

November 2, 2018

VIA EMAIL AND FIRST CLASS MAIL

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**Re: Complaint Regarding Benicia's Candidate Forum**

Dear Ms. McLaughlin:

Working Families for a Strong Benicia submits this letter to formally protest the City government's attempt to manipulate the political debate in the City through a taxpayer-funded and government-controlled campaign event scheduled for November 3 that has been styled as a "Candidate's Forum." This Forum is to be held during a meeting of the City's Open Government Commission, broadcast on the City's television station, and disseminated at taxpayer expense on public television stations. The city's strict regulation of who may speak and what they may ask, its reservation of the right to select and change the questions asked, and its limitations on the candidate's answers violate citizens' and the candidates' right to free speech guaranteed by the California and Federal constitutions.

**The Forum**

The City government has dictated that the only topic the public and candidates can discuss with one another during this public political discussion are "last minute hit pieces," for the sole purpose of "allow[ing] candidates the opportunity to respond to inflammatory statements and misinformation." Benicia Mun. Code § 1.42.110. The City's Staff Report on the agenda for last night's city council meeting also characterizes the Forum's scope of permissible speech by stating it is "not a debate of issues" but rather "an opportunity to address last minute attacks." Staff Report-Candidates Forum.<sup>1</sup> The City has also affirmed that "Only questions that deal with the purpose of this forum will be addressed." Staff Report

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<sup>1</sup> Available at [https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/260363/Staff\\_Report\\_-\\_Candidates\\_Forum.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/260363/Staff_Report_-_Candidates_Forum.pdf)

Attach. 2 (emphasis in original). Finally, the government has further directed the candidates “to not make personal comments about other candidates especially of a negative nature.” *Id.*

These vaguely and arbitrarily defined speech limits, and the other Forum rules described below, suggest the Forum is nothing more than a taxpayer-funded platform to boost the candidacy of a single candidate favored by the current Mayor.

To make matters worse, the government has decided that candidates will only be asked and permitted to answer questions screened and chosen by two appointed government officials of the City’s Open Government Commission. Benicia Mun. Code § 1.42.110. The City further determined that its agents may modify the questions asked and, despite the ordinance stating that each candidate will respond to the ads criticizing them, each question may be asked of all candidates. Staff Report Attach. 2.

Beyond the obvious First Amendment questions, it would seem this process of both retaining the ability to screen and revise any questions submitted is a further attempt to orchestrate a process that allows a chosen candidate to take advantage of a controlled environment.

Moreover, the only persons permitted to ask questions at this public forum are “residents of, and nonprofit organizations and business entities located in the city of Benicia.” Staff Report Attach. 2 (“Format” document). The Forum’s process allows for a voice for business owners, but not the thousands of people who work in Benicia.

### **Constitutional and Statutory Violations**

The First Amendment prohibits laws “abridging the freedom of speech.” U. S. Const., Amdt. 1.

[A] government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

*Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (internal quotations and citations omitted). Further, a law such as Benicia’s ordinance “that is content based on its face is subject to strict scrutiny regardless of the

government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228. "[I]t is well established that '[t]he *First Amendment's* hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 2230 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 100 S.Ct. 2326 (1980)). And "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* (quoting *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994)).

The City's ordinance and announcements restricting the public and candidates' permissible political speech at the Forum to so-called "last minute hit pieces," "inflammatory statements," "misinformation," and "attacks"—but not "a debate of issues"—are an unconstitutional content-based and viewpoint-discriminating government limitation on political speech at a public forum. The public's and the candidates' "speech on matters of public concern" at the Forum outside the vague and nonsensical boundaries the City has drawn "fall within the core of First Amendment protection." *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 600 (2008). To empower government censors to use the City's vague and subjective terms to control citizen and candidate speech at a government-sponsored public political forum days before the election is an unconstitutional violation of the freedom of speech guaranteed by the California and U.S. constitutions.

The City's reservation for itself of the power to screen and change the public's questions, and the persons to whom they are directed, and its impossibly vague directions to candidates about how they may speak of one another are further government infringements on the core First Amendment rights of the public and the candidates.

The censoring of any speech by persons other than "residents of, and nonprofit organizations and business entities located in the city of Benicia" is a second potential violation of the California and U.S. constitutions.

That this campaign subsidy for deflecting public criticism will be accomplished by hijacking the Open Government Commission, an agency created to help the public monitor and criticize its officials, only adds to gravity of the violations. And the apparent threat to rights of the public and the candidates is heightened by the fact that the appointed city officials tasked with policing political speech at the Forum certainly know that the City's Mayor and Vice-Mayor have endorsed one of the candidates in the debate in the hopes of cementing their own political agenda, while

aggressively trying to demonize others for their support of a different candidate.

The expenditure of taxpayer funds for the Forum may also be a violation of California Government Code 85300. California Government Code section 85300 prohibits public officials from spending government funds to help elect candidates—and prohibits candidates from receiving such support. Through the Forum, Benicia's elected officials have orchestrated a scheme that wastes taxpayer funds, potentially in violation of section 85300, by paying for a televised event with the express and focused purpose of helping candidates respond to public criticism. This substitutes government resources for campaign funds to pay for quintessential campaign activity—responding to criticism received on the campaign trail—and thus constitutes an in-kind contribution to the candidates and interference by the City government itself in the election. By pursuing this course the City again has its ordinance on a collision course with the Political Reform Act which could result in another finding against the City.

### **Demand**

For the foregoing reasons, Working Families for a Strong Benicia urges the City to cancel this ill-conceived use of government power to control the public's and the candidates' political discourse and use of taxpayer funds to subsidize a hand-picked candidate's campaign. Failure to do so may subject the City to the risk of costly litigation by those whose rights the City will trample. Because the candidates invited to the debate also have the power to stop this debacle if they unanimously agree to cancel the Forum, we have copied them on this letter and urge them to exercise that right so as to protect the City they would serve from costly and avoidable litigation.

Sincerely,



Jason D. Kaune



Michael A. Columbo