

KAUFMAN LEGAL GROUP

A PROFESSIONAL CORPORATION

May 15, 2023

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VIA EMAIL

Mr. Rich Miadich, Chair
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
E-Mail: CommAsst@fppc.ca.gov

**Re: Comment on FPPC Agenda Item 4.
Our File No.: JLH6217.001**

Dear Mr. Miadich:

We offer these comments on behalf of our client, Palo Alto City Council Member Julie Lythcott-Haims. Ms. Lythcott-Haims is the local official who is at issue in the *Winuk* Advice Letter (I-23-009) listed in Agenda Item 4. We respectfully request the Commission reconsider the advice provided by FPPC staff. Specifically, we request the Commission interpret the Honorarium laws and regulations in way that both preserves the purpose of the rules, but also recognizes that a bona-fide, longstanding business that does not do business with or receive income from those who have business before the City should be excluded from its purview.

The Legislative Digest of the 1995 bill that extended the Honorarium prohibition to local government officials explicitly states that the prohibition should only be extended to payments from those doing business in the official's jurisdiction. As stated in more detail below, this Legislative intent should be applied in the interpretation of several different FPPC Regulations to allow Ms. Lythcott-Haims to continue to both serve on the Palo Alto City Council and earn income through her business.

Julie Lythcott-Haims is an international and nationally prominent author, writer, thought leader, and educator. She holds degrees from Stanford University, Harvard Law School and a Master's Degree in Fine Arts (Writing) from the California College of the Arts. She is a former Dean at Stanford University. In 2013, she received her first contract for the development of a book with Henry Holt and Company ("Holt"), a division of Macmillan Publishers which is one of the "big six" book publishers in the United States. Throughout 2013-2014 she researched and drafted her first book.

In 2015 her first book, *How to Raise an Adult*, was published in the United States and internationally. The book provides child-rearing advice to parents based on Ms. Lythcott-Haims' experience as a Stanford Dean. This book quickly became very successful, reaching the *New*

York Times bestseller list. Contractually, Ms. Lythcott-Haims was (and is) required to cooperate with Holt to promote the book. As a result, she went on an initially unpaid tour to promote the book and help develop a strong reputation as a subject matter expert and for her presentation skills. She quickly became in high demand as a “parenting expert” who provides guidance to parents seeking to improve their parenting. As a result, she was paid to conduct 25 book talks and workshops to promote the book in between June and December 2015. This helped promote sales to the point where the book became a *New York Times* bestseller in November 2015. Based on these promotions and subsequent additional sales, Ms. Lythcott-Haims’ book exceeded her advance payments and, thus, resulted in her receiving additional compensation for the sales of her book in the form of royalty payments. These promotions and additional sales also provided other ancillary benefits that assisted with her career as an author, including being invited by the *New York Times* to review another author’s parenting book, for compensation.

In 2016, Ms. Lythcott-Haims was given a contract for two more books by Holt. Again, the contract required the promotion of the new books. Additionally, her first book was published in nearly a dozen additional countries. Demand for book promotion talks and workshops continued, and Ms. Lythcott-Haims conducted over 70 additional sessions across the United States and in several other countries. The sessions were (and are) largely conducted at high schools, where Ms. Lythcott-Haims interacts with parents regarding the subjects in her book. She also gives sessions to high school students in an assembly format and speaks with teachers and staff as part of their professional development activities. When she visits schools, her books are always featured and prominently available for sale. She additionally began a pro-bono practice where she offered unpaid sessions to select schools and other non-profit organizations. Due to her public appearances and other promotional activities such as being the subject of interviews on podcasts, she continued to receive foreign and domestic royalties from her first book. Also, during 2016, she completed her Masters of Fine Arts in Writing from California College of the Arts. Her Master’s Thesis for this degree served as the subject of her second published book.

Ms. Lythcott-Haims published her second book in 2017, *Real American: A Memoir*. She continued to receive royalties from her first book. She also continued promotion of the first book and began promotion of the second book that year. She conducted 56 promotional book talks and workshops on the parenting topics in the first book, over a quarter of which are unpaid, and 3 paid promotional book talks or workshops on the topic of race, the subject of her second book.

In 2018, Ms. Lythcott-Haims gave 54 promotional book talks and workshops regarding her two published books. Over a quarter of these promotional book talks and workshops were unpaid. She also continued to receive foreign and domestic royalties from sales of her first book. As part of her continuing book writing and publishing work, she wrote a book review for the *London Times* Literary Supplement and was awarded the Josephine Miles Literary Award for her second book by PEN Oakland.

Ms. Lythcott-Haims began to develop, research and write her third book in 2019 and continued doing so in 2020, while still receiving additional royalties for sales of her previously published

works. She also continued to conduct promotional book talks and workshops – conducting 61 in 2019 (roughly a third of which were unpaid) and 58 in 2020 (roughly a quarter of which were unpaid). In 2020, many of the promotional book talks and workshops were conducted online due to the pandemic. The book talks and workshops were specifically on the topics covered in her published works: parenting, race relations or sometimes both. Her work as an author during this period also included writing another book review for the *New York Times*, writing a book review for the *Washington Post*, and publishing a foreword in the writing guide *Writing Memoir*.

In 2021, Ms. Lythcott-Haims published her third book, *Your Turn: How to Be an Adult*. In support of the promotion of her book, and in furtherance of her contractual obligations to cooperate with Holt in the promotion of her books, she conducted 52 promotional workshops, almost entirely on Zoom (19% of the events were pro bono). Each of the events promoted sales of her published works. Shortly after the book's publication she was interviewed on the prestigious National Public Radio Show "Fresh Air" about her personal life journey, with a focus on both her second and third books, resulting in substantial sales of both books. She continued throughout the year to receive foreign and domestic royalties for book sales. Additionally, she entered into a contractor (paid) relationship with Meta to write four articles per month, and again was paid to review a book for the *New York Times* and the *Washington Post*, respectively. She also wrote a forward for a book on parenting, entitled *Raising Kids*, and entered into a (paid) contract with TED to develop an online course based on her book *Your Turn: How to Be an Adult*. Last, she also served as a teacher at BayPath University for a semester-long online course on writing a memoir.

During 2021 she also established a California corporation, Love Over Time LLC ("LLC"). The purpose of the LLC was to limit her liability for her public presentations and online writing. To further this purpose, the LLC obtained Errors and Omissions Liability Insurance. As you may be aware, this insurance is used generally by authors to protect them from liability for their public appearances and published works. Ms. Lythcott-Haims, as reflected in her LLC, considers herself a writer and author, and all activities, paid or otherwise, are done in furtherance of this business activity.

Over the past year, Ms. Lythcott-Haims conducted 37 promotional book talks and workshops, some of which were in-person and some of which were online. Approximately 15% of these book talks and workshops were uncompensated. In 2022, her LLC also received foreign and domestic royalties from books, income from weekly writing for Meta, income from writing a book review for the *Washington Post* and teaching an online course. She also spent a significant portion of her time developing ideas for her fourth book. In late 2022, actor Halle Berry took to social media of her own accord to promote Ms. Lythcott-Haims' first book, *How to Raise an Adult*, which resulted in substantial book sales.

Over the past seven years, Ms. Lythcott-Haims has, through her literary talent and hard work, developed herself into a national and international literary figure. Through her experience and her published works, she has become a consultant and expert on topics related to parenting, race, identity, and youth thriving. All the activities in which she engages are for the purpose of

developing and promoting her literary career, including: developing, researching and writing her books; promoting her books through book talks and workshops; writing articles; writing book reviews; mentoring other writers, and; teaching. In 2022, Ms. Lythcott-Haims spent well less than fifty percent of her time promoting her books through book talks and workshops, whether paid or unpaid. Over the same time period, more than fifty percent of the income to her LLC came from paid book talks and workshops. Other income includes advances from her publisher for book development, royalty payments on her first book, both foreign and domestic, contractual payments for digital articles, and income from other activities related to her literary business, such as teaching and literary criticism.

Ms. Lythcott-Haims was elected to the Palo Alto City Council in the November 2022 statewide general election. City Council members only receive a small salary as compensation for serving on the Council. Thus, Ms. Lythcott-Haims must continue to earn income from her literary endeavors as a means of support for her and her family. However, Ms. Lythcott-Haims will not accept any income from any business, person or entity either located in or doing business in the City of Palo Alto. In fact, this has already been her long-standing practice. Last, her books, promotional book talks and workshops, articles and other compensated activities are based on topics completely unrelated to her service as a member of the City Council.

The Political Reform Act (“The Act”) generally prohibits the receipt of “honorarium” by public officials. An honorarium is defined in Government Code Section 89501 as “any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.” However, the definition of an honorarium does not include “(e)arned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches.”

As the *Winuk* Advice Letter acknowledges, Ms. Lythcott-Haims’ business is unquestionably a bona fide business. As articulated previously, Ms. Lythcott-Haims has developed her literary business, with all its components, over the past seven years, using each component to increase book sales and her literary profile to secure the publication of additional books, which is the predominant activity of the business.

Earned Income/'Customarily Provided' Exception

FPPC Regulations have further defined the term “honorarium,” and the exception for “earned income.” Specifically, FPPC Regulation 18932 states that "honorarium" does not include income earned for personal services if:

- (1) The services are provided in connection with an individual's business or the individual's practice of or employment in a bona fide business, trade, or profession; and

(2) The services are customarily provided in connection with the business, trade, or profession.

The earned income exception has been considered in several FPPC advice letters. In the *Halderman* Advice Letter (I-08-073), the FPPC found that services that are “customarily provided” in connection with a bona fide business are earned income and, therefore, not subject to the honorarium ban. In the *Donald* Advice Letter (A-00-276), the FPPC found that “the determination of whether any particular speech given or article published is “customarily provided” in connection with your bona fide profession must be made on a case-by-case basis. The *Donald* Advice Letter found that a speech given or article published relating to the areas of medicine in which a doctor practiced or conducted research was earned income not subject to the honorarium ban.

Other FPPC Advice Letters have found the “customarily provided” test met where: payments were received for conducting church activities and speaking as a licensed minister at youth camps, couples retreats, weddings and funerals (*Boatwright* Advice Letter, No. A-93-323); payments received for speeches where a public official owns a business which produces, markets, and distributes educational materials, and occasionally is asked to deliver public speeches on the subjects covered by the materials sold by the business (*Clegg* Advice Letter, No. A-95-185); payments received for lectures given by a physician to health care professionals related to areas of medicine in which he practices and does research (*Phillips* Advice Letter, No. A-91-137) and; payments received by a licensed architect for a speaking engagement at a trade convention regarding architectural services (*Downey* Advice Letter, No. A-13-152).

Here, Ms. Lythcott-Haims’ bona fide business is that of writing, selling and promoting her books. Her books are all non-fiction and have led to her development as an expert in the subjects of parenting, overcoming the effects of racism, identity formation and youth thriving. The book talks and promotional workshops she conducts are specifically related to the contents of her published works. Each book talk and workshop features opportunities to purchase her books. The promotion of her works is specifically referenced in her contracts with her publisher. This is standard for the publishing industry. Therefore, such services are “customarily” provided by authors and should be included within the “earned income” exception.

The FPPC staff in the *Winuk* Advice Letter did not adopt this interpretation and excluded Ms. Lythcott-Haims’ public appearances from the “customarily provided” test. Although the Advice Letters issued by the FPPC have not provided clear guidance on this issue, we believe her work, providing book talks and other promotional workshops in support of her book writing business, should be included within this exception. This is particularly true where, as here, payment for the work comes exclusively from persons and entities who do not do business in the City of Palo Alto.

Definition of 'Speech Given'

The FPPC Regulations also define the term “speech given.” Specifically, Regulation 18931.1 defines “speech given” as a public address, oration, or other form of oral presentation, and includes participation in a panel, seminar, or debate.” Ms. Lythcott-Haims’ book talks and promotional workshops should not fall within this definition, given previous FPPC Advice Letters. Given the nature of her work and factual circumstances, specifically that her integrated business activities are all in support of her primary activity, publishing books, her book talks and promotional workshops should not be included within the definition of “speech given.” This is particularly true as the topics of her oral presentations (parenting, race/identity, youth thriving) are entirely unrelated to the policies, priorities, personnel, procedures, and protocols inherent in running a municipality such as the City of Palo Alto and, since the earned income received is all from outside of the City’s jurisdiction, is not even reportable income on her Statement of Economic Interests (“SEI”).

Excluding Ms. Lythcott-Haims’ work from the definition of the term “speech given” is consistent with FPPC Advice Letters which have addressed the interpretation of the term. The FPPC has advised that the general, dictionary definition of "speech," "any spoken expression or communication," is too broad in relation to the statutory scheme of the honoraria limits. (*Ashburn* Advice Letter No.A-07-119) The *Ashburn* letter confirmed the FPPC’s prior position in the *Tribe* Advice Letter (No, A-95-310), where an FPPC Commissioner hosting a radio show on a topic unrelated to his FPPC position was held not to be a speech.

Further, in the *Kahn* Advice Letter, (No. A-99-296) the FPPC advised that, “while the definition of "speech" in Regulation 18931.1 is broad, not all public speaking is governed by that definition.” The FPPC found that “earned income is based on the market value of services rendered and, therefore, differs from an honorarium which reflects values associated with the status of the speaker. Specifically, we have recognized that compensation in exchange for instructional presentations and training activities offered through a bona fide business and in an area of one's established expertise is earned income.” In *Kahn*, the FPPC found that a candidate who had a long-term, existing, bona fide business before running for office, whose business was serving as a seminar leader based on specialized expertise, was not engaged in giving speeches under the honorarium definitions. The payments for the seminars were characterized in the letter as “income earned as compensation for services of commensurate value, not for a "speech" within the meaning of Regulation 18931.1.” The same finding was made in the FPPC’s *Leach* Advice Letter, where the interpretation was applied to an incumbent public official. (*Leach* Advice Letter, No. A-97-160), The *Leach* advice letter further stated that the elected official could receive compensation only for presentations on subjects in which she had offered compensated instruction prior to election and before becoming subject to provisions of the Act.

Similar to the facts at issue here, this exception to the definition of “speech given” was even extended to a book author and public official who planned to give book presentations on the subject of his published book (*Ricci* Advice Letter, No. A-97-225.) This exception was again

restricted to presentations on topics related to the bona fide business operated by the public official.

Here, Ms. Lythcott-Haims has a longstanding, bona fide business that predates her public service. The payments she received for her book talks and workshops are based on the specialized expertise she has developed in the course of her extensive research and publication of three books. These book talks and workshops are completely unrelated to her service on the Palo Alto City Council and do not in any way trigger the potential harms against which the Honorarium ban seeks to protect. Thus, her book talks and workshops/seminars should not be considered “speeches” and, therefore, the making of “speeches” should not be considered the predominant activity of her business and should not be prohibited under the Honorarium rules.

Relevant Jurisdiction

Last, the Honorarium statute was never intended by the Legislature to include Honorarium payments received from those who do not do business in the public official’s jurisdiction. The honorarium prohibition was made applicable to local government officials in 1995 through the passage and enactment of SB 701. In the Digest for the bill, the Legislature found specifically that “This bill would reorganize the gift limitation and honoraria prohibition provisions of the act so that the rules currently applicable to state officials and candidates are made equally applicable to local officials and candidates, meaning that these provisions will only apply to local officials and candidates if a gift or honorarium received by the official or candidate is required to be reported on his or her statement of economic interests.” As you are aware, current rules related to SEIs do not require the reporting of income or other financial interests, including gifts of travel, from entities who do not do business within the relevant jurisdiction.

Since Ms. Lythcott-Haims does not accept payment from anyone who does business in the City of Palo Alto, interpreting the Honorarium rules consistent with Legislative intent would allow her, and others similarly situated, to continue to serve in public office while earning income from their bona fide businesses. Since the income received is not from any person or entity doing business in the City of Palo Alto, there is no risk of the harms the Honorarium rules seek to prevent.

We request the Commission adopt these statutory and regulatory interpretations and modify the *Winuk* Advice Letter to place Ms. Lythcott-Haims’ business activities outside the purview of the Honorarium rules found in Government Code Section 89501.

Sincerely,

Gary S. Winuk

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