (1988); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988).

¹² *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Hague v. CIO*, 307 U.S. 496, 515 (1939).

¹³ *Perry*, *supra*, 460 U.S. at 45.

¹⁴ *Baca*, *supra*, 936 F. Supp. at 729.

¹⁵ *Perry*, *supra*, 460 U.S. at 45; *City of Madison Sch. Dist v. Wisconsin Employment Relations Comm’n.*, 429 U.S. 167 (1976); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (Ninth Cir. 1990); *Baca*, *supra*, 936 F. Supp. 719. But see, *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266, 270 (Ninth Cir. 1995) (“It seems to us that the highly structured nature of city council and city board meetings make them fit more neatly into the nonpublic forum niche.”)

¹⁶ *Perry*, *supra*, 460 U.S. at 45; *Carey v. Brown* 447 U.S. 455, 461 (1983).

narrowly delineated exceptions to the First Amendment or the few other areas in which the Supreme Court has found a compelling need for regulation of speech.¹⁷

First Amendment Requirements re: Content-Neutrality

Regardless of whether a forum is public or nonpublic, government may place content-neutral restrictions¹⁸ on speech (*i.e.*, restrictions regulating the time, place or manner of speech) so long as those restrictions are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.¹⁹ Content-neutral speech restrictions are those that are justified without reference to the content of the regulated speech.²⁰

Many courts, including the U.S. Supreme Court, have routinely recognized the government's significant interest in conducting orderly, efficient, effective and dignified meetings of its public bodies. See, for example, *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*²¹ ("Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business"); *White v. City of Norwalk*²² (rule of decorum was a reasonable, content-neutral regulation of speech); *Kindt v. Santa Monica Rent Control Board*²³ (regulation restricting public comment to three minutes per item at the end of each meeting is a reasonable time, place, and manner restriction that preserves a board's legitimate interest in conducting efficient, orderly meetings).

In *White v. City of Norwalk*,²⁴ the Ninth Circuit Court of Appeal found that a local ordinance imposing a rule of decorum during council meetings was a permissible, content-neutral regulation where that ordinance stated:

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,

¹⁷ The areas of speech which are categorically excepted from the protection of the First Amendment are: obscenity; child pornography; defamation; fraudulent misrepresentation; subversive advocacy directed towards and likely to produce imminent lawlessness; and fighting words. The protected areas of speech in which the Supreme Court has nonetheless found a need for greater regulation include commercial speech and indecency.

¹⁸ Content-neutral speech restrictions are those that are justified without reference to the content of the regulated speech. *Boos v. Berry* 485 U.S. 312 (1988).

¹⁹ *Perry*, *supra*, 460 U.S. at 45; *U.S. Postal Service* 453 U.S. 114, 132.

²⁰ *Boos*, *supra*, 485 U.S. 312.

²¹ *Madison Sc. Dist.*, *supra*, 429 U.S. at 175, n.8.

²² *White*, *supra*, 900 F.2d at 1425-1426.

²³ *Kindt*, *supra*, 67 F.3d 266.

²⁴ *White*, *supra*, 900 F.2d 1421.

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. ...

While the court in *White* conceded that the ordinance could be read in a number of ways, it construed the language narrowly to allow removal from a council meeting only when someone making a proscribed remark was acting in a way that actually disturbed or impeded the meeting. In other words, the court found that the council's rule of decorum was a reasonable restriction on speech that was content-neutral.

Significantly, the court in *White* recognized that a speaker can become "disruptive" in a council meeting in ways that would not meet the test of an actual breach of the peace. "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." In such instances, Council would not be in violation of the First Amendment by stopping the speech.²⁵

In *White*, the court explained that a rule of decorum can not be applied in a mechanical manner, noting that the council president or committee chairperson must, by necessity, utilize a good deal of discretion in this regard.²⁶

A facially constitutional rule of decorum can be found unconstitutional if it is applied in a manner prohibiting speech based on content. This point is illustrated in the case of *Norse v. City of Santa Cruz*,²⁷ where plaintiff brought a First Amendment challenge against the city after the council ejected him from a meeting when he made a "Nazi salute" in protest of a ruling. The council ejected plaintiff pursuant to a rule of decorum which authorized removal from a council meeting of any person who uses "language tending to bring the council or any council member into contempt, or any person who interrupts and refuses to keep quiet...or otherwise disrupts the proceedings of the council." Plaintiff alleged that the council's rule of decorum was unconstitutional on its face and as applied. The Ninth Circuit found that the rule was constitutional on its face, noting that it was similar to the rule it had earlier upheld in *White v. Norwalk*. However, the court could not find as a matter of law that the council had applied the rule in a constitutional manner based on plaintiff's allegation that his salute lasted only a second and thus, was not disruptive. Accordingly, the court reversed the lower court's judgment of dismissal, finding that plaintiff was entitled to pursue his First Amendment claim. That case is now set for trial.

²⁵ *Id.* at 1425-1426.

²⁶ *Id.* at 1426.

²⁷ *Norse v. City of Santa Cruz*, 118 Fed. Appx. 177 (9th Cir. 2004).

Based on the above, Council should adopt a rule of decorum similar to the one upheld by the Ninth Circuit in the case of *White v. City of Norwalk*. We have attached a proposed rule hereto as Exhibit 1.

QUESTION 2

Can Council adopt an ordinance prohibiting the use of racial slurs during the public comment portion of a City Council meeting?

DISCUSSION:

Because racial slurs do not fall within any of the narrowly defined exceptions to the First Amendment, a blanket prohibition on the use of racial slurs in a public meeting is not likely to survive strict scrutiny review under the First Amendment.

First Amendment Exception for Fighting Words

Although “fighting words” fall within an exception to the First Amendment, this exception does not provide a viable justification for prohibiting racial slurs or profanity during public discourse. The “fighting words” exception was first articulated over sixty years ago by the Supreme Court in *Chaplinsky v. New Hampshire*.²⁸ There, the Court upheld the conviction of a man for calling the local marshal a “damned fascist” and a “damned racketeer” in violation of a state law that prohibited the public use of offensive or annoying words directed to another. In finding that the statute was constitutional under the First Amendment, the Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting words” – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.²⁹

Given the above language in *Chaplinsky*, at first glance racial slurs would appear to be “fighting words” *per se* since, by their very utterance, they can inflict injury.

²⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁹ *Id.* at 571-572.

However, subsequent Supreme Court opinions do not support this conclusion. In fact, since *Chaplinsky* was decided, the Supreme Court has never found any speech unprotected under the fighting words doctrine, despite having considered the issue numerous times.

The first major limitation on the “fighting words” doctrine occurred in *Cohen v. California*.³⁰ In *Cohen*, the court reversed appellant’s conviction for disturbing the peace after he entered the Los Angeles County courthouse wearing a jacket bearing the words “F--- the Draft.” The Court concluded that appellant’s message did not come within the “fighting words” exception of the First Amendment and in so doing, re-defined that exception to include only “those personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, *inherently* likely to provoke a violent reaction.”³¹ The Court went on to defend the use of the admittedly vulgar word as a clear example of a protected exercise of free speech, noting that the government does not have the right “to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”³²

In *R.A.V. v. City of St. Paul*,³³ the Supreme Court held unconstitutional a city ordinance which made it a crime to display any symbol, including a burning cross or a swastika, that would reasonably “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The ordinance was one of a number of violations charged against a teenager who placed a burning cross in the yard of a black family. The state court earlier had upheld the ordinance, narrowly construing it to regulate only “fighting words” which are unprotected by the First Amendment. The Supreme Court disagreed, finding that the ordinance was facially overbroad in that it prohibited otherwise permitted speech solely on the basis of the subjects the speech addresses. Even as narrowly construed, the Court found that the statute was facially invalid because it was content-based – *i.e.*, it proscribed only fighting words based on race, color, creed, religion or gender

The City of St. Paul argued that the ordinance was narrowly tailored to serve the compelling state interest of ensuring basic human rights to groups historically subjected to discrimination. While the Court agreed that the city had a compelling interest, it found that the ordinance was not narrowly tailored to address that interest since adequate content-neutral alternatives existed.³⁴ The Court explained:

³⁰ *Cohen*, supra, 403 U.S. 15.

³¹ *Id* at 20.

³² *Id* at 25. (The Court also noted that “one man’s vulgarity is another’s lyric.”)

³³ *R.A.V.*, supra, 404 U.S. 377.

³⁴ *Id.* at 395 (citations omitted).

[T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility – but not through means of imposing unique limitations upon speakers who (however benightedly) disagree.³⁵

Hate Speech

Except in connection with criminal acts, racist speech and ideology are fully protected under the First Amendment. See, generally, *Brandenburg v. Ohio*³⁶ (Ku Klux Klan's expression of racist language protected where language was not directed towards imminent violence); *Collin v. Smith*³⁷ (held unconstitutional an ordinance prohibiting the use of hate speech and symbols); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*³⁸ (fraternity's skit portraying racial minorities in an offensive manner protected); *Downs v. Maryland*³⁹ (defendant's loud use of a racial slur in a public place protected); *Di Bona v. Matthews*⁴⁰ (college play that included racially provocative theme and racially offensive language protected).

While we found two cases in which California courts have indicated that racial slurs are unworthy of protection under the Constitution, neither of those cases presented First Amendment challenges. See *In re Stevens*⁴¹ (upheld censure of judge who repeatedly used racial slurs, finding that the conduct was "prejudicial to the administration of justice and brings the judicial office into disrepute") and *Lee v. Superior Court*⁴² (upheld lower court's exercise of discretion in refusing to allow plaintiff to legally change his name to a racial slur).

Racial Slurs in the Workplace

Because employment laws impose obligations on employers to take appropriate corrective action against harassment in the workplace, we have considered whether these laws present a legally compelling reason to prohibit the utterance of slurs and epithets in public fora which also function as workplaces.

³⁵ *Id.* at 395-396.

³⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁷ *Collin v. Smith*, 578 F.2d 1197 (Seventh Cir. 1978) (cert. denied 439 U.S. 916).

³⁸ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (Fourth Cir. 1993).

³⁹ *Downs v. Maryland*, 278 Md. 610 (1976).

⁴⁰ *Di Bona v. Matthews*, 220 Cal.App.3d 1329, 1335-1336 (1990).

⁴¹ *In re Stevens*, 31 Cal.3d 403 (1982).

⁴² *Lee v. Superior Court*, 9 Cal. App.4th 510 (1992).

Under both federal and state law, it is unlawful for an employer to discriminate against an employee because of “race, color, religion, sex, or national origin.”⁴³ This prohibition includes harassment that is sufficiently severe or pervasive to result in a hostile work environment.⁴⁴ The definition of harassment includes “verbal harassment” such as epithets, slurs, and derogatory comments.⁴⁵ Harassment that is not directed at the complaining employee may nonetheless be actionable if it was witnessed by the complainant in the workplace and was sufficiently severe or pervasive as a matter of law.⁴⁶ Additionally, an employer may be held responsible for acts of harassment by a nonemployee if the employer is aware or should be aware of the harassment and fails to take appropriate corrective action.⁴⁷ However, with respect to harassment cases involving nonemployees, the Legislature has cautioned that it is important to consider the employer’s level of control over the nonemployee in determining whether the employer should be liable.⁴⁸

The United States Supreme Court has never held that the First Amendment permits restrictions on speech creating a hostile work environment.⁴⁹ However, because both federal and state cases recognize that a hostile work environment case can be based on the severe or pervasive use of language in the workplace,⁵⁰ there is at least an implicit recognition that speech of this nature is not fully protected under the First Amendment.⁵¹ ⁵² This conflict between employment laws and the First Amendment will probably not be resolved unless and until the Court is presented with a

⁴³ 42 U.S.C. § 2000e-2, subd. (a)(1); Govt. Code § 12940, *et seq.*

⁴⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57; *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App.4th at 409.

⁴⁵ Cal. Code Regs., tit. 2, § 7287.6, subd. B)(1)(A).

⁴⁶ *Pereira v. Schlage Electronics*, 902 F. Supp. 1095 (N.D. Cal. 1995).

⁴⁷ *Salazar v. Diversified Paratransit, Inc.*, 117 Cal. App.4th 318 (2004); Govt. Code § 12940(j)(1). The portion of this statute which addresses employer liability for harassment by nonemployees is limited to cases of sexual harassment. However, the statute generally prohibits harassment based on race, creed, color, national origin, ancestry, disability, medical condition, sex, age, or sexual orientation.

⁴⁸ Govt. Code § 12940(j)(1).

⁴⁹ The question continues to be debated by First Amendment scholars. See, Volokh, *How Harassment Law Restricts Free Speech* (1995) 47 Rutgers L.Rev. 563; Sangree, *Title VII Prohibitions Against Hostile Work Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461; Gerard, *The First Amendment in a Hostile Work Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003.

⁵⁰ *Harris*, *supra*, 510 U.S. 17; *Meritor Savings Bank v. Vinson* 477 U.S. 57.

⁵¹ *Aguiar v. Avis Rent-A-Car System, Inc.* 21 Cal.4th 121, 134-135. (1999).

⁵² Note that the California Court of Appeal has recently declared in dicta that “harassment” within the meaning of California Code of Civil Procedure Section 527.6 is not constitutionally protected. See *Hundington v. Life Sciences*, 129 Cal. App.4th 1228 (2005). Section 527.6 allows a victim of harassment to obtain an injunction against the harasser. Under that statute, harassment is defined as unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously annoys or harasses the person and serves no legitimate purpose.

hostile work environment case based solely on speech in the workplace. To date, there are not any published cases presenting this scenario.

In *Aguilar v. Avis*,⁵³ the California Supreme Court upheld the constitutionality of a post-judgment injunction which prohibited a manager from uttering ethnic slurs in the workplace. However, the plurality's opinion is a very narrow one, having turned on the fact that the employer had previously been judged liable for hostile work environment. As such, the Court did not find that the restriction on speech amounted to an unlawful prior restraint.⁵⁴ (Essentially, the Court adopted the argument that the ACLU made in its amicus brief.) Because the *Aguilar* case was decided on such narrow grounds, it should not be applied here to justify a blanket prohibition of racial slurs, especially in a public forum.

Based on the above, we do not believe that concerns about harassment lawsuits would provide a compelling reason to prohibit slurs or other offensive language during public comment. In the unlikely event that an employee ever sued the City for hostile work environment based entirely upon language used in Council meetings, we are confident that the case would be defensible since Council meetings are public fora.

QUESTION 3

Can Channel 35 censor racial slurs from its live coverage and its repeat coverage of Council meetings?

DISCUSSION

The Cable Act permits a local franchising authority (*i.e.*, the City) to control the operation of public access channels. However, the franchising authority should exercise editorial control of the public access channels within the boundaries of the First Amendment. Accordingly, Channel 35's coverage of Council meetings should not be censored except with respect to obscene, indecent or profane language. These are the limited areas wherein the law provides for censorship of broadcast and cable programming.

⁵³ *Aguilar*, supra, 21 Cal. 4th 121.

⁵⁴ In her concurring opinion in the *Aguilar* case, Justice Werdeger faulted the plurality for failing to address what she believed to be a critical question: whether the First Amendment permits imposition of civil liability under the Fair Employment and Housing Act for pure speech that creates a racially hostile work environment.

The Question of Editorial Control over Public Access Cable

It is well settled that the First Amendment allows for very broad exercise of editorial control in public broadcasting. A public broadcaster is allowed to engage in both content and viewpoint discrimination in the interest of exercising sound editorial control of its programming.⁵⁵ However, the Supreme Court has yet to extend this broad view of editorial discretion to public access channels⁵⁶ on cable systems. In fact, under the Cable Communications Policy Act ("Cable Act"), the franchising authority's control over public access channels is specifically limited to the designation and use of channel capacity.⁵⁷ While the Act permits a franchising authority to prohibit programs that are "obscene or are otherwise unprotected by the Constitution,"⁵⁸ the Act does not explicitly or implicitly permit franchising authorities to exercise broad editorial control over public access channels. In light of the absence of legal authority permitting local franchising authorities to exercise broad editorial control over its public access channels, any exercise of editorial control over the coverage of Council meetings should occur only in accord with traditional First Amendment principles.⁵⁹

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,⁶⁰ a majority of the Court found unconstitutional a provision in the Cable Act permitting cable operators to restrict indecent programming over public access channels.⁶¹ Unfortunately, the court offered no consensus or guidance regarding why it so ruled. Three members of the majority concluded that local bodies are capable of addressing patently offensive programming and that public programming control systems now in place would normally minimize or eliminate any child-related problems concerning "patently offensive" programming. Two members concluded that public access channels are public fora over which cable operators can not exercise editorial discretion.⁶² In the

⁵⁵ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 675. (1998).

⁵⁶ Public access channels are those that are reserved for public, educational and government programming.

⁵⁷ 47 U.S.C. § 531.

⁵⁸ 47 U.S.C. § 544(d)(1).

⁵⁹ 47 U.S.C. § 531(c); *McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161, 168 (Second Cir. 1998).

⁶⁰ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

⁶¹ A majority of the Court found constitutional a similar provision which permits cable operators to restrict indecent programming over leased access channels (those channels which federal law requires a cable operator to reserve for commercial lease by unaffiliated third parties). The Court found that the statute served the compelling interest of protecting children from exposure to patently offensive sex-related material.

⁶² *Id.* 792-293. Justice Kennedy, concurring in part, concurring in the judgment in part, and dissenting in part. Joined by Justice Ginsberg. But note that three dissenting members (Thomas, Rehnquist and Scalia) found that public access channels are nonpublic fora.

end, this case provides no guidance to local entities regarding the extent of editorial control they may exert over their public access channels, except that local entities can prohibit the transmission of indecent material.⁶³

While the Court in *Denver* expressed skepticism regarding whether forum analysis is applicable to an electronic medium such as cable, six members agreed that a heightened level of scrutiny should be applied to the content-based regulations over cable programming at issue in the case. Six members also seemed to agree that individual public forum cases provide useful analogies when analyzing First Amendment challenges to restrictions on PEG channels. Accordingly, we have employed forum analysis to the question presented here since forum analysis is a well established way to determine what, if any, content regulation the City may impose. If Channel 35's coverage of Council meetings was considered a public forum, then any editing of racial slurs from the program would be analyzed under a strict scrutiny standard and thus, probably would fail for the same reasons that a regulation prohibiting racial slurs during public comment would fail. Alternatively, if the coverage was deemed a nonpublic forum, content-based censorship could survive if reasonable and if not viewpoint discriminatory. For the reasons discussed below, Channel 35's coverage of Council meetings could be deemed a designated public forum if a court chose to engage in forum analysis.

Speaker Access in Nonpublic Fora

In a non-public forum, the government has broad discretion to make content-based decisions in deciding what private speech to make available to the public. Control over access to a nonpublic forum can be based on subject matter and identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise permissible subject.⁶⁴ The government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.⁶⁵

⁶³In *FCC v. Pacifica*, 438 U.S. 726, 731-732 (1978), the Supreme Court described indecency as follows: "The concept of 'indecent' is intimately connected with the exposure of children to language that describes, in patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."

⁶⁴*Perry*, supra, 460 U.S. at 49; *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 806 (1985).

⁶⁵*Cornelius*, supra, 473 U.S. at 808.

Distinguishing a Nonpublic Forum from a Designated Public Forum

In order to determine whether government property has been designated as a public forum or retained as a nonpublic forum, the government's intent must be determined.^{66 67} Whether the government intended to open a place not traditionally available for assembly and debate as a public forum is determined by the policy and practice of the government, the nature of the property, and the property's compatibility with expressive activity. See, for example, *Widmar v. Vincent*⁶⁸ (where university had an express policy of opening property to registered student groups, court found a clear intent to create a public forum); *Madison Joint School District v. Wisconsin Employment Relations Comm'n*⁶⁹ (public forum created by state statute providing for open school board meetings); *Southeastern Promotions, Ltd. V. Conrad*⁷⁰ (public forum created where municipal auditorium and city-leased theater were designed for and dedicated to expressive activities.).

For examples of cases where the Supreme Court found an intent to maintain a nonpublic forum, see, generally, *In Cornelius v. NAACP Legal Defense and Education Fund*⁷¹ (annual charity drive to solicit federal employees for contributions not a public forum); *Perry Education Assoc. v. Perry Educators' Assoc.* (school district's internal mail system not a public forum); *Lehman v. Shaker Heights*⁷² (sides of city buses not a public forum); *International Society for Krishna Consciousness, Inc v. Lee*⁷³ (airport terminal not a public forum); *Greer v. Spock*⁷⁴ (military reservations not a public forum); *Adderly v. Florida*⁷⁵ (jailhouse grounds not a public forum).

In *Arkansas Educational Television Commission v. Forbes*,⁷⁶ a candidate for state office sued a public broadcaster for infringement of his First Amendment rights after the broadcaster denied him access to a candidate debate. The Court found that

⁶⁶ *Id.* at 802.

⁶⁷ Note that courts routinely use the terms "limited public forum" and "designated public forum" interchangeably, even though they are not the same. In the Ninth Circuit, a "limited public forum" is a nonpublic forum that the government has intentionally opened to certain groups or certain topics. Because the forum still retains its nonpublic status, content-based regulations on speech in the limited public forum are permissible so long as they are reasonable in light of the purposes served by the forum and are not viewpoint discriminatory. See *Hopper v. City of Pasco* 241 F.3d 1067, 1074

⁶⁸ *Widmar*, supra, 454 U.S. 263.

⁶⁹ *Madison*, supra, 429 U.S. 167.

⁷⁰ *Southeastern Promotions, Ltd. V. Conrad*, 420 U.S. 546, 555 (1975)

⁷¹ *Cornelius*, supra, 473 U.S. at 803.

⁷² *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

⁷³ *International Society for Krishna Consciousness, Inc v. Lee*, 505 U.S. 672 (1992).

⁷⁴ *Greer v. Spock*, 424 U.S. 828 (1976).

⁷⁵ *Adderly v. Florida*, 385 U.S. 39 (1966).

⁷⁶ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 675. (1998).

engaging in forum analysis is rarely useful when dealing with public broadcasting issues because the sound exercise of editorial control demands content and viewpoint discrimination at times. This case, however, proved to be an exception. In *Forbes*, the Court found it was critical to determine the status of the forum since the issue was access to a candidate debate – the very essence of political speech and therefore, exceptionally significant to the electoral process.⁷⁷ The Court found that the debate was a nonpublic forum because the station had consistently evidenced the intent to allow only selective access to the debate. The Court then held that there was no First Amendment violation because the candidate had been denied access due to lack of popular support and not due to his views on any subject.

As in the case of the candidate debate in *Forbes*, a court could find that Channel 35 is a nonpublic forum since the City intended to limit access selectively to members of the “City family.”⁷⁸ However, there are strong indications that the City also intended Channel 35 to operate as a public forum in at least some instances, particularly with respect to coverage of Council meetings. For instance, Channel 35’s mission statement states in relevant part: “The mission of L.A. Cityview 35 is to ...highlight and *provide a forum for discussion of significant public issues of concern to the people of Los Angeles* and to stimulate and encourage all people representing the diverse ethnic and cultural communities of Los Angeles to involve themselves in local government and public issues.” Additionally, the Municipal Access Policies provide that coverage of the Council meeting shall be “gavel-to-gavel” and that neither the live nor taped Council coverage shall be edited or subjected to editorial comment. Finally, the fact that Council meetings themselves are public fora would support the argument that Channel 35’s coverage of those Council meetings should also be regarded as public fora.⁷⁹

In light of the above, Channel 35’s Council coverage could be deemed a designated public forum. If so, any censorship of the coverage would then be analyzed under a “strict scrutiny” standard. Even if a court declined to engage in forum analysis with respect to Channel 35’s coverage of Council meetings, the *Denver* case instructs that any censorship of the coverage probably would be analyzed under “heightened

⁷⁷ *Id.* at 675-676.

⁷⁸ The Municipal Access Policies provide that the following members of the City are eligible to use the access channel: elected officials, boards and commissions, task forces, and department heads or designees. Outside individuals or groups are not eligible to use the government channel unless sponsored by one of the eligible users from the City family.

⁷⁹ There is no requirement under the law to indefinitely retain the character of a designated public forum. *Perry*, supra, 460 U.S. at 45. “[W]ith the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.” *Forbes*, supra, 523 U.S. at 680. If Council wishes to clarify that its government channel is to remain a nonpublic forum for all purposes, we will gladly assist if requested to do so.

scrutiny". Under either standard, censorship is not likely to survive a First Amendment challenge unless it conforms with FCC guidelines (discussed below).

FCC Regulations on Content in Broadcasting

Although the federal government is generally prohibited from engaging in censorship of broadcasters,⁸⁰ the Supreme Court has recognized a narrow exception which allows the FCC to prohibit the broadcast of obscene, indecent or profane material during certain times of the day.⁸¹ Similarly, the Cable Act provides that cable operators and franchising authorities may refuse to transmit obscene or indecent programming.⁸²

In *FCC v. Pacifica*, the Supreme Court found that George Carlin's "Filthy Words" monologue was indecent and therefore, that the FCC did not violate the First Amendment when it sanctioned the radio station for broadcasting it at two o'clock in the afternoon. Unlike obscenity,⁸³ indecency is protected under the First Amendment.⁸⁴ Nevertheless, the Court in *Pacifica* found that the broadcast of indecent material should be regulated in light of the government's compelling interest in protecting children who have wide and often, unsupervised access to broadcast media.

The FCC has never promulgated a list of prohibited words, although it recently published guidance regarding broadcast indecency.⁸⁵ The FCC explained: "Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities. Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium. In applying the "community standards for the

⁸⁰ 47 U.S.C. § 326 states: Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

⁸¹ *FCC v. Pacifica*, 438 U.S. 726, 731 (1978). The precise issue in the *Pacifica* case was whether the FCC engaged in censorship in violation of 47 U.S.C. § 326 when it sanctioned the radio station pursuant to 18 U.S.C. § 1464 which authorizes sanctions against anyone who utters obscene, indecent or profane language by means of a radio communication.

⁸² 47 U.S.C. § 532(h).

⁸³ Obscene material has no protection under the First Amendment and thus, theoretically at least, the state has broad power to regulate it. Obscenity is defined as material that portrays sexual conduct in a patently offensive way, appeals to prurient interests, and lacks serious literary, artistic, political or scientific value. Typically, this test is applied from the point of view of a reasonable person applying contemporary community standards.⁸³ *Miller v. California*, 413 U.S. 15 (1973).

⁸⁴ *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

⁸⁵ 66 FR 21984 (2001).

broadcast medium" criterion, the Commission has ruled that the standard is not a local one, but rather, is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."⁸⁶

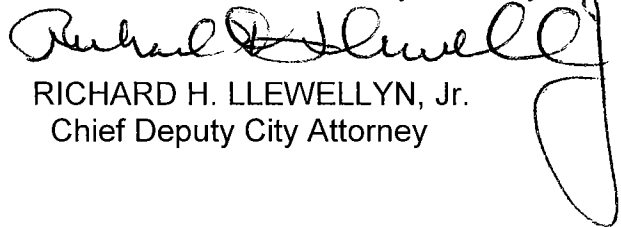
Shortly after the *Pacifica* case was decided, the NAACP requested the FCC to ban the use of the "n-word" word from broadcasting under the theory that it is both offensive and obscene. The FCC declined, finding that the word did not fall within established definitions of either obscenity or indecency. Additionally, the FCC explained that its authority was limited by the Communications Act of 1934 which prohibits government censorship of broadcasters.⁸⁷ Since then, the FCC has consistently declined to sanction the broadcast of programs which are offensive to various racial and ethnic groups.⁸⁸

CONCLUSION

Based on the above, a rule that prohibits the utterance of racial slurs during Council meetings is unlikely to survive a legal challenge. Accordingly, the Council should adopt a content-neutral rule of decorum aimed at mitigating disruptions to its business. Additionally, Channel 35 should not edit racial slurs from its coverage of Council meetings. If racial slurs continue to be used on occasion during Council meetings, Channel 35 can issue warnings to viewers prior to airing the repeat coverage of those meetings. Such warnings should adequately address the concerns of viewers who would be offended by the language and would not run afoul of the First Amendment.

Sincerely,

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RD:RL:MM:ac(m)

⁸⁶ *Id.*

⁸⁷ *In re Complaint by Julian Bond*, 69 F.C.C.2d 943 (July 28, 1978).

⁸⁸ See, for example, *Turner Broadcasting Corp.*, 87 F.C.C.2d 476 (1981) (rejecting petition alleging that station aired inflammatory, racist and demeaning statements against minorities); *Zapis Communications Corp.*, 7 F.C.C.R. 3888 (1992) (rejecting petition alleging that, *inter alia*, program insulted and stereotyped minorities); *In re Matter of Greater Boston Radio, Inc.*, 19 F.C.C. Rcd. 13064 (2004) (no independent FCC violation where radio host advocated killing Muslims since there was no judicial finding that the speech constituted "incitement to violence").

EXHIBIT 1 – PROPOSED RULES OF DECORUM

12. a. Rules of Decorum. During a meeting of the Los Angeles City Council, there is the need for civility and expedition in the carrying out of public business in order to ensure that the public has a full opportunity to be heard and that the deliberative process of the Council is retained at all times. While any meeting of the City Council is in session, the following rules of decorum shall be observed. All remarks shall be addressed to the Council as a whole and not to any single member thereof, unless in response to a question from such member. No question may be asked of a member of the Council or of the City staff without permission of the presiding officer. Persons addressing the Council shall not make personal, impertinent, unduly repetitive, slanderous or profane remarks to the Council, any member of the Council, staff or general public, nor utter loud, threatening, personal or abusive language, nor engage in any other disorderly conduct that disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting. No person in the audience at a Council meeting shall engage in disorderly or boisterous conduct, including the utterance of loud, threatening or abusive language, whistling, stamping of feet or other acts which disturb, disrupt or otherwise impede the orderly conduct of any Council meeting. Signs, placards, banners, or similar items shall not be permitted at any time in the Council chamber. Unless addressing the Council or entering or leaving the Council Chambers, all persons in the audience shall remain sitting in the seats provided. No person shall stand or sit in the aisles or along the walls, nor shall the doorways be blocked.

b. Enforcement of Decorum. The rules of decorum set forth above shall be enforced in the following manner. The presiding officer of the Council shall be responsible for maintaining the order and decorum of meetings. The presiding officer shall request that a person who is violating the rules of decorum as set forth in Rule 12 a., comply immediately. If, after receiving a warning from the presiding officer, a person persists in violating the rules of decorum, the presiding officer shall order him or her to leave the Council meeting. Any person so ordered removed shall be excluded from further attendance at the meeting from which he or she has been removed, unless permission to attend is granted upon motion adopted by a majority vote of the Council. If such person does not remove himself or herself, the presiding officer may order the sergeant-at-arms of the Council to remove that person from the Council chambers. Any person who resists removal by the sergeant-at-arms shall be charged with a violation of Penal Code Section 403. The City reserves the right to seek further legal remedies should a member of the public engage in disruptive conduct during multiple meetings.