July 5, 2017

The Honorable Kevin de León
President pro Tempore of the Senate
State Capitol, Room 205
Sacramento, CA 95814

Re: Opposition to SCR-38 (De León) - March 30, 2017 version

Dear Senator de León,

This is a formal letter of opposition to SCR-38 (de León).

The terms of SCR-38 would violate the California Constitution as amended by Proposition 54, and it is requested that the relevant portions of SCR-38 be changed.

There are four large issues with the current SCR-38 language.

1. **The California Constitution forbids the power to make policies or rules that restrict the exercise of a person's right to record meetings from being devolved by the Legislature onto individuals or committees.**

The proposed SCR- 38 language:

> (g) (1) The Senate Committee on Rules and the Assembly Committee on Rules each may adopt policies to further implement the foregoing rules for legislative meetings in the respective houses. The Joint Rules Committee may adopt policies to further implement the foregoing rules for joint legislative meetings.

is unconstitutional the Legislature cannot delegate to the committee the right to make policies that further implement the rules because the Constitution requires that restrictions on the exercise of a person's right to record be codified in rules adopted by concurrent resolution or statute, and (1) a "policy" is not a rule; and (2) such a "policy" would not have been adopted by a concurrent resolution or a statute.

In the proposed SCR-38 rule:

> (g) (2) The Senate Committee on Rules and the Assembly Committee on Rules, or persons designated as representatives of those committees, may grant exemptions from the foregoing rules in specific instances in the respective houses as circumstances warrant.

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the grant of exemptions is too broad, because there is no requirement that the application of these exemptions "as circumstances warrant," and therefore the actual application of the rules, will be "for the sole purpose of minimizing disruption of the proceedings," which is the only purpose the Constitution allows. For example, the exemptions would be used to discriminate between persons of different points of view, making some person's exercise of their right to record difficult by strict enforcement of rules, while making another person's especially easy or privileged by granting exemptions to those rules.

The full relevant constitutional language is (with italics added for emphasis):

> Article IV, Section 7(c) (1) Except as provided in paragraph (3), the proceedings of each house and the committees thereof shall be open and public. The right to attend open and public proceedings includes the right of any person to record by audio or video means any and all parts of the proceedings and to broadcast or otherwise transmit them; provided that the Legislature *may* adopt reasonable rules *pursuant to paragraph (5)* regulating the placement and use of the equipment for recording or broadcasting the proceedings *for the sole purpose of minimizing disruption of the proceedings*. Any aggrieved party shall have standing to challenge said rules in an action for declaratory and injunctive relief, and the Legislature shall have the burden of demonstrating that the rule is reasonable.
> …
> The Legislature *shall* implement this subdivision by concurrent resolution adopted by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by statute, and in the case of a closed session held pursuant to paragraph (3), shall prescribe that reasonable notice of the closed session and the purpose of the closed session shall be provided to the public. If there is a conflict between a concurrent resolution and statute, the last adopted or enacted shall prevail.

2. "Any person" not "any member of the public."

The proposed rules speak of ensuring the right of members of the public (which include a subset of members of the public who are accredited press representatives) "the opportunity to exercise their constitutional right to record and broadcast those meetings."

The actual language of the relevant section of the California Constitution does not, however, refer to "the public" or "members of the public." The Constitution states that ``The proceedings of each house and the committees thereof *shall be open and public* [emphasis added],'' but ``public'' is here an adjective, not a noun: the language does not create a class of individuals to be known as ``the public'' about which the Legislature can dispute who belongs to it and who does not. Indeed, the Constitutional language is not that the right to record and broadcast meetings belongs to ``the public,'' the Constitution explicitly grants it to "any person." The right to record legislative meetings explicitly belongs to persons with a right to attend whom the Legislature might choose not to consider to its class of "members of the public," including members of the Legislature themselves, members of the press not deemed "accredited" by the Legislature, and so on:

> … The right to attend open and public proceedings includes the right of *any person* to record by audio or video means any and all parts of the proceedings and to broadcast or otherwise transmit them; … California Constitution, Article IV, Section 7c (1)

Consequently, when the proposed rules state:

> (b) (1) In the Senate and Assembly Chambers, the opportunity to record on the Floor of the Chambers shall be provided only to press representatives accredited pursuant to Joint Rule 32.

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they unconstitutionally deny to other persons on the Floor their constitutional right to record the proceedings, including the members of the Legislature present. At a minimum, the rules should acknowledge that any person lawfully on the floor has the right to record.

3. Rules must be "for the sole purpose of minimizing disruption of the proceedings."

The Constitution provides strict limits on what rules may be adopted by the Legislature. The section of the Constitution already quoted in 7(c) (1) continues:

> provided that the Legislature may adopt reasonable rules pursuant to paragraph (5) regulating the placement and use of the equipment for recording or broadcasting the proceedings *for the sole purpose* of minimizing disruption of the proceedings. Article IV, Section 7c (1).

There are a number of instances in SCR-38 where rules are proposed "regulating the placement and use of the equipment" that clearly have other purposes than the *sole* permissible one of "minimizing disruption of the proceedings," and are therefore unconstitutional. For example:

> (2) The opportunity to record legislative meetings in the Senate and Assembly Chambers shall be provided to members of the public other than accredited press representatives in the public Galleries above the Senate and Assembly Floors, provided that the person recording shall be seated while recording and *shall use only a hand-held recording device*, unless *permission otherwise has been granted*. Recording devices shall not extend beyond the Gallery railing.

Whether a device in the Assembly or Senate galleries is hand-held or is supported by a tripod, or whether a device is light enough to be held for hours in one's hands or is not, is hardly something that disrupts the proceedings below. A restriction to hand-held devices only does restrict the quality of the video a person might which to make, including their ability to faithfully record what is going on below with an appropriate microphone or lens. The caveat that this restriction shall hold "unless permission otherwise has been granted" shows that the real purpose has nothing to do with minimizing disruption of the proceeding, because if the mere presence and operation of a device will disrupt a meeting, it would do so no matter who is its operator.

This is a clear bid that people favored by the Legislature shall have a wider choice of equipment than those who are not; and that is a purpose outside the sole purpose of minimizing disruption of the proceedings.
Another example of an unconstitutional restriction is:

> (c) (1) In committee hearing rooms, the opportunity to record legislative meetings shall be provided to members of the public other than accredited press representatives in the public seating area of the hearing room. *Members of the public other than accredited press representatives shall not record on the dais or in the witness testimony area of the hearing room.*

A meeting is not disrupted if a witness lays a recording device on the table before them, whether on the dais or in the witness testimony area. The operation of a studio camera does not change from disruptive to benign depending on who stands behind it.

It is important, too, that according to the Rules an "accredited" member of the press does not receive his accreditation from his or her newspaper, broadcast channel, or news program; it is granted by a specific organization whose status is at the control of the Legislature itself. Just because a reporter is from the New York Times doesn't mean the reporter will be deemed by the Legislature capable of managing a camera without disrupting proceedings as well as someone "accredited." In fact, this proposed rule just gives the Legislature the authority to allow certain members of the press

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better access to making recordings than members the Legislature does not favor. That has nothing to do with minimizing the disruption of the proceedings, and is constitutionally impermissible.

Additionally, SCR-38 states:

> (e) Recording equipment used by members of the public other than accredited press representatives shall not employ additional lighting of any kind. Recording equipment used by accredited press representatives on the Floors of the Senate and Assembly Chambers or in committee hearing rooms may employ additional lighting while recording if the lighting is not disruptive, but meetings shall be recorded without additional lighting when possible.

The Legislature may well experience that aggressive lighting glaring into their eyes disrupts their meetings. But the question has to be what lighting disrupts and what doesn't. To say that the same lighting disrupts when one person uses it, but doesn't when it is used by another, is clearly to make a distinction that has everything to do with some people having favored access; it has nothing to do with minimizing the disruption of a meeting.

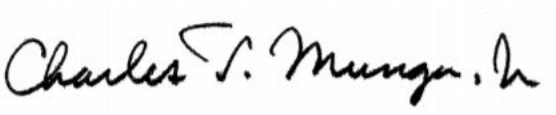
4. Rules are subject to court challenge.

The Constitution requires that Legislature implement restrictions on persons' right to record only by a concurrent resolution (with a 2/3 vote) or by statute. The Constitution subjects such rules to challenge in court:

> Any aggrieved party shall have standing to challenge said rules in an action for declaratory and injunctive relief, and the Legislature shall have the burden of demonstrating that the rule is reasonable. California Constitution, Article IV, Section 7(c).

Were the Legislature to adopt a rule not "for the sole purpose of minimizing disruption of the proceedings", an aggrieved party can go to court to have the rule struck. That is the action for "injunctive relief". If the application of the rules depends on unspecified "policies," as in the proposed rule (g) (1), or may be granted exemptions in unspecified "circumstances," as in the proposed rule (g) (2), or that are arguably not "for the sole purpose of minimizing disruption of the proceedings, an aggrieved party can go to court and ask the court to clarify what effect those policies or exemptions might have, or to clarify that the rules are not to be used for inadmissible purposes. That is the action for "declaratory" relief. Both types of suits can be brought in advance of any implementation of a rule, as well as after. Since there are potentially many aggrieved parties, to avoid a blizzard of suits, the Legislature should be careful to write rules that implement restrictions on persons' right to record that are indeed limited to the purpose of minimizing disruption of its proceedings, and whose application is not ambiguous.

Sincerely,



Dr. Charles T. Munger, Jr. The Honorable Sam Blakeslee

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