AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Texas

To: Leander City Council

From: Brian Klosterboer and Adriana Piñon

Date: July 18, 2019

Re: Library Policies and Freedom of Speech

To Mayor Hill, Mayor Pro Tem Czernek, and City Council Members Pantalion-Parker, Stephenson, Shaw, Sederquist, and Cannon:

We write to express our concern that the proposed library policy changes that the Leander City Council is considering may violate the First Amendment of the United States Constitution. By creating selective requirements for using library facilities—and giving the Library Director sweeping discretion to cancel events and charge security costs based on controversial speech—the proposed policy changes will likely stifle free expression, severely limit free assembly, and prevent Leander residents from equal access to public facilities.

The First Amendment protects every person's right to free expression. Even when speech is unpopular or contentious, the government cannot choose to silence specific points of view. While local governments may regulate the time, place, and manner of speech, they cannot cut off public forums arbitrarily or burden specific speakers based on the content of their speech.[1] Municipalities also cannot require groups to pay security costs because their views are controversial or will potentially lead to protests. The Supreme Court specifically condemned this practice in *Forsyth County v. The Nationalist Movement*, finding that fees based on counter-protests amounted to a tax on controversial views. 505 U.S. 123, 134 (1992). The Fifth Circuit Court of Appeals, which presides over Texas, follows this principle and requires "narrow, objective, and definite standards" when security costs are billed to any event or use of public space. *See International Women's Day March Planning Committee v. City of San Antonio*, 619 F.3d 346, 365 (5th Cir. 2010) (noting that "[g]enerally, ordinances that grant officials discretion to impose or waive fees at will are unconstitutional").

The new policies that the City Council is considering would allow government officials to impose or waive fees at will and discriminate against specific viewpoints without any narrow, objective, or definite standards. For example, the Meeting Room Use Policy states that if any event "creates a disruption, becomes a source of contention or divisiveness . . . or is determined by the Library Director for any other reason to create an interference with the use of and access to the main Library," then the Library Director may *cancel* the event or require event organizers to *pay for* "all security precautions, including security, police or other emergency services." This

1 *See Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

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policy imposes a tax on views perceived to be controversial and also requires users of library meeting rooms to purchase liability insurance totaling $500,000, which the Library Director can waive at will. The Library Director can also "prohibit or revoke use of Library meeting rooms, if the event will ultimately disrupt the main Library usage *or for other reasons*." Under these policies, the Library Director has total discretion to cancel and tax public events based on the content of people's speech, and the Director's opinion about that speech, which is impermissible under the First Amendment.[2]

To the extent the City Council considers these new rules necessary to ensure that all library facilities remain safe and accessible to every Leander resident in light of recent protests, the proposed policy changes could have the opposite effect. By allowing the imposition of security costs on event organizers, the City Council inadvertently provides a mechanism for opposition groups to censor speech by inflicting monetary harm on organizers they dislike. For example, if someone believes that the Harry Potter books promote witchcraft, then that person could organize protests of the library's Harry Potter Week starting July 29th and force library patrons who enjoy Harry Potter to cover the costs of police. Or if someone is angry that a Christian book club is reading the Bible in a library meeting room, then that person could organize a rally to protest the book club while forcing the book club to pay the bill.[3] Such unintended consequences underscore the reason that freedom of speech must be protected evenhandedly. As the Supreme Court reminds us, "[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Healy v. James*, 408 U.S. 169, 188 (1972).

The City cannot impose penalties for harms that others cause; just like the City cannot stifle free expression just because someone else might express a contrary view. The City has an obligation to provide security for its residents, but it is also required to follow the Constitution and First Amendment. Because Leander residents have a right to use public facilities without regard to the content of their speech, the City should not impose a tax on unpopular views or give the Library Director unbridled discretion to cancel specific events.

Respectfully,

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[2] The ACLU of Louisiana was recently successful in enforcing these First Amendment principles by suing a city library that responded to public pressure by banning drag queen story time from its premises. *See* https://www.laaclu.org/en/press-releases/aclu-louisiana-files-lawsuit-challenging-public-librarys-ban-drag-queen-story-time

[3] Of course, whether to impose these costs rests on the Library Director's sole discretion but, as discussed, if they choose to selectively impose costs based on the content or viewpoint of the speech at issue, the Library Director engages in impermissible content and/or viewpoint discrimination that violates the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (The government may not "restrict expression because of its message, its ideas, its subject matter, or its content.").