Communication from Public

Name: First Amendment Coalition
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Council File No: 16-1104-S3
Comments for Public Posting: The First Amendment Coalition ("FAC") is a nonprofit, nonpartisan organization dedicated to defending freedom of speech, freedom of the press, and the people's right to know. For reasons more fully expressed in the attached letter, FAC respectfully urges the City Council to reject item 16 on its April 29, 2025 agenda, which would amend the City Council's rules to prohibit public speakers from using "the N-word or C-word, or any variation of either of these words, in a Council or Committee meeting." While FAC understands and sympathizes with the City's concerns about the use of such words at public meetings and their impact on community members, the proposed rule nonetheless violates the First Amendment. To adopt it would expose the City to litigation resulting in a judgment preventing enforcement of the rule and awarding significant attorney fees to the plaintiff. As with other ill-fated attempts to silence offensive speech, that result would amplify the objectionable message and allow those who utter it to claim victory as defenders of free speech. Also, the first victim of censorship is rarely the last, and attempts at restricting offensive speech often lead to censorship of those they are intended to protect. The City Council has other tools at its disposal to express disagreement with offensive terms without violating the First Amendment's cardinal rule against censorship of political speech. It may preface public comment with a disclaimer that it does not endorse certain language used by speakers, and it may reinforce its disagreement with offensive epithets by its own statements before or after such comments are made. But the First Amendment prohibits the government from censoring speech because it is offensive to some or many. The rule cannot be justified on the ground that it prohibits "fighting words" unprotected by the First Amendment. As explained in the attached letter, the question whether certain terms are "fighting words" depends on the unique facts and circumstances of each case. The "fighting words" doctrine does not allow the government to ban certain words in advance, regardless of context. A few examples demonstrate why the words covered by the proposed rule do not qualify as "fighting words" in every instance. A person making a public comment about the rule might use the N-word in citing scholarship that explains its historical meanings and uses. In criticizing the City's failure to clean up

graffiti on public property, a commenter might underscore the urgency of the issue by informing the City Council that some of the graffiti contains the words covered by the rule. In either case, the prohibited words would not remotely amount to "fighting words." Even assuming that the terms at issue could be deemed "fighting words" that justify a categorical ban on using them during public comment, the proposed rule would remain unconstitutional because it prohibits only terms based on race or gender, not other topics or characteristics. As a result, the rule would amount to unconstitutional "content discrimination" under Supreme Court precedent. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down ordinance which "applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'" because "[t]hose who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered"). For these reasons and those explained in the attached letter, FAC respectfully urges the City Council to reject the proposed rule.

FIRST AMENDMENT COALITION

April 28, 2025

Via https://cityclerk.lacity.org/publiccomment/

Los Angeles City Council
200 North Spring Street
Los Angeles, CA 90012

Re: April 29, 2025 agenda: Item 16

Dear Council Members,

The First Amendment Coalition ("FAC") is a nonprofit, nonpartisan organization dedicated to defending freedom of speech, freedom of the press, and the people's right to know. FAC urges the City Council to reject item 16 on its April 29, 2025 agenda, which would prohibit public speakers from using "the N-word or C-word, or any variation of either of these words, in a Council or Committee meeting."

While FAC understands and sympathizes with the City's concerns about the use of such words at public meetings and their impact on community members, the proposed rule nonetheless violates the First Amendment. To adopt it would expose the City to litigation resulting in a judgment preventing enforcement of the rule and awarding significant attorney fees to the plaintiff. As with other ill-fated attempts to silence offensive speech, that result would amplify the objectionable message and allow those who utter it to claim victory as defenders of free speech. Also, the first victim of censorship is rarely the last, and attempts at restricting offensive speech often lead to censorship of those they are intended to protect. The City Council has other tools at its disposal to express disagreement with offensive terms without violating the First Amendment's cardinal rule against censorship of political speech.

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A "core postulate of free speech law" is that the "government may not discriminate against speech based on the ideas or opinions it conveys," no matter how "offensive to a substantial percentage of the members of any group" the speech might be. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). The Supreme Court's "decisions establish that mere public intolerance or animosity cannot be the basis for abridgment" of First Amendment rights. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971). The First Amendment therefore protects speech that is "deeply offensive to many," including "virulent ethnic and religious epithets." *United States v. Eichman*, 496 U.S. 310, 318 (1990).

Under the First Amendment, "speech cannot be restricted simply because it is upsetting or arouses contempt," and "in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (cleaned up); *see also*, *e.g.*, *Dworkin v. Hustler Mag., Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (holding "speech is not actionable

simply because it is base and malignant" and "speech may not be suppressed simply because it is offensive") (cleaned up).

In political debate especially, the First Amendment protects "not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Cohen v. California*, 403 U.S. 15, 26 (1971). As the Supreme Court has recognized, one cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.*

While public officials and private persons are free to express their disagreement with certain speech, the government may not silence speech simply because it finds the speech offensive, degrading, or upsetting to some or many. Nor may the City Council deem speech disruptive of a meeting merely because the speech is offensive. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812–13, 816 (9th Cir. 2013) (holding rule against "personal, impertinent, profane" or "insolent" remarks at city council meeting violated First Amendment); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("[A] speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing."). The use of the prohibited words is intrinsic to the speaker's message and necessarily expresses a viewpoint, however offensive or odious it might be. *See Cohen*, 403 U.S. at 26 (noting "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well" and "words are often chosen as much for their emotive as their cognitive force").

The proposed rule cannot be justified on the ground that the prohibited terms are "fighting words" unprotected by the First Amendment in all circumstances. Although the Supreme Court remarked over 80 years ago that certain words "by their very utterance inflict injury or tend to incite an immediate breach of the peace" and might sometimes be prosecuted as "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (cleaned up), that does not necessarily justify the censorship of offensive speech during a city council meeting.

The "mere use of a vulgar, profane, indecorous, scurrilous, opprobrious epithet cannot alone be grounds" to censor it as fighting words. *Jefferson v. Superior Ct.*, 51 Cal. App. 3d 721, 724 (1975). It is not enough that persons hearing certain terms might "violently react to the words in the abstract." *Id.* at 725. Instead, the question "[w]hether offensive words uttered in a public place are inherently likely to provoke an immediate violent reaction must be decided on a case-by-case basis." *In re Alejandro G.*, 37 Cal. App. 4th 44, 48 (1995). In deciding whether certain terms are unprotected fighting words, one may not "look solely to the content of the words" but must "consider the totality of the circumstances." *Id.* at 49.

A few examples demonstrate why the words covered by the proposed rule do not qualify as "fighting words" in every instance. A person making a public comment about the rule might use the N-word in citing scholarship that explains its historical meanings and uses. In criticizing the City's failure to clean up graffiti on public property, a commenter might underscore the urgency of the issue by informing the City Council that some of the graffiti contains the words covered by the rule. In either case, the prohibited words would not remotely amount to "fighting words."

In some cases, perhaps the use of certain words might justify prosecution under Penal Code section 415(3), which "codifies the 'fighting words' exception to the right of free speech under the First Amendment." *Alejandro G.*, 37 Cal. App. 4th at 47. But that does not mean the City Council may categorically ban the use of certain words during public comment. The question whether the utterance of certain terms amounts to the use of "fighting words" must be carefully considered in light of all relevant facts and circumstances at a given time and place. Although prosecution for the use of "fighting words" might be justified after the fact in some cases, that does not justify censorship in advance of certain terms in all circumstances. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (noting that even when "criminal penalties" might be allowed, "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand"); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180–81 (1968) ("Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached."); *Million Youth March, Inc. v. Safir*, 63 F. Supp. 2d 381, 392 (S.D.N.Y. 1999) ("The fighting words doctrine has not been used as a basis for justifying a 'prior restraint' on future speech.").

Even assuming that the terms at issue could be deemed "fighting words" that justify a prior restraint in all cases, the proposed rule would remain unconstitutional because it prohibits only terms based on race or gender, not other topics or characteristics. As a result, the rule would amount to unconstitutional "content discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down ordinance which "applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'" because "[t]hose who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered").

The proposed rule cannot be justified on the ground that members of the public might perceive that the City Council condones offensive terms uttered during public comment. The government "does not endorse or support … speech that it merely permits" or "fail[s] to censor." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). The City is free to express its disagreement with offensive speech in numerous ways. For example, it may preface public comment with a disclaimer that it does not endorse certain language used by speakers, and it may reinforce its disagreement with offensive epithets by its own statements before or after such comments are made. But the First Amendment prohibits the government from censoring speech because it disapproves of that speech. FAC respectfully urges the City Council to reject the proposed rule.

Sincerely,
FIRST AMENDMENT COALITION

David Loy
Legal Director