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**Re: CN-28-3141**

Dear Deputy District Attorney Wong and District Attorney Dumanis:

I am writing in regards to the recent arrest of Richard Shapiro at a Carlsbad City Council meeting. Mr. Shapiro spoke during the public comment time and was removed by officers after using what some might consider vulgar language while addressing the council. But distasteful or not, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). We are long past the time when governmental officials can enforce grade school standards of acceptable speech in an adult forum, especially in a political context. The removal, arrest, and prosecution of Mr. Shapiro violate the First Amendment to the United States Constitution. Please dismiss the charges immediately.

**I. Summary of Facts**

On August 24, 2010, Robert Shapiro spoke during the public comment period of a Carlsbad City Council meeting. Immediately before Mr. Shapiro's comments, a speaker demanded that the council take a position on whether President Obama was born in the United States and cited Dietrich Bonhoeffer and Abraham Lincoln on the moral evil of silence. The mayor indicated that the council's response is to do "nothing" on that issue. Mr. Shapiro then began his speech by referring to the previous speaker, saying, "Silence is what the real evil is," accusing his fellow citizens of being "massive pussies," and noting, "We have a Constitution." Before he was able to continue and articulate the reasons for this sentiment, he was dragged

away from the lectern by police officers. This interaction may be viewed at [http://carlsbad.granicus.com/MediaPlayer.php?view\\_id=7&clip\\_id=484](http://carlsbad.granicus.com/MediaPlayer.php?view_id=7&clip_id=484).<sup>1</sup>

Mr. Shapiro was subsequently arrested and charged with a violation of Carlsbad Municipal Code § 1.20.330(b), which provides that any person using “vulgar, profane, loud or boisterous language at any meeting or otherwise interrupting the proceedings of the council” shall upon conviction be guilty of a misdemeanor. It is my understanding that Mr. Shapiro was charged with an infraction. His trial date is set for April 26, 2011 at 8:30 a.m.

## II. Legal Analysis

Mr. Shapiro’s removal and arrest clearly violate established First Amendment law. The First Amendment reflects 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) (citations omitted). Given the context and content, Mr. Shapiro was clearly engaging in political speech, which is at the core of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

When a City Council meeting is actually disrupted so that business cannot be conducted, a moderator may have reason to silence a member of the public. However, “abuses can occur, as when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like.” *White v. Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990). That is precisely what occurred here. Mr. Shapiro was speaking during his allotted public comment time, did not interrupt another speaker, and did not otherwise actually disrupt the council meeting. Instead, he was silenced simply because of the content of his speech.

It is no answer to assert that the word Mr. Shapiro used was simply “too bad” to be tolerated. The Supreme Court determined decades ago that Paul Cohen could not be punished for wearing a jacket reading “Fuck the draft” into a courthouse. *Cohen*, 409 U.S. at 25. The Court explained that in addition to conveying ideas, words often convey “otherwise inexpressible emotions” and furthermore, one cannot forbid particular words without “running a substantial risk of suppressing ideas in the process.” *Id.* at 26.

In *Leonard v. Robinson*, the Sixth Circuit recently confronted a case remarkably similar to this one, in which a commenter at a township board meeting said “god damn” when expressing his opinion and was subsequently arrested. 477 F.3d 347 (6th Cir. 2007). Not only did the court find the arrest unconstitutional, but it denied qualified immunity for the officer, finding that “no reasonable police officer” would believe the statutes in question “constitutional as applied to Leonard’s political speech during a democratic assembly.” *Id.* at 359. The court stated unequivocally, “Prohibiting Leonard from coupling an expletive to his political speech is clearly unconstitutional.” *Id.* at 360. As the court noted, “we can find no principled distinction between the expletive in *Cohen* and the milder profanity in this case.” *Id.* at 359.

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<sup>1</sup> The altercation occurs about 35 minutes into the video, in the public comment section.

In fact, a court may find that Carlsbad Municipal Code § 1.20.330(b) violates the First Amendment not only as applied to Mr. Shapiro, but on its face due to its vagueness. It is unclear what language would qualify as “vulgar, profane, loud or boisterous.” Indeed, Mr. Shapiro himself was confused, as evidenced by his comment while being dragged away from police: “Now ‘pussies’ is not allowed?”

### **III. Conclusion**

Mr. Shapiro’s removal, arrest, and prosecution violate the First Amendment to the United States Constitution. The code itself may violate the First Amendment as well. I encourage you to drop the charges against Mr. Shapiro. If you do not do so, the ACLU is prepared to file an amicus brief on his behalf.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Abshear".

Sarah Abshear  
Staff Attorney/Legal Fellow