

1 Jamie L. Lucia (SBN 246163)  
jlucia@steptoe.com  
2 Amanda C. Schwartz (SBN 307522)  
aschwartz@steptoe.com  
3 **STEPTOE & JOHNSON LLP**  
4 1 Market Street  
Spear Tower, Suite 3900  
5 San Francisco, CA 94105  
Telephone: (415) 365-6700  
6 Facsimile: (415) 365-6678

7 Michael Dockterman (admitted *pro hac vice*)  
mdockterman@steptoe.com  
8 **STEPTOE & JOHNSON LLP**  
9 227 West Monroe Street, Suite 4700  
Chicago, IL 60606  
10 Telephone: (312) 577-1300

11 [Additional counsel listed on signature page]  
12 *Attorneys for Plaintiff*

13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **OAKLAND DIVISION**

16 LEAGUE OF WOMEN VOTERS OF  
CUPERTINO-SUNNYVALE,

17 Plaintiffs,

18 v.

19 CITY OF CUPERTINO, et al.

20 Defendants.  
21  
22  
23  
24  
25  
26  
27  
28

Case No.: 4:22-cv-04189-JSW

**PLAINTIFF’S OPPOSITION TO  
DEFENDANTS’ MOTION TO DISMISS**

Date: December 2, 2022

Time: 9:00 a.m.

Ctrm: 5

Judge: Honorable Jeffrey S. White

Action Filed: July 19, 2022

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INTRODUCTION..... 1

STATEMENT OF ISSUES TO BE DECIDED..... 2

FACTUAL BACKGROUND ..... 2

I. League of Women Voters of Cupertino-Sunnyvale ..... 2

II. Cupertino Ordinance Number 21-222 ..... 3

LEGAL STANDARD ..... 4

ARGUMENT ..... 5

I. LWVCS HAS ADEQUATELY PLED STANDING TO CHALLENGE CUPERTINO’S LOBBYING ORDINANCE..... 5

II. THE ORDINANCE IS SUBSTANTIALLY OVERBROAD IN ITS RESTRICTION OF FIRST AMENDMENT ACTIVITY. .... 7

A. The Ordinance’s Overbroad Text Contains Content- And Speaker-Based Restrictions on Political Speech, A Protected First Amendment Activity..... 8

1. The Ordinance’s sweep creates a deterrent effect on legitimate expression that is both real and substantial. .... 10

2. The Ordinance has restrained and altered the Cupertino Matters publisher’s protected First Amendment activity. .... 11

3. The Ordinance’s overbreadth would chill the free expression of other speakers who are not engaged in lobbying under a traditional definition..... 12

B. The Ordinance Is Not Readily Susceptible to A Narrowing Construction..... 14

III. CUPERTINO’S ARTICULATED INTENT BEHIND ENFORCEMENT DOES NOT CURE THE FAILURE TO DRAFT A CONSTITUTIONALLY VALID ORDINANCE .. 15

CONCLUSION ..... 15

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

1

2

3 *Arizona Right to Life Pol. Action Comm. v. Bayless,*

4 320 F.3d 1002 (9th Cir. 2003).....6

5 *Ashcroft v. Iqbal,*

6 556 U.S. 662 (2009) .....4, 10

7 *Babbitt v. United Farm Workers Nat. Union,*

8 442 U.S. 289 (1979) .....5

9 *Bell Atl. Corp. v. Twombly,*

10 550 U.S. 544 (2007) .....4

11 *Bland v. Fessler,*

12 88 F.3d 729 (9th Cir. 1996).....6

13 *Broadrick v. Oklahoma,*

14 413 U.S. 601 (1973) .....6, 12

15 *Buckley v. Valeo,*

16 424 U.S. 1 (1976) .....12, 14

17 *Citizens United v. FEC,*

18 558 U.S. 310 (2010) .....5

19 *Coates v. City of Cincinnati,*

20 402 U.S. 611 (1971) .....12

21 *Dombrowski v. Pfister,*

22 380 U.S. 479 (1965) .....15

23 *Erznoznik v. City of Jacksonville,*

24 422 U.S. 205 (1975) .....10, 14

25 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,*

26 528 U.S. 167 (2000) .....6

27 *Glendale Assocs., Ltd. v. NLRB,*

28 347 F.3d 1145 (9th Cir. 2003).....7

*Hinds Invs., L.P. v. Angioli,*

654 F.3d 846 (9th Cir. 2011).....4

*Kwan v. SanMedica Int’l,*

854 F.3d 1088 (9th Cir. 2017).....4

*Lane v. Franks,*

573 U.S. 228 (2014) .....11

1 *Lujan v. Defs. of Wildlife*,  
 2 504 U.S. 555 (1992) ..... 5

3 *Nat’l Council of La Raza v. Cegavske*,  
 4 800 F.3d 1032 (9th Cir. 2015)..... 4

5 *New York v. Ferber*,  
 6 458 U.S. 747 (1982) ..... 6-7

7 *Pierce v. Jacobsen*,  
 8 44 F.4th 853 (9th Cir. 2022)..... 4

9 *Police Dept. of City of Chicago v. Mosley*,  
 10 408 U.S. 92 (1972) ..... 7

11 *Reed v. Town of Gilbert, Ariz.*,  
 12 576 U.S. 155 (2015) ..... 9

13 *Steffel v. Thompson*,  
 14 415 U.S. 452 (1974) ..... 6, 11

15 *Stenberg v. Carhart*,  
 16 530 U.S. 914 (2000) ..... 12

17 *Turner Broad. Sys., Inc. v. F.C.C.*,  
 18 512 U.S. 622 (1994) ..... 10

19 *U.S. v. Stevens*,  
 20 559 U.S. 460 (2010) ..... 8, 10

21 *U.S. v. Williams*,  
 22 553 U.S. 285 (2008) ..... 8, 10

23 *Virginia v. Am. Booksellers Ass’n, Inc.*,  
 24 484 U.S. 383 (1988) ..... 6

25 *Virginia v. Black*,  
 26 538 U.S. 343 (2003) ..... 8

27 *Washington State Grange v. Washington State Republican Party*,  
 28 552 U.S. 442 (2008) ..... 8, 10

*Watchtower Bible and Tract Socy. of New York, Inc. v. Village of Stratton*  
 536 U.S. 150 (2002) ..... 8

**STATE CASES**

*Citizens for Responsible Behavior v. Superior Court*,  
 1 Cal.App.4th 1013 (1991)..... 6

1 *Robins v. Pruneyard Shopping Ctr.*,  
2 23 Cal.3d 899 (1979), *aff'd*, 447 U.S. 74 (1980) ..... 7

3 *Summit Bank v. Rogers*,  
4 206 Cal.App.4th 669 (2012)..... 5

4 **FEDERAL STATUTES**

5 26 U.S.C. § 501 ..... *passim*

6 **OTHER AUTHORITIES**

7 Cupertino Municipal Code § 2.100, et. al. .... *passim*

8 F.R.C.P. 12(b)(1)..... 4

9 F.R.C.P. 12(b)(6)..... 4

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

1 League of Women Voters of Cupertino-Sunnyvale (“LWVCS” or the “League”) brought  
2 this action against Defendants City of Cupertino, California, (the “City”), Darcy Paul, Diane  
3 Thompson, Kirsten Squarcia, Chris Jensen, Liang Chao, Kitty Moore, Hung Wei, and Jon Willey’s  
4 (collectively with the City referred to as “Cupertino”) to vindicate the rights of its members and its  
5 donors under the First Amendment to the United States Constitution and Article 1 of the California  
6 Constitution. Cupertino enacted a dangerously overbroad lobbying disclosure ordinance that  
7 imposes an annual fee and extensive disclosure requirements on political speech from people who  
8 attempt to influence legislation or administrative action by speaking to their councilmember or  
9 elected city official. On its face, Ordinance Number 21-222 even subjects nonprofit groups,  
10 including LWVCS, no matter how nonpartisan or apolitical, to onerous, invasive reporting and  
11 disclosure requirements that fail constitutional scrutiny.

12 Cupertino turns the notion of transparency on its head: the electorate is entitled to  
13 transparency in government, but government is not entitled to make citizens lay bare their private  
14 lives as a condition of addressing political bodies. This Ordinance is an overbroad speaker-based,  
15 content-based regulation that chills protected First Amendment expression, subjecting it to strict  
16 scrutiny: Cupertino must show that the Ordinance is narrowly tailored to further a compelling  
17 government interest justifying its burdensome registration and reporting requirements. Cupertino  
18 cannot meet this burden because the Ordinance is not, as drafted, narrowly tailored to meet its  
19 interests of “impos[ing] registration and disclosure requirements on those engaged in lobby efforts  
20 to influence the decisions of City policy maker for [c]ompensation.” Instead, the Ordinance  
21 encompasses a wide breadth of organizations whose members or employees communicate about  
22 local political or other municipal matters in *any* way that affects the decision-making of a local  
23 official, even if those members are speaking in their *individual* capacity. Contrary to Cupertino’s  
24 gloss, the operative terms do not require compensation for conduct to be defined as “lobbying” or  
25 for an individual to be defined as a “lobbyist.” Had Cupertino passed an ordinance that said that on  
26 its face, this litigation would not have been necessary.

1 A facially overbroad ordinance has a chilling effect on political speech, and this Ordinance  
 2 has had that effect on LWVCS and its members, deterring them from exercising their protected  
 3 rights to assemble, to engage in free speech and to petition the government. The manner in which  
 4 Cupertino has chosen to enforce the Ordinance does not cure its chilling effect.<sup>1</sup> The Ordinance  
 5 must be invalidated because its possible application to legitimate expression is both real and  
 6 substantial, and it is not readily subject to a narrowing construction by the state courts.

7 As Cupertino hammers home in its brief, lobbyist registration requirements across the  
 8 country have been upheld as constitutional. The League agrees that Cupertino is entitled to enact a  
 9 constitutionally sound lobbyist registration requirement of its own. Ordinance Number 21-222,  
 10 however, is not narrowly tailored; it fails strict scrutiny as it is drafted and must be re-written.

#### 11 **STATEMENT OF ISSUES TO BE DECIDED**

- 12 1. Whether LWVCS's factual allegations that the Ordinance's onerous and unnecessary  
 13 burdens deter the League and its members from exercising their protected rights to engage  
 14 in free speech satisfies LWVCS's burden to demonstrate standing.
- 15 2. Whether LWVCS's allegations about the Ordinance's deterrent effect on legitimate political  
 16 expression constitute a valid facial overbreadth challenge to the Ordinance.

#### 17 **FACTUAL BACKGROUND**

##### 18 **I. League of Women Voters of Cupertino-Sunnyvale**

19 LWVCS is a local chapter of the nonpartisan League of Women Voters of the United States  
 20 ("LWVUS"). One of its primary goals is to ensure opportunities for effective and inclusive voter  
 21 participation in government decision-making, often through advocacy for or against particular laws  
 22 or policies. (ECF 1 at ¶¶ 29, 31). It sponsors candidate forums and debates, hosts programs to  
 23 educate voters, and distributes educational election materials. (*Id.*). Although LWVCS advocates  
 24 on vital issues of concern to its members and the public, it remains a nonpartisan organization. (*Id.*  
 25 at ¶ 30). The League has approximately 51 members in Cupertino who research and present  
 26 unbiased information about candidates, the voting process, and voting propositions. (*Id.* at ¶ 31).

27 LWVCS is a nonprofit public benefit corporation registered under 26 U.S.C. § 501(c)(4).

28 <sup>1</sup> While the prior City Attorney declined to enforce the Ordinance because he knew that it was  
 unconstitutional, there is no guarantee that Cupertino will continue to not enforce the Ordinance.

(ECF 1 at ¶ 21). Section 501(c)(4) exempts LWVCS from federal income taxation. LWVCS operates not only as its own § 501(c)(4) public benefit corporation, but it works with the LWVUS “Education Fund,” a § 501(c)(3) organization. (ECF 1 at ¶¶ 29–33). The Education Fund provides financial support for certain activities carried out by the LWVUS and its local affiliate chapters, including LWVCS. (*Id.* at ¶¶ 58–63). Individuals wishing to support LWVUS donate to both § 501(c) corporations, and individuals’ donations to the § 501(c)(3) organization are tax deductible.

## **II. Cupertino Ordinance Number 21-222**

On July 1, 2021, Cupertino Ordinance Number 21-2222 (the “Ordinance”) went into effect. (ECF 1 at ¶ 36; Cupertino Municipal Code (“CMC”) Chapter 2.100). The Ordinance requires all “Lobbyists” to register with the City Clerk, pay annual registration fees, and disclose a long list of detailed information to the City. (ECF 1 at ¶ 49–52). The Ordinance’s preamble states that its purpose is to “impose registration and disclosure requirements on those engaged in lobby efforts to influence the decisions of City policy maker for Compensation.” CMC § 2.100.010. It defines lobbying as “the Influencing or attempting to influence a Legislative Action or Administrative Action of the City.” CMC § 2.100.030(n). It defines “Influencing” as any “purposeful communication” that promotes, supports, modifies, opposes, causes the delay or abandonment of conduct, or intentionally affects the behavior of a city official through persuasion, information, incentives, statistics, studies, or analyses. CMC § 2.100.030(n). The Ordinance defines three categories of “Lobbyists,” two of which are “Business or Organization Lobbyist” and Expenditure Lobbyist.”<sup>2</sup> As defined in the Ordinance, a “Business or Organization Lobbyist,” is:

Any business or organization, whose owner(s), officer(s), or employee(s), carry out lobbying on its behalf in an aggregate amount of ten hours or more within any consecutive twelve (12) month period, whether or not such officers or employees are specifically compensated to engage in Lobbying; provided, that the activities of officers shall be considered Lobbying only if those officers receive Compensation by the business or Organization beyond reimbursement for their reasonable travel, meals or incidental expenses. . . .

CMC § 2.100.030(o)(2). An “Expenditure Lobbyist” is defined as:

A Person who makes payments or incurs expenditures of five thousand dollars (\$5,000.00) or more during any calendar year in connection with carrying out

<sup>2</sup> LWVCS seeks no relief as it pertains to the third category, Contract Lobbyists, and therefore omits its definition.



1 public relations, advertising or similar activities with the intent of soliciting or  
 2 urging, directly or indirectly, other Persons to communicate directly with any  
 3 City Official in order to attempt to influence Legislative Action or  
 4 Administrative Action. The five thousand dollar (\$5,000.00) threshold shall not  
 5 include: (A) Compensation paid to Contract Lobbyists or employees for  
 6 Lobbying; or (B) dues payments, donations, or other economic consideration  
 7 paid to an Organization, regardless of whether the dues payments, donations or  
 8 other economic consideration are used in whole or in part to lobby.  
 9 CMC § 2.100.030(o)(3).

10 The Ordinance also defines “Organization” as “any Person that is not an individual” and  
 11 “Person” as “any individual, domestic or foreign corporation, for-profit or nonprofit entity, firm,  
 12 association, syndicate, union, chamber of commerce, joint-stock company, partnership of any kind,  
 13 limited liability company, common-law trust, society, or any other group of Persons acting in  
 14 concert.” CMC §§ 2.100.030(q) and .030(r). An organization’s owners, directors, employees not  
 15 holding officer positions, and volunteers are not afforded any exemptions under the Ordinance.  
 16 (ECF 1 at ¶¶ 44, 47); CMC § 2.100.180. The Ordinance also imposes fines and lobbying  
 17 debarment for violating the ordinance, as well as criminalizes failure to comply as a misdemeanor.  
 18 (ECF 1 at ¶ 56); CMC §§ 2.100.080(c), .150, and .170.

### LEGAL STANDARD

19 When ruling on a motion to dismiss under Rule 12(b)(6) and 12(b)(1), the Court must accept  
 20 all well-pleaded factual allegations as true and construe all reasonable inferences in the manner most  
 21 favorable to the plaintiff. *Kwan v. SanMedica Int’l*, 854 F.3d 1088, 1096 (9th Cir. 2017) (Rule  
 22 12(b)(6)); *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (Rule  
 23 12(b)(1)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
 24 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.  
 25 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The grant of a  
 26 motion to dismiss is appropriate only “where there is either a lack of a cognizable legal theory or the  
 27 absence of sufficient facts alleged under a cognizable legal claim.” *Hinds Invs., L.P. v. Angioli*, 654  
 28 F.3d 846, 849–50 (9th Cir. 2011). Laws burdening political speech are subject to strict scrutiny and  
 the Ordinance must be narrowly tailored to achieve its compelling interest. *Pierce v. Jacobsen*, 44

1 F.4th 853, 862 (9th Cir. 2022).<sup>3</sup>

2 **ARGUMENT**

3 **I. LWVCS HAS ADEQUATELY PLED STANDING TO CHALLENGE**  
 4 **CUPERTINO’S LOBBYING ORDINANCE.**

5 To establish standing, a plaintiff must show injury, a causal connection to the conduct  
 6 complained of, and redressability through a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S.  
 7 555, 560–61 (1992). Cupertino’s brief confirms, and in fact appears to concede, that LWVCS has  
 8 standing to challenge the provisions of Cupertino Municipal Code Chapter 2.100 pertaining to  
 9 “Business or Organization Lobbyists” and “Expenditure Lobbyists.” (ECF 31 at 5–6). To be sure,  
 10 Cupertino’s brief confirms that the “Business or Organization Lobbyists” provision would  
 11 encompass and stifle constitutionally protected activities of LWVCS officers. (*Id.* at 13 (“The  
 12 Business and Organizational Lobbyist provision only applies where owners or *employees* are  
 13 directed to lobby for the organization, or where officers do so in exchange for more than expense  
 14 reimbursement.”) (emphasis in original) (citing CMC § 2.100.030(o)(2))). That alone establishes  
 15 standing, but the failure of Cupertino to restrict the language of the Ordinance to the paid  
 16 individuals it purports to regulate makes clear that the Ordinance causes actual harm.

17 First, LWVCS has pled an injury-in-fact—i.e., “a realistic danger of sustaining a direct  
 18 injury as a result of the statute’s operation or enforcement”—to both its organizational interests and  
 19 its members. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). LWVCS has  
 20 alleged that the Ordinance impairs its financial support, which threatens LWVCS’s ability to carry  
 21 out its public mission. (ECF 1 at ¶¶ 58–63, (citing 26 U.S.C. § 501)).<sup>4</sup> LWVCS also has alleged that  
 22 the Ordinance has chilled the constitutionally protected expressive activities of at least one LWVCS  
 23

24 <sup>3</sup> Cupertino misapplies *Citizens United v. FEC*, 558 U.S. 310 (2010), which applied exacting  
 25 scrutiny in addressing a challenge to a law mandating disclosure and reporting requirements for  
 26 electioneering expenditures, not lobbying, a wholly different context with fundamentally different  
 government interests. *Id.* at 366–67; see also *Summit Bank v. Rogers*, 206 Cal.App.4th 669, 692  
 (2012) (finding content-based regulations are subject to the highest level of scrutiny).

27 <sup>4</sup> As explained in further detail in Section II(A)(3) below, LWVCS is financially supported in part  
 28 by a Section 501(c)(3) organization. Requiring that Section 501(c)(3) organization to register as a  
 lobbyist would jeopardize its ability to receive tax deductible donations, crippling its fundraising  
 and impairing the mission of LWVCS.

1 member—the publisher of “Cupertino Matters,” who modified the content of her weekly electronic  
2 newsletter to avoid the Ordinance’s civil and criminal penalties—which satisfies the standing  
3 requirement. (ECF 1 at ¶¶ 64–67); see *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*  
4 *Inc.*, 528 U.S. 167, 181 (2000) (organizations have standing to bring suit on behalf of their  
5 members); see also *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013,  
6 1019–1021 (1991). Cupertino argues, without citation or merit, that “alleged concerns and self-  
7 censorship” are not constitutional injuries. (ECF 31 at 15). LWVCS and its members need not “first  
8 expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute that [they]  
9 claim[] deters the exercise of [their] constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459  
10 (1974); see also *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (holding that  
11 “self-censorship” is “a harm that can be realized even without an actual prosecution.”); *Arizona*  
12 *Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (finding the  
13 plaintiff had demonstrated injury by showing it “was forced to modify its speech and behavior to  
14 comply” with the challenged statute); *Bland v. Fessler*, 88 F.3d 729, 736–37 (9th Cir. 1996).  
15 Furthermore, each of LWVCS’s injuries-in-fact is causally linked to Cupertino’s passage of the  
16 Ordinance, while the relief requested would provide redress in satisfaction of the standing  
17 requirements.

18         Second, LWVCS has adequately alleged third-party standing under the overbreadth  
19 doctrine. Generally, “a person to whom a statute may constitutionally be applied” lacks standing to  
20 “challenge that statute on the ground that it may conceivably be applied unconstitutionally to  
21 others, in other situations not before the Court.” *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).  
22 The overbreadth doctrine is an important exception to the traditional rule prohibiting third-party  
23 standing. *New York v. Ferber*, 458 U.S. 747, 768 (1982). In recognition of the maxim that “the First  
24 Amendment needs breathing space” if it is to have any effect, third-parties may bring First  
25 Amendment challenges to protect others who may refrain from constitutionally protected activity  
26 due to the overly broad sweep of the statute at issue. *Broadrick*, 413 U.S. at 612 (“Overbreadth  
27 attacks have also been allowed where the Court thought rights of association were ensnared in  
28 statutes which, by their broad sweep, might result in burdening innocent associations.”) (collecting

1 cases); *Ferber*, 458 U.S. at 769 (“It is for this reason that we have allowed persons to attack overly  
 2 broad statutes even though the conduct of the person making the attack is clearly unprotected and  
 3 could be proscribed by a law drawn with the requisite specificity.”).

4 LWVCS’s Complaint includes numerous instances where constitutionally protected First  
 5 Amendment activity would fall within the ambit of the Ordinance, subjecting that protected activity  
 6 to criminal and civil penalties or an onerous regulatory compliance scheme. For example, the  
 7 Ordinance would require each of the following to register as lobbyists and pay a fee or face serious  
 8 penalties, including criminal charges: (1) a religious institution sending its minister or another  
 9 employee to speak to a councilmember to muster support for an affordable housing project; (2) a  
 10 neighborhood group that encouraged all of its members to write to the Community Development  
 11 Department to oppose putting a large, eyesore self-storage facility in a residential area; (3) LWVCS  
 12 sending a representative to the City Clerk to encourage her to ensure that voting places for elections  
 13 are properly advertised, in ADA accessible locations, and close to transit routes for voters who do  
 14 not drive; and (4) a school PTA asking its members to meet with their councilmembers about road  
 15 construction causing congestion near the school. (ECF 1 at ¶¶ 3–6, 8, 43–47, 56, 65). LWVCS has  
 16 likewise detailed how the Ordinance is likely to chill the protected First Amendment activity of  
 17 these numerous potential speakers. (*Id.*). These allegations satisfy the pleading requirement that  
 18 LWVCS demonstrate how the Ordinance affects LWVCS under the overbreadth doctrine, as well as  
 19 injury-in-fact, to allow LWVCS to challenge the constitutionality of the Ordinance.

20 **II. THE ORDINANCE IS SUBSTANTIALLY OVERBROAD IN ITS RESTRICTION**  
 21 **OF FIRST AMENDMENT ACTIVITY.**

22 A fundamental tenet of the First Amendment is that the government “has no power to restrict  
 23 expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of City*  
 24 *of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).<sup>5</sup> Political speech is at the core of the First

25 \_\_\_\_\_  
 26 <sup>5</sup> Because the California Constitution is more protective of free speech than the First Amendment,  
 27 LWVCS relies on opinions finding a violation of the U.S. Constitution’s more narrow protections.  
 28 *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir. 2003) (“The California Supreme  
 Court has recognized that the California Constitution is ‘more protective, definitive and inclusive of  
 rights to expression and speech’ than the First Amendment to the United States Constitution.”)  
 (quoting *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899, 908, 910 (1979), *aff’d*, 447 U.S. 74

1 Amendment’s protection. *Virginia v. Black*, 538 U.S. 343, 365 (2003). The Ordinance at hand  
 2 concerns exclusively political speech, creating content-based and speaker-based restrictions on a  
 3 bevy of expressive activities directed at Cupertino’s public officials.

4 In addition to legitimate regulation of traditional lobbying activity, the Ordinance subjects  
 5 concerned citizens’ protected expressive activity to a rigorous regulatory scheme. That regulatory  
 6 scheme requires registration, payment of fees, and disclosure of substantial personal information.  
 7 Registration and licensing requirements that impose burdens on free expression are inherently  
 8 suspect. For example, in *Watchtower Bible and Tract Socy. of New York, Inc. v. Village of Stratton*,  
 9 the Supreme Court invalidated an Ohio village ordinance that required solicitors to register before  
 10 going door-to-door. 536 U.S. 150, 166–69 (2002). The Court determined that the registration scheme  
 11 imposed significant First Amendment burdens, particularly with respect to spontaneous speech. *Id.*  
 12 at 166–67. The Court noted that “a significant number of persons [] support causes anonymously”  
 13 and registration with the local government would result “in a surrender of that autonomy.” *Id.* at 166.

14 The Ordinance’s requirements are hardly different from the regulations on solicitation struck  
 15 down in *Watchtower*. When combined with the criminal and civil penalties associated with failure  
 16 to register, the Ordinance’s regulatory scheme chills a wide range of protected activity, creating a  
 17 real and substantial deterrent on legitimate expression in violation of the First Amendment. *See U.S.*  
 18 *v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State*  
 19 *Republican Party*, 552 U.S. 442, 449, n. 6 (2008)) (“[A] law may be invalidated as overbroad if ‘a  
 20 substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly  
 21 legitimate sweep.’”) (internal quotation marks omitted).

22 A. The Ordinance’s Overbroad Text Contains Content- And Speaker-Based Restrictions  
 23 on Political Speech, A Protected First Amendment Activity.

24 “The first step in overbreadth analysis is to construe the challenged statute” to determine  
 25 “what the statute covers.” *U.S. v. Williams*, 553 U.S. 285, 293 (2008). The Ordinance states that its  
 26 purpose is to “impose registration and disclosure requirements on those engaged in efforts to  
 27

28 (1980)). Since the Ordinance fails federal Constitutional muster, it also fails under Article 1 of the  
 California Constitution.

1 influence the decisions of City policy makers for Compensation.” CMC § 2.100.010. The plain  
2 language of the Ordinance sweeps up far more than the “paid lobbyists” described in Cupertino’s  
3 Motion, (ECF 31 at 2, 13, 14), to designate a wide swath of interested citizens as “Lobbyists.” Under  
4 the Ordinance, a Lobbyist is any person who seeks to speak to an organ of Cupertino government  
5 “to influence a Legislative Action or Administrative Action of the City.” CMC § 2.100.030(n). As  
6 a result, *any person* who speaks to government, in any of its manifestations in the City, must consider  
7 whether it is worth registration, an annual fee, and extensive disclosure obligations to do so—that  
8 is, provided the interested citizens want to avoid criminal prosecution, civil penalties, or other  
9 punitive actions they city may take against “Unregistered Lobbyists”—in case the Ordinance is  
10 applied to them by Cupertino enforcement authorities. *See* CMC §§ 2.100.130, .150, .160.

11       Cupertino says that the Ordinance applies only to “paid” persons, but two categories of  
12 “Lobbyist” fall within the Ordinance’s restrictions on political speech. A “Business or Organization  
13 Lobbyist” includes any business or “Organization” whose owners, officers or employees, in the  
14 aggregate, engage in “Lobbying” on behalf of the organization for ten hours or more in any twelve-  
15 month period. CMC § 2.100.030(o)(2). An “Expenditure Lobbyist” is any person who expends  
16 \$5,000 or more in a calendar year “in connection with carrying out public relations, advertising or  
17 similar activities with the intent of soliciting or urging, directly or indirectly, other Persons to  
18 communicate directly with any City Official in order to attempt to influence Legislative Action or  
19 Administrative Action.” CMC § 2.100.030(o)(3).

20       Both of these definitions create content- and speaker-based restrictions on political speech,  
21 which are presumptively unconstitutional. Any ordinance that restricts certain types of expression to  
22 Cupertino based on the content thereof, including communication regarding matters of local political  
23 concern and other municipal matters, is by definition content-based. *Reed v. Town of Gilbert, Ariz.*,  
24 576 U.S. 155, 163 (2015) (regulation of speech is content-based where the law “defin[es] regulated  
25 speech by its function or purpose.”). The Ordinance is similarly a speaker-based regulation because  
26 it allows the unhindered speech of exempted individuals, defined as members of the press, public  
27 officials, and certain employees of 26 U.S.C. § 501(c)(3) corporations, but it subjects burdensome  
28 registration and reporting requirements on other members of the public. Speaker-based laws



1 “demand strict scrutiny when they reflect the Government’s preference for the substance of what the  
2 favored speakers have to say (or aversion to what the disfavored speakers have to say).” *See Turner*  
3 *Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994). The Ordinance is not narrowly tailored.

4 These are only part of the reason that the Ordinance is facially overbroad. Cupertino requires  
5 any corporation, regardless of whether it employs a professional lobbyist, whose members or  
6 employees communicate about local political or other municipal matters in any way that affects the  
7 decision-making of a local official to submit to onerous and expensive registration, reporting, and  
8 disclosure requirements. Those requirements prevent protected speech like the examples detailed in  
9 the Complaint, (ECF 1 at ¶¶ 3–6, 8, 43–47, 56, 65), in violation of the First Amendment. *See*  
10 *Williams*, 553 U.S. at 292 (“[A] statute is facially invalid [as overbroad] if it prohibits a substantial  
11 amount of protected speech.”).

- 12 1. The Ordinance’s sweep creates a deterrent effect on legitimate expression that is  
13 both real and substantial.

14 When evaluating the chilling effect of a law that stifles rather than outright prohibits free  
15 expression, the Court must determine whether the law’s “deterrent effect on legitimate expression is  
16 both real and substantial[.]” *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). The  
17 Court must invalidate the law where “it is not readily subject to a narrowing construction by the state  
18 courts.” *Id.* The examples LWVCS has identified in the Complaint highlight the innumerable  
19 applications in which the Ordinance would be unconstitutional in relation to its plainly legitimate  
20 sweep, not to mention the confusion the Ordinance creates over whether a League member who has  
21 advocated for candidate forums must register to make her personal complaint about garbage  
22 collection. There is a material difference between a corporate employee petitioning the City Council  
23 for a zoning variance and a League member speaking to the Council about transparency in voting  
24 procedures, yet the Ordinance fails to recognize any distinction among restricted Business or  
25 Organization Lobbyists. These examples, and many others, describe an overbroad and poorly  
26 worded ordinance against which relief could plausibly be granted. *See Stevens*, 559 U.S. at 473  
27 (quoting *Washington State Grange*, 552 U.S. at 449, n. 6). If the Court accepts any one of LWVCS’s  
28 well-pleaded allegations as true, as it must under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the

1 Court must deny Cupertino's Motion to Dismiss.

2           2.       The Ordinance has restrained and altered the Cupertino Matters publisher's  
3                       protected First Amendment activity.

4           The first and most obvious example in the Complaint describes how the passage of the  
5 Ordinance compelled a concerned citizen, who also is an LWVCS member, to alter the content of  
6 her "Cupertino Matters" electronic newsletter. (ECF 1 at ¶¶ 5, 34). Prior to the Ordinance, the  
7 newsletter updated the publisher's neighbors on municipal affairs, expressed her opinions, and  
8 sometimes called on her neighbors to take action. (ECF 1 at ¶ 5). The newsletter also addressed key  
9 council, commission, and community outreach meetings and decisions, and matters that involved  
10 legislative or administrative action by the City. (ECF 1 at ¶ 64). In light of the Ordinance, and  
11 councilmembers' specific hostility toward the newsletter, the publisher has refrained from calling  
12 on readers to take action. (*Id.*).

13           The content of that newsletter, both before and after the passage of the Ordinance, is  
14 indisputably protected speech as a legitimate expression of citizen concerns to a government body.  
15 *Lane v. Franks*, 573 U.S. 228, 235 (2014) ("Speech by citizens on matters of public concern lies at  
16 the heart of the First Amendment[.]"). That begs the question whether LWVCS is a Business or  
17 Organization Lobbyist and that question is not answered by the Ordinance, putting the League and  
18 its members—including the member who writes "Cupertino Matters"—at risk of prosecution.  
19 Moreover, should that member spend \$5,000 or more on web hosting, web design, expenses incident  
20 to public records requests, or the like—and again it is not clear whether her expenditures are  
21 aggregated with the League's expenditures because she is a member—she would fall within the  
22 definition of an "Expenditure Lobbyist" under the Ordinance. CMC § 2.100.030(o)(3).

23           Cupertino argues that the newsletter's expression is exempted from the Ordinance's  
24 regulatory coverage of lobbyists by Section .030(p)(2). (ECF 31 at 10). That Section, however,  
25 exempts "members of the press," and the member is not a professional journalist. Moreover, as  
26 detailed in the Complaint, Defendant Chao, a member of the City Council, specifically called out  
27 the "Cupertino Matters" newsletter in a statement supporting the enactment of the Ordinance. (ECF  
28 1 at ¶¶ 34, 38) ("...news sort of like lobbying' should be subject to disclosures laws"). It seems that  
Cupertino's decision not to prosecute the member is, at best, undirected, which is a hallmark of



1 overbroad legislation. *Steffel*, 415 U.S. at 459.

2           Cupertino also argues that LWVCS failed to plead that “Cupertino Matters” meets the  
3 expenditure requirements of Section 2.100.030(o)(3). (ECF 31 at p. 15). That argument both misses  
4 the point of the overbreadth doctrine and highlights Cupertino’s astonishing interpretation of the  
5 Ordinance: the publisher may continue to call for community action but only to the extent that doing  
6 so costs her less than \$5,000. Cupertino’s transient interpretation of free expression is precisely the  
7 type of burden that the overbreadth doctrine exists to prevent. *See Broadrick*, 413 U.S. at 612  
8 (“Overbreadth attacks have also been allowed where the Court thought rights of association were  
9 ensnared in statutes which, by their broad sweep, might result in burdening innocent associations.”)  
10 (collecting cases). This is not a problem that Cupertino can leave to the courts to resolve by a  
11 narrowing interpretation because, as noted, there is no linchpin to guide a court in statutory  
12 construction. *Stenberg v. Carhart*, 530 U.S. 914, 918 (2000) (“the Court lacks power” to adopt a  
13 narrowing construction when one “is not reasonable and readily apparent.”); *Buckley v. Valeo*, 424  
14 U.S. 1, 77 (1976) (“Where First Amendment rights are involved, an even greater degree of specificity  
15 is required.”) (cleaned up). The remedy, if Cupertino wants to regulate corporate lobbying, is to write  
16 an ordinance that focuses on the conduct it seeks to prohibit in conformity with constitutional rights.

17           3. The Ordinance’s overbreadth would chill the free expression of other speakers who  
18           are not engaged in lobbying under a traditional definition.

19           In facially challenging a law whose overbreadth violates the First Amendment, the Court  
20 must focus on the ordinance and its potential applications to the legitimate First Amendment activity  
21 it constrains. *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (“We need not lament that we  
22 do not have before us the details of the conduct found to be [within the scope of the law]. It is the  
23 ordinance on its face that sets the standard of conduct and warns against transgression.”).

24           In its Complaint, LWVCS highlighted that a religious institution who sends its minister or  
25 another employee to discuss affordable housing projects with a city councilmember might be  
26 compelled to register as a “Lobbyist” under the Ordinance. (ECF 1 at ¶ 3). The “Business or  
27 Organization Lobbyist” includes all compensated persons of the organization (i.e. owners, officers,  
28 and employees) “whether or not such officers or employees are specifically compensated to engage  
in Lobbying[.]” CMC § 2.100.030(o)(2). The religious institution would be required to register,

1 under Section .030(o)(2), as a “Business or Organization Lobbyist” after employees of the religious  
 2 institution spent, “in an aggregate,” ten hours or more speaking with the councilmember about the  
 3 religious institution’s position on affordable housing projects.

4 Cupertino posits that the religious institution would be exempt under the Ordinance, Section  
 5 .030(p)(9). (ECF 31 at 10). That subsection exempts “[b]oard members or employees of nonprofit  
 6 501(c)(3) corporations,” not the organizations themselves:

7 (p) Exemptions to “Lobbyist” include:

8 . . .

9 (9) Board members or employees of nonprofit 501(c)(3) corporations, unless  
 10 the nonprofit Organization is Lobbying for a specific project, issue or Person  
 for which the Organization has received Compensation or a contribution to  
 lobby for or against a specific project, issue or Person;

11 CMC § 2.100.030(p)(9). Therefore, while the employee might be exempt from registering as a  
 12 “Lobbyist,” the *institution* would not be exempt and the actions of its minister would subject the  
 13 religious institution to prosecution. Not to mention that registering as a “Lobbyist” would jeopardize  
 14 the religious institution’s federal income tax exemption under 26 U.S.C. § 501(c)(3), as those tax-  
 15 exempt entities may not engage in a “substantial” amount of lobbying. § 501(c)(3), (h). As written,  
 16 the Ordinance presents religious institutions with a Hobson’s choice: forego First Amendment-  
 17 protected community outreach with Cupertino officials or forego favorable taxation treatment.

18 The same logic applies to neighborhood associations. (ECF 1 at ¶ 3). While Cupertino posits  
 19 that “members of neighborhood associations” are exempted from the Ordinance’s definition of  
 20 “Lobbyist” by Subsection (p)(10), (ECF 31 at 10), the neighborhood associations themselves, like  
 21 the religious institutions, fall within the sweep of “Business and Organization Lobbyist.” CMC  
 22 § 2.100.030(o)(2), (p)(10). In addition, the Subsection (p)(10) exemption only applies to members  
 23 of neighborhood associations, not paid employees. *Id.* Therefore, should a paid officer of a  
 24 neighborhood association speak with city councilmembers regarding city zoning or development  
 25 policies, both the association and the employee fall within the zone of required registration, payment  
 26 of fees, and disclosures compelled by the Ordinance.

27 When an LWVCS member speaks with councilmembers or other city officials regarding the  
 28 location, accessibility, or number of polling locations, the member and LWVCS as an organization

1 fall within the Ordinance’s overbroad regulatory coverage under the same circumstances that would  
2 ensnare religious institutions, neighborhood associations, and the employees of each. Similarly,  
3 LWVCS’s financial support structure is imperiled by the Ordinance’s requirement that LWVCS  
4 register as a lobbyist, limiting the scope and effectiveness of LWVCS’s public benefit mission and  
5 stifling its ability to petition its government for redress of grievances. The Ordinance’s definition of  
6 “Organization” includes 26 U.S.C. § 501(c)(4) entities—like LWVCS—as well as entities registered  
7 under § 501(c)(3)—like the Education Fund. CMC § 2.100.030(q); (ECF 1 at ¶¶ 44–45). Section  
8 501(c)(3) entities are prohibited from engaging in a “substantial” amount of lobbying activity. 26  
9 U.S.C. § 501(h). Yet the Education Fund’s support for LWVCS would compel the Education Fund  
10 to register with Cupertino as a “Lobbyist” because the sweep of the Ordinance’s definition of  
11 “Influencing” encompasses a broad range of support activity that facilitates LWVCS’s  
12 communication with city officials. CMC § 2.100.030(k). Registration as a “Lobbyist” would  
13 jeopardize the Education Fund’s tax-exempt status under Section 501(c)(3), and thus the tax-  
14 deductible status of donors’ contributions. 26 U.S.C. § 501(h).

15 It is well-established that disclosure of donor and membership lists has a chilling effect on  
16 an organization’s donors’ choices to contribute. *Buckley*, 424 U.S. at 66–68. Compelling the  
17 Education Fund to either disclose substantial information about its donors as a Lobbyist under the  
18 Ordinance or discontinue its financial support of LWVCS is proof of that chilling effect. (ECF 1 at  
19 ¶ 62). In short, the Ordinance is written so broadly that these alternatives are all too real for LWVCS,  
20 LWVUS, the Education Fund, and all of their members and supporters.

21 B. The Ordinance Is Not Readily Susceptible to a Narrowing Construction.

22 As noted above, the Ordinance applies broadly to professional lobbyists, ordinary citizens,  
23 and organizations engaging in public petition and participation in the same way. In addition, it  
24 restricts educational and other noncommercial discourse in the same way as it limits commercial  
25 lobbying activity, making association of likeminded citizens a potential crime. Litigating each of  
26 these applications to determine the precise contours of the expressive activity that falls within the  
27 Ordinance’s bounds would prove burdensome to the citizens of Cupertino as well as the courts of  
28 California. The Ordinance would have to be rewritten to be construed more narrowly; indeed,

1 councilmembers' public statements suggest that the breadth is fully intentional. *See Erznoznik*, 422  
 2 U.S. at 217 ("In these circumstances, particularly where as here appellee offers several distinct  
 3 justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance  
 4 can or will be decisively narrowed."). LWVCS has appropriately brought a facial challenge to the  
 5 Ordinance's overbreadth. *See Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965) (when "no readily  
 6 apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single  
 7 prosecution, and appellants are entitled to an injunction."). The Court should not rewrite the  
 8 Ordinance but, rather, enjoin it and allow Cupertino to do so.

9 **III. CUPERTINO'S ARTICULATED INTENT BEHIND ENFORCEMENT DOES NOT**  
 10 **CURE THE FAILURE TO DRAFT A CONSTITUTIONALLY VALID ORDINANCE**

11 Cupertino's Motion is replete with justifications for its overbroad ordinance based on the  
 12 manner in which it has not enforced the Ordinance, highlighting the fact that only six persons have  
 13 registered with the City as lobbyists and attaching the corresponding registration and reporting forms  
 14 to the Declaration of its City Clerk. (ECF 31 at 3; ECF 31-1). But this only serves to evidence the  
 15 uncertainty and capriciousness of Cupertino's approach. Cupertino offers nothing to suggest that the  
 16 registration requirements they have applied to date will not place a future burden on City residents.

17 Cupertino ironically attacks the League's use of hypotheticals to illustrate the extent of the  
 18 Ordinance's overbreadth "[i]nstead of alleging any actual situation where" it has been applied in an  
 19 unconstitutional manner without Cupertino ever restricting itself to the interpretations in its brief.  
 20 (ECF 31 at 9). As Cupertino is well aware, its lack of enforcement to date does not cure the chilling  
 21 effect it has on LWVCS and its members. Indeed, at any point new circumstances may arise, such  
 22 as a change in city attorney, that lead to different prosecutorial decisions. Today, nothing prohibits  
 23 Cupertino from finding a new approach to enforcement of the Ordinance that makes every  
 24 hypothetical come true and validates the fears of the author to "Cupertino Matters." Cupertino should  
 25 redraft the Ordinance, clearly identify the intended targets and conduct, and remedy the chilling  
 26 effect the Ordinance as written currently poses.

27 **CONCLUSION**

28 For the foregoing reasons, the Motion to Dismiss should be denied in its entirety.

1 Dated: October 7, 2022

Respectfully submitted,

2 **STEPTOE & JOHNSON LLP**

3 By: /s/ Tahir L. Boykins

4 Jamie L. Lucia (SBN 246163)

*jlucia@steptoe.com*

5 Amanda C. Schwartz (SBN 307522)

*aschwartz@steptoe.com*

6 Michael Dockterman (*pro hac vice*)

*mdockterman@steptoe.com*

7 Joseph M. Sanderson (SBN 305256)

*josanderson@steptoe.com*

8 Tahir L. Boykins (SBN 323441)

*tboykins@steptoe.com*

9 Attorneys for Plaintiff

10 LEAGUE OF WOMEN VOTERS OF

11 CUPERTINO-SUNNYVALE

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2022, a copy of the foregoing document was filed with the Clerk of the Court via the online CM/ECF filing system, which will send notification of such filing to the attorneys of record in this civil action.

/s/ Tahir L. Boykins  
Tahir L. Boykins