FREEDOM X
PROTECTING CONSERVATIVE & RELIGIOUS FREEDOM OF EXPRESSION
WWW.FREEDOMXLAW.COM

Bill@FreedomXLaw.com

August 7, 2015

Via E-mail Attachment Only

Mayor Edward D. Selich and Members of the City Council
CITY OF NEWPORT BEACH
100 Civic Center Drive
Newport Beach, CA 92660

Re: *Resolution to Censure Councilman Scott Peotter and Criminal Investigation*

Dear Mayor Selich and Council Members:

We write to protest the Newport Beach City Council's consideration of punitive action against Councilman Scott Peotter over his use of the city seal on a constituent newsletter addressing the U.S. Supreme Court's controversial same-sex marriage ruling. We request this letter be made part of the official record at the appropriate council meeting.

By way of introduction, Freedom X is a tax-exempt non-profit public interest law firm and advocacy center dedicated to protecting our freedom of religious, political and intellectual expression.

Councilman Peotter did not act unlawfully by using a photograph of the city seal in his communications with constituents. Nor is a proclamation of censure well-advised.[1] Indeed, we question the wisdom of even contemplating such measures over an elected government official's right to address issues of the day with or without a city seal. We submit that: (1) Councilman Peotter's remarks on same-sex marriage were expressions of opinion grounded in his religious faith and protected under the First Amendment; (2) the storm over use of the seal is pretext for stifling dissent that political activists oppose; and (3) the proposed resolution amending the seal use ordinance and public statements made by the council represent strong evidence of unconstitutional content- and view-point-based discrimination.

We provide you with our analysis of the issues, which incorporates and supplements the valuable legal reasoning already submitted to the council by the Pacific Justice Institute and attorney Craig P. Alexander.

[1] These actions were introduced by Kevin O'Grady, an activist, and supported by Councilman Keith Curry.

I. Summary Of The Alleged "Offense"

Councilman Peotter uses the mass e-mail platform "Constant Contact" and social media to connect with his constituents. On July 6, 2015, he exercised his First Amendment right and civic duty as an elected representative of the people to address a matter of profound public concern rending the nation and communities like Newport Beach. Councilman Peotter, joined by many residents of Newport Beach, believes the Supreme Court's 5-4 decision in *Obergefell v. Hodges*[2] represents a radical transformation of our nation's moral laws and the subversion of the God-ordained institution of marriage (or "holy" matrimony).[3] The court has unfortunately, but not unforeseeably, deepened hostilities between the religious faithful and sexual orientation/gender identity ("SOGI")[4] activists.

[2] In *Obergefell*, four Supreme Court justices issued dissenting opinions finding there to be no constitutional right to same-sex marriage. Applying the reasoning of those calling for Councilman Peotter's censure, four of the Supreme Court justices are bigots, homophobes and hatemongers, who would incite rampant bullying and bigotry leading to psychological scarring, especially felt by children.

[3] Councilman Peotter relies on Genesis 2:18-24 for his belief that marriage is the union between one man and one woman:

> The Lord God said, "It isn't good for the man to live alone. I need to make a suitable partner for him." So the Lord took some soil and made animals and birds. He brought them to the man to see what names he would give each of them. Then the man named the tame animals and the birds and the wild animals. That's how they got their names.
>
> None of these was the right kind of partner for the man. So the Lord God made him fall into a deep sleep, and he took out one of the man's ribs. Then after closing the man's side, the Lord made a woman out of the rib.
>
> The Lord God brought her to the man, and the man exclaimed, "Here is someone like me! She is part of my body, my own flesh and bones. She came from me, a man. So I will name her Woman!" That's why a man will leave his own father and mother. He marries a woman, and the two of them become like one person. (CEV)

[4] The acronyms LGBT, LGBTQ and other variations are frequently cited inconsistently. As short-hand for various sexual categories, they omit many others. Each acronym has one commonality: heterosexuality is excluded. Our preference, for the purpose of clarity, is to identify membership in the non-heterosexual universe of sexual categories as the "sexual orientation/gender identity" ("SOGI") movement, a term adopted by the American Bar Association, the United Nations, LGBT

Councilman Peotter made statements regarding the *Obergefell* ruling[5] in a mass e-mailed newsletter bearing a banner with photographs depicting a portion of city hall, what appears to be the edge of a dock, and a facsimile of the city seal attached to a wall behind an American flag. He wrote:

> I know, The Supreme Court (that would be 5 out of 9 guys in black robes) decided 10 days ago to overturn 5,000 years of Judeo-Christian tradition, by redefining and allowing gay marriage.
> All of a sudden, a lot of the "important stuff" of the city didn't seem so important.
>
> I like how the White House is really quick on the "important" stuff like this rainbow lighting.
>
> I do find it interesting that the homosexual movement adopted the rainbow as their symbol, as it was God's symbol that he wouldn't destroy the world by flood again…. Maybe they are "wishful thinking…"

These statements appeared below a color photograph of homosexuals kissing and celebrating outside a White House bathed in the rainbow colors of the SOGI movement. None of these statements constitutes "hatred," "bigotry" or "homophobia." They are observations that question (1) the validity of the Supreme Court's interpretation of the U.S. Constitution, (2) the council's priorities, and (3) the use of the rainbow to celebrate sexual orientation.

A particular segment of the community found reason to invoke outrage over these statements, using every rhetorical trick in the book to sway council opinion.[6] Apparently, Councilman Peotter didn't get the memo stating that any expression of opposition to "marriage equality" is per se homophobic.[7] But according to whom? The phenomenon of tarring an individual with the aforementioned labels is part of a widening culture of profane, reflexive and unreflective outrage in which being "offended" constitutes serious injury. The SOGI movement, including the protesters

---

rights groups and other organizations.

[5] The statements are copied here verbatim, including typographical errors.

[6] These include labeling (bigot, homophobe, heterosexist, misogynistic, bully), fearmongering (loss of commerce, boycotts, divestments; promoting bullying, psychological harm, distrust, lack of personal safety, division, stigmatizing), ad hominem, threats, hyperbole, misdirection … to name a few.

[7] Mark Joseph Stern, "Yes, Opposing Gay Marriage Makes You a Homophobe," *Slate*, 12/16/2015. http://www.slate.com/blogs/outward/2013/12/16/gay_marriage_opponents_homophobic_does_opposing_gay_marriage_make_you_a.html

at the July 14, 2015, special session, tries to justify its outrage on the specious and emotionally-charged claim that mere expression of dissent is harmful to children.[8] Yet from our review of the video posted on the council's website of the hearing, public opinion is decidedly mixed. *Some* members of the community claimed to take offense, while others threw their support behind Councilman Peotter's expressive rights and viewpoint. Quite evidently, there is no community consensus to warrant any action to punish him. Nor is there a national consensus. A recent poll found that voters, by a four to one margin, support protecting religious liberty over protecting gay and lesbian rights.[9]

As most Newport Beach residents went about their daily routines, teams of militant SOGI activists devoted to pounding a postmodern version of morality into mainstream acceptance descended on city hall to engage in a blistering series of attacks on Councilman Peotter. These SOGI activists, including "proud" parents of gay children, paid mere lip service to the cherished backbone of freedom, the freedom to express unpopular opinions without fear of government censorship or reprisal. Under their warped reasoning, Councilman Peotter is "entitled," but just not free, to express his opinions. If he does express a view they oppose, as one bellicose man put it, they will not hesitate to exact a "pound of flesh."

In spite of having to endure attacks on his personal integrity and constitutional rights, Councilman Peotter offered apologies and removed the seal from his newsletters and Facebook page.

II. Councilman Curry's Remarks

The city's response to the shrill chorus showcased on July 14 should have been to lower the temperature of public dissent. After all, no person receiving Councilman Peotter's newsletter (sent to a private list of recipients) could reasonably be "confused" over the unofficial nature of his comments. Nor could a *reasonable* person find in his remarks signs of bigotry, hate or "homophobia."

[8] "To oppose gay marriage is to help prevent loving couples from visiting each other in the hospital, from raising a child together, from enjoying the most basic facets of a fulfilling life. And just as perniciously, in the words of the Supreme Court, opposition to marriage equality 'humiliates tens of thousands of children now being raised by same-sex couples' by telling them their parents don't deserve the dignity and respect afforded to straight couples. Those who oppose gay marriage drive the laws that inflict this daily humiliation unto gay couples and their children. That, put simply, is homophobia." *Id*.

[9] Paul Bedard, "Poll: Americans, 4 to 1, choose religious freedom over gay rights," Washington Examiner, 8/5/2015. http://www.washingtonexaminer.com/poll-americans-4-to-1-choose-religious-freedom-over-gay-rights/article/2569587.

Yet rather than lower the temperature, the council turned up the heat by pandering to a thuggish crowd imposing an unconstitutional "heckler's veto."[10]

Councilman Curry was particularly heated in his remarks. Because he is responsible for calling for additional action intended to make an example of Councilman Peotter, it is necessary to unveil the flaw in his logic. Councilman Curry's performance, especially his statement that Newport Beach is an "inclusive" community, conveyed the impression that Councilman Peotter is opposed to promoting inclusiveness and diversity within Newport Beach. But Councilman Curry should consider his own affiliations and whether the same broad brush could be used against him.

Councilman Curry is a staff member and director of Concordia University Irvine's Center for Public Policy.[11] Concordia describes itself as "a Christian educational institution operated by The Lutheran Church-Missouri Synod [LCMS]."[12] Concordia operates "in compliance with Title VII of the Civil Rights Act of 1964, [and] employs only those applicants who meet the religious membership requirements established by the university."[13]

This is the official doctrine of the LCMS relating to same-sex marriage:

> God gave marriage as a picture of the relationship between Christ and His bride the Church (Eph. 5:32). Homosexual behavior is prohibited in the Old and New Testaments (Lev. 18:22, 24, 20:13; 1 Cor. 6:9–20; 1 Tim. 1:10) as contrary to the Creator's design (Rom.

---

[10] "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[11] Councilman Curry's profile page at Concordia's website states: "In October, 2011, Keith Curry was named Director of the Concordia University Center for Public Policy. The Center is dedicated to promoting civil dialogue, encouraging public engagement and serving as a forum for research and discussion on public policy issues facing Orange County and California." He has been assigned a Concordia telephone number and e-mail address: (949) 214-3200 and keith.curry@cui.edu. http://www.cui.edu/centers-institutes/center-public-policy/index/id/22050.

[12] http://www.cui.edu/hr/index/id/3684.

[13] http://www.cui.edu/hr/index/id/3688.

> 1:26–27). The LCMS affirms that such behavior is "intrinsically sinful" and that, "on the basis of Scripture, marriage [is] the lifelong union of one man and one woman (Gen. 2:2-24; Matt. 19:5-6)" (2004 Res. 3-05A). It has also urged its members "to give a public witness from Scripture against the social acceptance and legal recognition of homosexual 'marriage' " (2004 Res. 3-05A).

(Emphasis added.)

Based upon Concordia's mission statement,[14] and following the tortured reasoning of SOGI activists, Councilman Curry's association with Concordia and would be considered no different than if he were associated with the Ku Klux Klan. According to such logic, Councilman Curry should be censured for his association with Concordia. If Councilman Curry's views on what qualifies as a "diverse" community excludes Lutherans or others who share the LCMS position on homosexuality and same-sex marriage, the public has a right to know. This is especially true if he intends to proceed with his goal of punishing Councilman Peotter.

III. Legal Analysis

A. Censure Is Not Warranted

Our review of Newport Beach's city ordinances and policies fails to turn up any language establishing a basis for government censure of a sitting council member. Without such a formal policy, it is difficult to see how any formal action taken by the council would not be *ultra vires* and thus unlawful and actionable.

The City of Stockton does have a censure policy that provides some useful guidance:

> Censure is a formal Resolution of City Counsel reprimanding one of its own members for specified conduct, generally a violation of law or of City policy where the violation of policy is considered to be a ***serious offense***. Censure should not follow an occasional error in judgment, which occurs in good faith and is unintentional. Censure carries no fine or suspension of the rights of the member as an elected official but a censure is a punitive action that serves as a punishment for wrongdoing.

(Emphasis added.) Censure, generally, is a formal, public reprimand for an *infraction or violation*. Has Councilman Peotter committed a "serious" offense, infraction or violation by publishing his views on a court decision and the use of the rainbow by the SOGI movement using the city seal?

[14] See "Lutheran Higher Education at Concordia University: Belief and Application." http://www.cui.edu/aboutcui/heritage/index/id/20789.

There is no evidence that Councilman Peotter has objectively committed a serious offense, an infraction or violation of Newport Beach's city ordinances. Igniting the wrath of intemperate SOGI activists who show up with cudgels to city council meetings shouting "Kill the beast!" is not a serious offense. It is *politics*. Indeed, as a matter of public record, the city attorney has already stated that he believes section 1.16.050 (Use of the City Seal) to be ambiguous in that it is unclear what is meant by the term "city purpose," and ***therefore he has chosen not to enforce it until such time as the council has approved a new ordinance. Accordingly, no serious offense, infraction or violation could possibly have been committed***.

Censure is also unwarranted because Councilman Peotter's statements said nothing about his attitude towards gays, lesbians, etc., but merely reflected his opposition to the Supreme Court's same-sex marriage ruling and use of a Biblical symbol for purposes of SOGI activism. There is no community consensus relating to the ruling, and objections based on religious viewpoints are no basis for punishing speech. Indeed, the First Amendment prohibits government hostility towards religion.

Censure is also unwarranted because it appears to be politically-motivated and therefore not in the city's best interest.

Finally, censure is unwarranted because Councilman Peotter has already been subjected to a lengthy harangue, has apologized and has removed the city seal from his private communications. Censure thus accomplishes nothing other than to allow political rivals to enjoy a sense of self-satisfaction.

B. A Criminal Investigation Is Not Warranted

As already discussed, the city attorney has found the seal use ordinance to be ambiguous and ceased enforcement of it prior to Councilman Peotter's statements. A criminal investigation is thus unwarranted if the ordinance was not being enfrced. Calling for one only reveals political opportunism.

C. The Proposed Revised Policy Regarding Expressions Of Official City Position Or Policy Is Defective And Could Subject The City To Potential Legal Action.

The proposed revised policy regarding "Expressions of Official City Position or Policy" states in pertinent part:

> Any City Council Member who wishes to make a statement or opinion regarding a matter

> which the City Council has not taken an official position on shall ensure that said statement or opinion cannot be construed by the public as being an official position or policy of the City of Newport Beach.

How can this reasonably be enforced? It requires a council member to read the public's mind. What is a member to do to "ensure" other people will not misinterpret his or her communications? How exactly does a member control how others perceive his or her statements?

As written, the proposed policy supplies no objective enforcement mechanism nor even a legal remedy. More directly, it allows for arbitrary application, which is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992), citing *Hefron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

D. Unless Resolution No. 2015-63 Is Stricken, Any Law Or Policy Adopted Under It Will Become Evidence Of Content- And Viewpoint-Based Censorship In Violation Of The First Amendment.

By referencing Councilman Peotter's statements, Resolution No. 2015-63 demonstrates that the regulation arising from its recitals is based on the content of Councilman Peotter's statements and the viewpoints he expressed. A regulation that by its terms singles out particular content for differential treatment is content-based. *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). However, a facially content-neutral regulation having as its "underlying purpose" the goal of suppressing particular ideas is also content-based. *Id.*; *see also Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) (content-based if the main purpose of the regulation is to suppress or exalt speech of a certain content); *Tollis Inc. v. San Bernardino Cty.*, 827 F.2d 1329, 1332 (9th Cir.1987) (content-based if the regulation is predominantly aimed at the suppression of First Amendment rights). Although a statute "does not indicate an intent to suppress speech of a certain content . . . [t]hat lack of purpose . . . does not render application of the statute to the Committees' speech content-neutral." *Ctr. for Bio-Ethical Reform*, 533 F.3d at 787.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). "The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And the Supreme Court has held time and again that the mere fact that someone might take offense at the content of the speech or the viewpoint of the speaker does not provide

a basis for prohibiting the speech. *Texas v. Johnson*, 491 U.S. 397, 491 (1989). ("If there is a bed-rock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Street v. New York*, 394 US 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words [or pictures] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views."); *see generally Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Indeed, a listener's reaction is not a legally sufficient basis for restricting speech. *See Forsyth Cnty. v Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob").

Ashlee Kendall, a former city code enforcement officer who appeared during the public comment session on July 14, cited the case of *Waters v. Churchill*, 511 U.S. 661 (1994) as authority for the proposition that the Constitution permits punishing official speech that disrupts an "agency's" operations.[15] *Waters* is inapposite here, and Ms. Kendall has misread it. *Waters* is an employment law case involving government *employee* speech, not speech of an elected official. It holds that employers may restrict employee speech, not privileged speech or speech expressed as a private citizen. It is therefore unsuitable to the facts presented in this matter. If Councilman Peotter could properly be said to have acted as an official when he published his remarks, then his statements are absolutely privileged and immune from liability. If his statements constitute private speech, they are non-actionable.

[15] We wish to observe that Ms. Kendall incorrectly made a big point of stating that Justices Scalia and Ginsberg joined in the majority opinion. Although Justice Scalia wrote an opinion concurring in the *judgment*, he did not join the majority opinion or its legal reasoning. However, Chief Justice Rehnquist, and Justices Souter and Ginsberg, did join the Sandra Day O'Connor-authored majority opinion.

E. If Newport Beach Is An Inclusive Community, Respectful Of People Of Different Faiths, It Must Respect Councilman Peotter's Constitutional Rights.

Resolution No. 2015-63 states that Newport Beach "is a diverse community comprised of ***people of different faiths***, races, nationalities, ethnicities and sexual orientations" and that the city wishes to "reaffirm its commitment to a diverse community that actively protects the rights of people of different faiths, races, nationalities, ethnicities and sexual orientations." (Emphasis added.)

Is that only *sometimes*? Is that only when SOGI activists abandon their demand, as one gay man told the counsel, for *acceptance* and not merely *tolerance*? Is the city now in the business of protecting speech that favors sexual orientation over religious conviction?

Councilman Peotter draws his beliefs from his faith. Under the city's policy, he is legally entitled to as much respect as any citizen who comes to the council chambers with beliefs different from his. That means respect for Councilman Peotter's viewpoint however offensive it may be to some members of the community. To quote *Waters*: "The First Amendment demands a tolerance of 'verbal tumult, discord, and ***even offensive utterance***,' as 'necessary side effects of ... the process of open debate[.]'" *Waters*, U.S. 661 at 672, quoting *Cohen v. California*, 403 U.S. 15, 24-25 (1971). (Emphasis added.) That means both sides of the debate are free to give as good as they get.

Councilman Peotter needs your support, not your condemnation. His actions demonstrate that he is not trying to silence SOGI activists. Indeed, he patiently and respectfully endured some two hours of vituperative insults. But *they* wish to chill *his* right to freely express his opinions on matters of public concern because they have a political agenda they wish to succeed. At least two citizens who addressed the council in July represented that they are directors of Democratic LGBT caucuses. More than a few were social workers or involved in other SOGI political activism (*e.g.*, PFLAG).

IV. Threats Of Boycott, Divestment Or Sanctions Should Not Interfere With The City's Duty To Respect Religious Speech.

The fear of boycott, divestment or sanctions ("BDS") cannot be used as a cudgel to chill free speech and public expressions and opinions on issues that merit debate. Otherwise, the city will become captive to the special interests of activists pushing agendas that may not serve the city's best interests. By submitting to fearmongering, the city only emboldens those who cannot win political change legitimately.

What is needed by civil leaders is clarity and boldness of expression. In this case, members of

the council have already publicly reproached Councilman Peotter and made a record of the city's policy on "diversity" and "inclusiveness." Fueling public anger by going further to make an example of Councilman Peotter will not relieve the city of BDS threats. In reality, the zealots won't be satisfied until Councilman Peotter leaves office.

No civic interest is served by stirring up a hornet's nest over political and religious statements that, while they may have been poorly expressed, have done no provable harm to the city or its citizens and pose no future threat of harm. Now is the time for cooler heads to prevail. The sensible thing to do would be to leave it behind and move forward.

V. Conclusion

Councilman Peotter must be allowed to exercise his judgment to "freely speak, write and publish his … sentiments ***on all subjects***, being responsible for the abuse of this right." Cal.Const. Art. 1, § 2. He is free to express his disagreement with court opinions, as well as his moral views on sexuality and marriage. He can express these views in e-mails, on Facebook, on television, on radio, in council chambers and elsewhere. Punishing him for offending some people would reflect badly on the city, leaving the impression that homosexuals are welcome but Christians who follow scriptural admonitions regarding sexual behavior outside of a one-man/one-woman marriage are not.

If the city council decides to adopt the threatened punitive measures, we would not hesitate to initiate legal action against the city to protect free expression and religious liberty in Newport Beach.

All for His Glory!
I Corinthians 10:31
Freedom X

William J. Becker, Jr.
President/CEO/General Counsel

cc:
City Clerk, Leilani Brown
LBrown@newportbeachca.gov

City Attorney, Aaron Harp
aharp@newportbeachca.gov

Mayor Pro Tem Diane B. Dixon
DDixon@NewportBeachCa.gov

Councilman Tony Petros
TPetros@NewportBeachCa.gov

Councilman Kevin Muldoon
KMuldoon@NewportBeachCa.gov

Councilman Ed Selich
EdSelich@roadrunner.com

Councilman Scott Peotter
SPeotter@NewportBeachCa.gov

Councilman Keith Curry
curryk@pfm.com

Councilman Duffy Duffield
DDuffield@NewportBeachCa.gov