SENT VIA ELECTRONIC MAIL

December 4, 2023

City Attorney Timothy Donaldson &
The City of Walla Walla, Washington.
15 North 3rd Avenue,
Walla Walla, WA 99362.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Washington

PO Box 2728
Seattle, WA 98111
(206) 624-2184
aclu-wa.org

Sherri Nichols
Board President

Michele Storms
Executive Director

La Rond Baker
Legal Director

John Midgley
Of Counsel

Taryn Darling
Senior Staff Attorney

Susannah Porter Lake
Brent Low
Jonathan Nomamiukor
Staff Attorneys

Sagiv Galai
Legal Fellow

Tracie Hooper Wells
Paralegal

Dear City Attorney, Councilmembers and Mayor,

On October 25, 2023, the City Council of Walla Walla unanimously approved a new public comment policy. On November 15, 2023, the City Council unanimously amended the policy and resolved that "Persons making irrelevant, personal, impertinent, overly redundant, vulgar or slanderous remarks that disrupt, disturb, or otherwise render orderly conduct of the meeting unfeasible may be barred by the presiding officer from making further comment before the council during the meeting." City of Walla Walla, *2023-11-15 City Council Meeting*, VIMEO (Nov. 15, 2023) at 03:18:00, https://vimeo.com/875652073.

We at the ACLU of Washington appreciate the mayor's and city council's concerns over disruptive use of public comment, and we share the mayor's and city council's commitment to ensuring that forums of civic engagement are devoid of derogatory language, hate, and racial epithets. However, we fear that the city's current policy is impermissibly overbroad and risks viewpoint discrimination. Accordingly, we write to alert you that the policy likely runs afoul of the First Amendment. We believe that the councilmembers, mayor, and city attorney sought to create a constitutionally sound policy, so we submit the following in hopes that our concerns assist Walla Walla in creating a sound public comment policy.

A public comment speech restriction is constitutional only when it is applied to speech that actually "'disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.'" *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990). Since *Norwalk*, this area of law has evolved. The Court of Appeals for the Ninth Circuit has elaborated on *Norwalk* by explaining that a city may not define a disturbance or a disruption any way it likes. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010). Courts will not tolerate restrictions on protected speech that bar speakers because their language was perceived as offensive, and by extension disruptive. *Id.* In other words: "Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption." *Id.*

Fearing misinterpretation of *Norwalk*, the Ninth Circuit cautioned cities against drafting policies that circumvent the *actual disruption* requirement: cities "cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk.*" *Id.* Here, Walla Walla appended subjective terms: "irrelevant, personal, impertinent, overly redundant, vulgar or slanderous," to language akin to the language that was upheld in *White v. Norwalk* ("disrupt, disturb, or otherwise render orderly conduct of the meeting unfeasible"). Nonetheless, the policy remains impermissibly broad because it utilizes the subjective terms to inform the type of speech or behavior a presiding officer can bar for being disturbing, disruptive, or disorderly.

Walla Walla's policy is analogous to other speech restrictions that the Ninth Circuit has invalidated for failing "to limit proscribed activity to actual disturbances." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 807 (9th Cir. 2013). The unconstitutional policy challenged in *Acosta* enabled the presiding officer to bar speakers who engaged in "disorderly, insolent, or disruptive behavior…". *Id.* at 811. The defective policy in *Acosta* defined "disorderly, insolent, or disruptive behavior," in part, as "personal, impertinent, profane, insolent, or slanderous remarks." *Id.* There, the Ninth Circuit invalidated the entire municipal ordinance because it was "overbroad on its face[.]" *Id.* at 812.

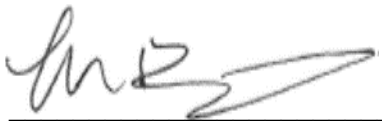
Like the *Acosta* policy, Walla Walla's policy fails to limit the proscribed speech to actual disturbances because it treats the presiding officer's subjective interpretation of speech as the rubric for remarks deemed to "disrupt, disturb, or otherwise render orderly conduct of the meeting unfeasible."

Inextricably, here Walla Walla's policy is impermissibly overbroad. In this context, an unconstitutionally overbroad speech policy is one that "unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language." *Id.* at 816. By relying on subjective terms to inform what type of speech will be deemed disturbing, disruptive, or disorderly—the Walla Walla policy sweeps a substantial amount of non-disruptive speech into the categories of speech that can be barred.

Furthermore, a city council policy that regulates speech in meetings that are open to the public must be "viewpoint neutral." *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010). Here, Walla Walla's policy utilizes adjectives that require subjective interpretation. What may be disruptively impertinent, vulgar, overly redundant, or slanderous to the presiding officer, may be vital political discourse for the public speaker who is barred by the presiding officer.

The ACLU of Washington has faith in the Walla Walla City Council's ability to stop racist bigotry from upending its governmental operations during public comment—without unduly burdening constitutionally protected speech.

Sincerely,



La Rond Baker, Legal Director
Sagiv Galai, Legal Fellow
American Civil Liberties Union of Washington
PO Box 2728
Seattle, WA 98111