AMERICAN CIVIL LIBERTIES UNION FOUNDATION
San Diego and Imperial Counties

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Police Department Chief David Nisleit
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Sent via email

Re: Ordinance Prohibiting "Seditious Language"

Dear Mayor Faulconer, City Council Members, and Chief Nisleit:

As you may be aware, the *Voice of San Diego* ("*VOSD*") recently reported that San Diego Police Department officers have been enforcing an obviously unconstitutional ordinance purporting to

prohibit "seditious" language, Municipal Code section 56.30.[1] The ordinance descends from a disgraceful time in San Diego history when the City silenced dissent in the name of "patriotism." A similar federal law was repealed 100 years ago.[2] The City must now follow suit by repealing the ordinance, immediately halting its enforcement, expunging or seeking judicial expungement of all citations deriving from its previous enforcement, and canceling or refunding any fines imposed under the ordinance.

We are in the midst of an extraordinary moment where communities around the country have begun to reconsider antiquated models of policing that have disproportionately impacted people of color. Taking advantage of the opportunity to repeal a century-old law that should never have been enacted in the first place would be one small step in responding to demands for decriminalization in this moment.

The article contained the encouraging news that the City Attorney's office has disavowed the ordinance, referring to it as "antiquated" and saying that deputy city attorneys would not enforce it. Nevertheless, it was dismaying to learn that officers have cited dozens of people under the ordinance over the past seven years, in an apparently racially disparate manner, given that, according to Ms. Nucci's article, "eight of 11 people cited for using seditious language since 2018 were … Black." The City must promptly repeal the ordinance and compensate those wrongly cited in the past for any fees they paid or suffering they endured as a result of the improper citations. In the interim, SDPD must cease enforcing section 56.30 immediately.

This is not a complicated matter requiring sophisticated legal analysis. As Mr. Dotinga's article notes, quoting prominent First Amendment scholar Professor Geoffrey Stone, the ordinance is "patently unconstitutional and a joke under current law." By penalizing "seditious language, words or epithets … [and] any words, language or expression or seditious remarks, having a tendency to create a breach of the public peace," section 56.30 prohibits pure speech in violation of core First Amendment principles. It has been more than fifty years since the Supreme Court determined that even speech that advocates crime is protected by the First Amendment unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). A prohibition on language that merely has a "tendency to incite a breach of the public peace" does not come close to clearing this hurdle. Indeed, "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (citation and quotation marks omitted).

Ms. Nucci's article indicates that section 56.30 may be enforced not because officers believe that the speaker is truly advocating the overthrow of the government (which, again, would not be a constitutionally permissible basis for enforcement), but because they find the speech to be offensive in some way – "seven of the 11 most recent seditious language cases described the violation as 'profanity'

[1] Kate Nucci, "SDPD Is Punishing Speech Using a 102-Year-Old City Law," *Voice of San Diego*, August 3, 2020, https://www.voiceofsandiego.org/topics/public-safety/sdpd-is-punishing-speech-using-a-102-year-old-city-law/.

[2] Randy Dotinga, "'Keep Your Mouth Shut': Why San Diego Banned 'Seditious' Talk in 1918," *Voice of San Diego*, August 4, 2020, https://www.voiceofsandiego.org/topics/news/keep-your-mouth-shut-why-san-diego-banned-seditious-talk-in-1918/.

on the ticket." This, too, is not a valid basis for criminalization. Instead, the Supreme Court has made clear that that speech cannot be penalized based solely upon the "asserted offensiveness of [the speaker's] words." *Cohen v. California*, 403 U.S. 15, 18 (1971). As the Court noted, government officials are ill-equipped to determine the bounds of acceptable discourse. "[O]ne man's vulgarity is another's lyric. Indeed, … it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971).

Ms. Nucci's article also noted that at least one individual who was cited for violation of section 56.30 was told by the citing officer that "the lyrics he'd been singing had been directed at the police." It may be understandable that officers would not like to be subjected to verbal critiques, via spoken word or song, but they cannot issue citations based on their displeasure. "Contempt of cop" is not a crime. Instead, "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," and "in the face of verbal challenges to police action, officers and municipalities must respond with restraint." *City of Houston v. Hill*, 482 U.S. 451, 461, 471 (1987). The Supreme Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them" such as section 56.30. *Id.* at 465. "The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462–63.

For the foregoing reasons, section 56.30 cannot lawfully be enforced. The apparent fact that the ordinance has already been enforced in a racially biased manner, disproportionately punishing Black people for constitutionally protected speech, raises additional concerns in the current climate, where this history might give pause to people wishing to protest against racially biased policing. So long as it is on the books, section 56.30 unconstitutionally chills the expression of "constitutionally protected political speech" at "the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003).

Repealing this law should be only one component of decriminalizing conduct that should never have been unlawful. As documented by Campaign Zero, 70 percent of arrests by SDPD have been for misdemeanors. Community partners have also identified areas for decriminalization, including ending gang suppression units and preventing police from engaging in traffic stops or responding to mental health calls. These areas should be explored in order to reduce the role of police in Black and Brown communities and end the criminalization of people within those communities.

Thank you for your attention, and please let me know if you have any questions.

Sincerely,

Jonathan Markovitz
Staff Attorney