LEADERSHIP COUNSEL FOR JUSTICE & ACCOUNTABILITY

August 4, 2020

Fresno County Board of Supervisors
Chairman Buddy Mendes
2281 Tulare Street
Fresno, California 93721

Sent Via Email

Re: Cease and Desist Violations of State Law; Remedy Past Violations

Dear Chairman Mendes,

We write to demand that the Fresno Board of Supervisors ("Board") immediately cease and desist ongoing Brown Act Violations, violations of California and Federal Civil Rights Laws, and violation of Dymally-Alatorre Bilingual Services Act. We also write to request that the Board cure or correct any actions taken during any inappropriate closed session meeting that has taken place since March 17, 2020. We believe this action violates the Brown Act, and ask the Board to promptly cure or correct the mistake(s) within 90 days.[1]

The Brown Act and The California Constitution

The Ralph M. Brown Act ("Brown Act") was enacted to "aid in the conduct of the people's business." Cal. Gov. Code § 54950 *et seq.* "It is the intent of the law that [legislative body] actions be taken openly and that their deliberations be conducted openly." *Id.* "The Brown Act was designed to facilitate public participation in local governmental decisions and to curb misuse of the democratic process by secret legislation." *Bell v. Vista Unified School Dist.*, 82 Cal.App.4th 672, 681 (2000). "The Brown Act is intended to ensure the public's right to attend

[1] *See* Gov't. Code § 54960.1 (c)(1).

public agency meetings to facilitate public participation in all phases of local government decisionmaking." *Chaffee v. San Francisco Library Com'n*, 115 Cal.App.4th 461, 469 (2004).

Pursuant to the California Constitution, "people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, § 3 (b)(1).

The Board's failure to comply with open meeting laws violates the underpinnings of our society. Not only do the Board's actions violate the Brown Act and the Constitution, but they violate the civil rights laws that protect our democracy.

Unlawful Reliance on Government Code Section 54957

The Board has violated and continues to violate the Brown Act and the California Constitution by unlawfully holding discussions and making decisions in closed session pursuant to Government Code § 54957.

"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided." Gov. Code Section § 54953(a). "The legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding shall comply with all requirements of this chapter and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding." Cal. Gov. Code § 54953(b)(1).

However, there are limited exceptions that allow legislative bodies to have closed or executive sessions. Specifically, a legislative body can hold a closed session during a regular or special meeting "to consider the appointment, employment, evaluation of performance,

discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." Gov. Code, § 54957. However, both the California courts and the California Constitution require that the provisions of the Brown Act that allow closed sessions must be "narrowly construed." Cal. Const., Art. I, § 3(b)(2); *see also, e.g., Trancas Property Owners Assn. v. City of Malibu*, 138 Cal.App.4th 172, 184-87 (2006). Legislative bodies can also hold closed sessions with specific individuals "on matters posing a threat to the security of public buildings, a threat to the security of essential public services…or a threat to the public's right of access to public services or public facilities." Gov. Code, § 54957 (a). Lastly, the legislative body can only consider in closed session the matters covered in its public notice. S*hapiro v. San Diego City Council*, 96 Cal.App.4th 904, 916 (2002). When the legislative body reconvenes into open session, it has to disclose any "actions" taken during closed session. *Id*; Gov. Code, § 54957.1.

It is our understanding that the Board has held discussions regarding health and economic ramifications of COVID-19 as well as strategies to address COVID-19 in closed session in reliance on Cal. Gov. Code § 54957(a). The County's reliance on that narrow exception to open meeting laws is inappropriate and a violation of the Brown Act. While § 54957(a) allows local agencies to meet in closed session with specifically enumerated public officials - a list that does not include county public health officers or directors - on matters regarding threats to the security of public buildings, facilities, and services, discussions about COVID-19 are matters of great public interest and discussion that should be held in an open and transparent process.

Section 54957's text and legislative history demonstrate an intent to grant local agencies flexibility to address security concerns without disclosing vulnerabilities to potential malfeasants and encompasses only those circumstances where public dissemination of the matter under consideration poses a threat to security. The Court's discussion in *Los Angeles Times Commc'ns LLC v. S. California Reg'l Rail Auth.* (Aug. 30, 2019) is instructive on the limited applicability of § 54957(a). Amendments in 1971, the Court notes, were catalyzed by Alameda County supervisors who argued that the amendments were critical to protecting public facilities and access to public facilities from the impacts of demonstrations and protests. The amendments

were necessary to ensure that people planning on threatening public facilities, proponents argued, did not learn of the plans designed to obstruct their activities. The Court in *Los Angeles Times* went on to discuss the amendments in 2002 that following the September 11, 2001 attacks which added security consultants, security operations managers, and agency counsel to the list of individuals permitted to attend closed sessions, and to expand the matters warranting a closed session to include those posing "a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service" to assess the vulnerability of public facilities and services and take actions necessary to protect them. Proponents of the amendments, noted the Court, argued that such discussions in a public forum could facilitate dissemination of information to those hoping to take advantage of the vulnerabilities and lack of security.

The Court concluded that the concern underpinning each of the substantive amendments to section 54957 was the Legislature's recognition that the public dissemination of certain sensitive information could reveal vulnerabilities in the security of public buildings and critical infrastructures, and that exposing proposed plans to address such vulnerabilities could undermine efforts to secure them. Accordingly, Section 59457 only authorizes a local agency to hold a closed session item if *public disclosure* of the matters would *itself* pose a threat to the security of public buildings, essential public services, or the public's right of access to public services or public facilities.

While we agree strongly that COVID-19 poses a serious health concern to the people of Fresno County, it is not the type of physical or terrorist threat envisioned by Section 54597's exclusions.

We demand, therefore, that you immediately cease and desist illegally cloaking most COVID-19 policy discussions and updates under the closed session exception, and that you immediately release transcripts, audio recordings, and video recordings of closed session discussions that were held pursuant to Section 54597. Additionally, we demand copies of all

documents distributed and reviewed during those closed-door discussions conducted since March 17, 2020.

Failure to Allow for Telephonic and Teleconference Participation Options Fails to Comply with the Brown Act and Civil Rights Laws

We also believe that the Board is improperly limiting the ability of members of the public to make public comments at Board meetings. We believe these limitations are inconsistent with the Brown Act and the Governor's Executive Order N-29-20, which permitted government bodies certain flexibility in holding their meetings in response to COVID 19.

The intent of the Brown Act and Article 1, Section 3 of the Constitution is to ensure the ability for constituents to participate in the decisions that impact their lives. However, Fresno County's modus operandi of allowing remote public comment *only* through written comments that are not read or considered during board deliberations does not comply with the mandates or spirit of the Brown Act. The Brown Act (the "Act") requires government bodies to allow members of the public to comment on items on the Board's agenda and on any subject within the Board's jurisdiction. *See* Government Code § 54954.3. It is plain from the language and structure of the Brown Act and the uniform practice of local government bodies throughout the state before COVID-19 that government bodies must allow members of the public to address them orally during board meetings, not limited to submitting written comments or having those written comments read allowed by someone associated with the legislative body.

Specifically, Government Code section 54954.3 requires government bodies to allow "the public to ***directly address*** the legislative body" and authorizes regulations limiting the time for public comment. *Id.* (emphasis added). For example, the Act requires government bodies to double the time allotted for speakers who utilize a translator. *See Id*. These provisions would have no force if a government body may limit public comment solely to written submissions and afford no time for the public to address the board directly. The Brown Act also refers to members of the public making public comments as "speaker[s]." *See* § 54953.3(b)(1&2). Thus, it

is clear from these provisions of the Brown Act that refer to real-time public testimony and "speaker[s]" that government bodies must permit oral testimony, not limit testimony to written comments. Moreover, the California Court of Appeal has held that a local agency violates the Brown Act by prohibiting a person from speaking at the public comment period. *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1079-80 (2008).

As remote participation remains the only way for vulnerable individuals to protect their health and their lives during the pandemic, and the only way that residents can help stop community spread by refraining from participating in large group events, the Board's actions are at odds with State mandates designed to ensure that constituents can direct and inform their representatives.

Additionally, California's Civil Rights laws (Government Code Section 11135 *et seq*) states that

> No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

In the time of COVID-19, the County's failure to provide effective remote participation options has a disproportionate impact on residents more vulnerable to the impacts of COVID-19, including older residents and residents with underlying medical conditions that lead to more severe COVID symptoms. By failing to provide remote participation options that allow for vulnerable populations to engage via telephone or teleconference, the Board of Supervisors has, and continues to operate in a manner that denies access to participate effectively in Board meetings to older, medically vulnerable, and other at risk populations.

Failure to Allow for Telephonic Participation Options Fails to Protect People With Disabilities

The Board only allows for remote participation though delivery of written comments. This effectively excludes persons with certain disabilities including visual impairment and physical impairment that affects a person's mobility or dexterity. Government Code § 54953.2 states that all meetings of a legislative body of a local agency that are open and public shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132) (ADA), and the federal rules and regulations adopted in implementation thereof. Section 202 of the ADA states that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. Moreover, denial of equal opportunity to attend and make public comment violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, which require that State and local governments give people with disabilities an equal opportunity to benefit from all of a local government's programs, services, and activities including local government meetings. Unless these government bodies change course and allow for people to attend meetings and make public comment through telephone or teleconference technology, they will continue to violate the ADA and the Rehabilitation Act.

Additionally, as noted above, California's Civil Rights laws prohibit local agencies that receive funding from the state from denying access based on disability or medical condition. (Cal. Gov. Code. Section 11135). Accordingly, Board's practices related to remote participation in Board meetings violates California's Civil Rights law. Finally, restriction of public comment to written communications unfairly and illegally excludes constituents that are unable to write for reasons beyond physical disability.

Failure to Ensure the Ability to Participate in Board of Supervisors Meetings for Non-English Speakers

Numerous and varied mandates prohibit the exclusion of people who do not speak English from accessing government agencies and participating in government programs and services. There is no program or service more fundamental than public and open meetings.

The Board only allows remote participation in Board meetings through submission of written comments. As faulty and deficient as this mechanism is for all constituents, it presents even more of a barrier to participation for non-English speakers as there is no indication that the Board has a mechanism for translating or reading into the record the written comments that are not in English into a language they can understand. Additionally, the Board's failure to provide interpretation services for each public meeting undermines access to public decision-making.

Through the Dymally-Alatorre Bilingual Services Act, the Legislature declared that the effective maintenance and development of a free and democratic society depends on the right and ability of its citizens and residents to communicate with their government and the right and ability of the government to communicate with them. It specifically calls on the government agencies to ensure that all programs and services are accessible to non-English speakers. (Cal. Gov. Code 7290 *et seq.)*

Recent amendments to the Brown Act reinforce the rights of non-English speakers to participate fully in public agency meetings. Gov Code § 54954.3 (b)(2) states that 'when the legislative body of a local agency limits time for public comment, the legislative body of a local agency shall provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency.

Finally, as noted above, California's Civil Rights laws prohibit local agencies that receive funding from the state from denying access based on national origin or ethnic group. Cal. Gov. Code. §11135.

As currently administered, the Board's remote participation practices do not provide either adequate or equal access to non-English speakers and, as such, violate both the Bilingual Services Act and the Brown Act.

The Board's deficient and inadequate remote participation procedures violate several state and federal mandates. Accordingly, we demand that the County immediately institute telephonic and teleconferencing remote participation options that allow for all residents to participate, including those who do prefer to communicate in a language other than English and those with hearing impairment.

Executive Orders Do Not Absolve The Board of its Responsibilities as Outlined Above

Nothing in the various Executive Orders issued by Governor Newsom with respect to the current COVID-19 pandemic authorize the Board to eviscerate California's laws aimed at ensuring public and open access to decision-making or California's Civil Rights Laws. In fact, authorization to meet through teleconference does quite the opposite by encouraging and facilitating public engagement in ways that protect democracy and public health.

We look forward to your expeditious actions to address the deficiencies outline above. Please email or call with any questions you may have.

Sincerely,

Phoebe Seaton
Leadership Counsel for Justice and Accountability