

**VIA EMAIL**

Mayor Andrea Oakes  
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May 4, 2021

Re: Public Participation in Staunton City Council Meetings

Dear Mayor Oakes:

We are writing to express concerns about the Staunton City Council's recent decision to eliminate public participation in City Council meetings via telephone. Removing the only available avenue for remote participation during the ongoing pandemic raises questions about the City Council's compliance with federal laws prohibiting discrimination against individuals with disabilities. In addition, at least one City Council member has recently made comments suggesting that this change may have been motivated by a desire to stifle dissenting viewpoints in violation of the First Amendment. Accordingly, we request that you take immediate action to resolve these concerns by restoring the public's ability to participate remotely by telephone.

**Compliance with Federal Disability Law**

The Staunton City Council's decision to eliminate phone participation may impermissibly exclude citizens with disabilities from exercising their rights to equal participation in the legislative process in violation of federal law.<sup>1</sup> As you know, the COVID-19 pandemic has had a devastating impact in Virginia, including in Staunton where "at least 1 in 10 residents have been infected" and residents remain at "high risk of exposure."<sup>2</sup> The pandemic presents unique risks to people with preexisting health conditions and older citizens, who are at the highest risk for significant complications or death related to COVID-19.<sup>3</sup> For many such people, remote participation may be the only safe method of

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<sup>1</sup> Minutes of Staunton City Council Meeting 14–17 (Apr. 8, 2021), <https://www.ci.staunton.va.us/Home/Components/MeetingsManager/MeetingMinutes/ShowPrimaryDocument/?minutesID=514&isPub=True&includeTrash=False> (motions repealing Uncodified Emergency Ordinance Numbers 2020-04 (Mar. 24, 2020) and 2021-06 (Feb. 11, 2021) and adopting new "introductory remarks concerning Matters from the Public *without remarks made by telephone*") (emphasis added); Tara Todd, *Protesters say Staunton Council is silencing the public by ending their ability to call in during meetings*, NBC29 (Apr. 16, 2021), <https://www.whsv.com/2021/04/16/protesters-say-staunton-council-is-silencing-the-public-by-ending-their-ability-to-call-in-during-meetings/>.

<sup>2</sup> N.Y. Times, *Staunton, Virginia Covid Case and Exposure Risk Tracker*, <https://www.nytimes.com/interactive/2021/us/staunton-virginia-covid-cases.html> (last visited Apr. 28, 2021) (archived at <https://perma.cc/G8S3-MB9E>).

<sup>3</sup> Ctrs. for Disease Control & Prevention (CDC), *People at Increased Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last updated Apr. 20, 2021). A number of common medical conditions—including, for example, diabetes, cancer, and heart disease—place adults at increased risk of severe illness from COVID-19. CDC, *People with Certain Medical Conditions*, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-)

participating in City Council meetings,<sup>4</sup> and eliminating telephonic participation therefore excludes them from the legislative process.

Both Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act prohibit state or local governments from discriminating against individuals with disabilities by, among other things, excluding them from any “program,” “activity,” or “service[]” on the basis of disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 (1999). These terms are broad and encompass all operations of a local government. See 29 U.S.C. § 794(b); *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

Title II of the ADA requires that public entities, such as the Staunton City Council, make reasonable modifications to their policies, practices, and procedures to eliminate such discrimination.<sup>5</sup> 28 C.F.R. § 35.130(b)(7)(i). This duty includes the obligation to make reasonable modifications to mitigate the impact of COVID-19 on people with disabilities, *Silver v. City of Alexandria*, 470 F. Supp.3d 616, 622 (W.D. La. 2020),<sup>6</sup> as well as to accommodate participation in legislative activities. See, e.g., *Nat’l Ass’n of the Deaf v. Florida*, No. 18-12786, 2020 WL 6575040, at \*6 (11th Cir. Nov. 10, 2020) (applying Title II of the ADA to require captioning of legislative videos for deaf individuals). The “failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion.” *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

Section 504 of the Rehabilitation Act similarly prohibits discrimination on the basis of disability in programs that receive federal financial assistance. 29 U.S.C. § 794(a); see *Semenova v. Maryland Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017). The Staunton City Council has accepted \$200,000 of federal Coronavirus Aid Relief and Economic Security Act funding and used it to implement “significant technology improvements to the overall functioning of City Council meetings that will improve public access and engagement.”<sup>7</sup> The City Council therefore also must comply with Section 504.

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[precautions%2Fgroups-at-higher-risk.html](#) (last updated Apr. 29, 2021). Older adults are at greater risk of serious illness or death from COVID-19. CDC, Older Adults, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last updated Apr. 16, 2021).

<sup>4</sup> Minutes of Staunton City Council Meeting, *supra* note 1 (summarizing testimony by Dr. Laura Kornegay, Director of the Central Shenandoah Health District, that “working virtually should continue, because the area is not at herd immunity”).

<sup>5</sup> Public entities need not make such modifications if they “can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i). But that defense does not apply here, given that the City Council has been offering telephonic participation since April 2020. Minutes of Staunton City Council Meeting (Apr. 9, 2020), <https://www.ci.staunton.va.us/Home/Components/MeetingsManager/MeetingMinutes/ShowPrimaryDocument/?minutesID=364&isPub=True&includeTrash=False> (“Members of the public who wish to participate in Matters from the Public, at the appropriate time, may call (844) 854-2222.”).

<sup>6</sup> See also U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (“[T]he ADA requires reasonable accommodations for individuals with disabilities . . . during a pandemic.”).

<sup>7</sup> Staunton Provides Update on Technology Improvements to Rita S. Wilson Council Chambers and Caucus Room, <https://www.ci.staunton.va.us/Home/Components/News/News/1927/> (last updated Apr. 19, 2021) (archived at <https://perma.cc/8E2M-R6JK>) (improvements to enable “the public, Council members and staff” to operate “as hybrid or all virtual” include: “Audio improvements to integrate better with Zoom”; “In room video and presentation displays that can be integrated with Zoom”; “Audio stream improvements”; “Streaming video”; “Closed captioning”; “Integration of public comment workflow to provide more efficient call screening and handling”; “Smart board in the Caucus Room”).

## First Amendment Concerns

The City Council's decision to eliminate telephonic participation also raises substantial concerns under the First Amendment to the U.S Constitution.

As an initial matter, one City Council member recently suggested that the elimination of telephonic participation was based on a constitutionally impermissible desire to silence dissenting views. Specifically, two days after the City Council voted to end remote participation, Council member Steve Claffey explained that “the call in period at the end of the meetings will not” remain because of the perceived “constant negative views and personal attacks of a vocal few.”<sup>8</sup> However, it is well established that the First Amendment prohibits the government from “target[ing] . . . particular views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Therefore, “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale.” *Id.*

Moreover, because COVID-19 remains a threat, particularly to individuals with disabilities and senior citizens, the inability to participate remotely may impermissibly preclude people from exercising their core First Amendment rights to speak and petition their government for redress of grievances. *See* U.S. Const. amend. I; *see also* Va. Const. art. I, § 12. The Supreme Court has long recognized that “[t]he First Amendment affords the broadest protection to . . . political expression in order ‘to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The Court has also characterized “[t]he right of the people peaceably to assemble, for the purpose of petitioning Congress for a redress of grievances” as essential to “[t]he very idea of a government republican in form.” *United States v. Cruikshank*, 92 U.S. 542, 547 (1875). But by forcing citizens to choose between participating in City Council meetings and protecting their own health, the City Council has placed an unconstitutional restraint on the exercise of these First Amendment rights.

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All of Staunton's residents benefit from the participation of a diverse coalition of people in the legislative process, including individuals with disabilities, persons of all ages, and advocates with other health concerns. And federal law protects the rights of these citizens to participate. For these reasons, we call upon you to take prompt action to restore the public's ability to participate by phone in Staunton City Council meetings.

We welcome the opportunity to meet with you and discuss these issues further. Thank you for your attention to this matter.

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<sup>8</sup> Steve Claffey (@SteveClaffeyCityCouncil), Facebook (Apr. 10, 2021, 4:39 PM), <https://www.facebook.com/SteveClaffeyCityCouncil/posts/283079553272273>.

Sincerely,

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