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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LEAGUE OF WOMEN VOTERS OF CUPERTINO-SUNNYVALE, Plaintiff, v. CITY OF CUPERTINO, et al. Defendants.	Case No. 22-cv-04189-JSW **REPLY IN SUPPORT OF MOTION TO DISMISS** Date: December 2, 2022 Time: 9:00 a.m. Ctrm: 5 Hon. Jeffrey S. White

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I. INTRODUCTION

LWVCS's opposition ignores the detailed statutory analysis presented in the moving papers. It makes no serious attempt to analyze the specific language of the Cupertino Lobbyist Registration Ordinance, how it compares to similar lobbying registration ordinances at the local, state, or federal level, or how it comports with the existing body of law on registration and reporting requirements. LWVCS does not even separately analyze each of the challenged definitions of lobbyist, address the policies supporting each, or discuss the fit between those policies and the Ordinance's effect. Nor does LWVCS provide any legal analysis of why the hypothetical applications of the law it insists will occur—despite Cupertino's contrary interpretation—would be unconstitutional in the first place.

Instead, LWVCS just declares *ipse dixit* that it is correct, and that the Ordinance is "dangerously overbroad," "onerous," "invasive," "confusing," and "astonishing." Adjectives and hyperbole are no substitute for legal argument and provide no basis to facially invalidate a democratically enacted statute.

There is nothing unusual about Cupertino's Ordinance. It is essentially identical to the County's ordinance and those of other cities including the state capitol, Sacramento, and its challenged provisions are similar to both state and federal lobbying law. Cupertino has a legitimate, and indeed vital, interest in registration and disclosure of, not just "professional" contract lobbyists, but also businesses or organizations that direct their paid staff to lobby on their behalves, and expenditure lobbyists who fund "Astroturf" lobbying. LWVCS's apparent belief that only professional lobbyists, lobbying firms, and partisan political actors can constitutionally be required to register as lobbyists has no basis in either constitutional law or common practice. Cupertino's Ordinance is not unconstitutional in any application, much less in so many that it can be invalidated as facially overbroad. The Court should dismiss this action without leave to amend.

II. ARGUMENT

A. LWVCS'S SILENCE IS LOUDER THAN ITS WORDS

Before addressing the arguments LWVCS presents in its opposition, it is important to note what LWVCS ignores.

LWVCS ignores the relevant registration and disclosure cases cited in the moving papers, and cites none of its own. Instead, LWVCS presents an argument-by-snippet, citing generic standards or isolated sentences from cases dealing with, for example, child pornography,[1] picketing,[2] animal cruelty,[3] cross burning,[4] and abortion.[5] This is hardly an issue of first impression; indeed, LWVCS admits that "lobbyist registration requirements across the country have been upheld as constitutional." Opp'n p. 2:7-8. LWVCS' choice not to address *any* of the relevant case law on this topic is telling.

Similarly, LWVCS ignores the other local, state, and federal lobbying laws cited in the moving papers, including the basically identical laws enacted by the County in which Cupertino is located, two neighboring cities, and several others in California. LWVCS makes no attempt to show why Cupertino's Ordinance is meaningfully different from these similar ordinances.

LWVCS also makes no attempt to distinguish between its eight causes of action, confirming Cupertino's position that they are effectively identical. See Mot. § IV.C.

Finally, LWVCS makes no attempt to justify its claims against numerous city officials in their official capacity, presenting no opposition to the motion to dismiss those duplicative claims. See Mot. § IV.B. With no further analysis required, the Court should dismiss each individual defendant from the case.

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[1] *See New York v. Ferber*, 458 U.S. 747 (1982); *United States v. Williams*, 553 U.S. 285 (2008).

[2] *See Coates v. Cincinnati*, 402 U.S. 611 (1971); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[3] *United States v. Stevens*, 559 U.S. 460 (2010).

[4] *Virginia v. Black*, 538 U.S. 343 (2003).

[5] *See Stenberg v. Carhart*, 530 U.S. 914 (2000).

B. LWVCS'S ARGUMENTS ARE NOT BASED ON THE CITY'S ORDINANCE

The arguments LWVCS does make are largely not tied to specific provisions of the challenged Ordinance. Instead of analyzing the statutory language, or responding to the City's analysis of it, LWVCS continues to make exaggerated assertions about what the Ordinance requires.

LWVCS insists that "members" or "volunteers" are regulated by the Ordinance, despite no statutory language making them so. The opposition also adds "donors" to that baseless list. As discussed in the moving papers, an individual is only required to register as a lobbyist if he or she is a Contract Lobbyist (a category LWVCS does not challenge) or an Expenditure Lobbyist (a category that has nothing to do with being a member, volunteer, or donor of any organization). Mot. § IV(E)(2)(a); §.030(o)(1)-(3).

LWVCS also claims that the Ordinance applies to people speaking "in their individual capacity" or making "personal complaints." It cites no provision of the Ordinance for this baseless argument. LWVCS even wildly asserts that "any person" could somehow be considered a lobbyist based on a deliberate misreading of the definition section of the Ordinance:

> The plain language of the Ordinance sweeps up far more than the "paid lobbyists" described in Cupertino's Motion [citation] to designate a wide swath of interested citizens as "Lobbyists." Under the Ordinance, a Lobbyist is any person who seeks to speak to an organ of Cupertino government "to influence a Legislative Action or Administrative Action of the City." CMC § 2.100.030(n). As a result, *any* person who speaks to government, in any of its manifestations in the City, must consider [the Ordinance's various requirements] in case the Ordinance is applied to them by Cupertino enforcement authorities.

Opp'n p. 9:1-10. This argument is a blatant misrepresentation, and amply illustrates the baseless nature of this lawsuit. Section .030(n) does *not* define *Lobbyist*, it defines *Lobbying*. The Ordinance does *not* regulate lobbying. It only regulates three specific categories of *Lobbyists* under section .030(o)(1)-(3). There are absolutely no requirements imposed on people who do not meet one of the three definitions of Lobbyist—Contract, Business or Organization, or Expenditure—whether or not they engage in speech that falls within the definition of lobbying.

LWVCS argues that the Ordinance creates "confusion" about "whether a League member who has advocated for candidate forums must register to make her personal complaint about garbage collection." Opp'n p. 10:20-22. There is no confusion. Nothing in the Ordinance requires anyone to register as a lobbyist before making personal complaints about anything. An ordinance is not unconstitutional just because someone aggressively insists on misreading it. Nothing in Cupertino's Ordinance requires individuals who want to speak to government on their own behalves, or without compensation for others, to register as lobbyists.

C. LOBBYIST REGISTRATION AND DISCLOSURE LAWS ARE SUBJECT TO EXACTING SCRUTINY NOT STRICT SCRUTINY

In a footnote, LWVCS attempts to redefine the standard of review as strict scrutiny. Opp'n p. 5 n.3. It argues *ipse dixit* that the clear rule from *Citizens United* discussed in the moving papers does not apply to lobbyist registration but to "a wholly different context with fundamentally different government interests." LWVCS cites *Pierce v. Jacobsen*, 44 F.4th 853 (9th Cir. 2022), which invalidated a Montana ban on non-residents collecting signatures in support of ballot initiatives, *id.* at 863, and *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (2012), which invalidated a criminal bank libel statute as violating the First Amendment. *Id.* at 691-92. Later in its brief, Plaintiff also cites *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)—a sign ordinance case[6]—and *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994)—which held that a "must carry" provision in the Cable Television Consumer Protection and Competition Act of 1992 was content-neutral.[7]

LWVCS is simply wrong. A lobbyist registration and disclosure ordinance does not restrict or prohibit any speech. *United States v. Harriss*, 347 U.S. 612, 626 (1954); *Fair Political Practices Com. v. Superior Court*, 25 Cal. 3d 33, 47 (1979) ("*FPPC*"). *Citizens United* applied

[6] Although not relevant given the clear law setting the standard for lobbyist registration and disclosure, we note that LWVCS over-simplifies *Reed*'s content based analysis. A law is not content based simply because the content of speech is relevant to the law's application. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1473-74 (2022) (sign ordinance was content-neutral even though the sign's content was relevant).

[7] LWVCS makes no attempt to defend the argument in its complaint that the Ordinance is somehow a "prior restraint" or compels speech. (See Mot. p. 7:3-13.)

"exacting scrutiny" to "disclaimer and disclosure requirements" for the same public policy reasons at issue in *Harriss*. *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010); *see also Buckley v. Vallejo*, 424 U.S. 1, 64-68, 80 (1976). Because they do not regulate what can be said, registration and disclosure requirements are governed by exacting scrutiny, not strict scrutiny. *See Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 459-60 (11th Cir. 1996); *Montanans for Cmty. Dev. v. Mangan*, 735 Fed. Appx. 280, 284 (9th Cir. 2018); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).[8]

LWVCS does not cite any case that has invalidated a lobbyist or other politically related registration and reporting law as "content based." Instead, it argues that Cupertino's Ordinance is "hardly different from the regulations on solicitation struck down" in *Watchtower Bible and Tract Socy. of New York v. Village of Stratton*, 536 U.S. 150 (2002). Opp'n p. 8. *Watchtower* challenged an ordinance prohibiting "canvassers" "from going on private property for the purpose of explaining or promoting any 'cause'" without a permit. The Supreme Court noted that "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Id.* at 160. "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Id.* at 165-66.

The assertion that Cupertino's commonplace lobbyist registration statute is akin to requiring anyone who wants to talk to a neighbor to get a permit before doing so is risible. As the Southern District of Ohio noted in rejecting the same argument, "*Watchtower* involved neither candidate election related disclosure, nor lobbying disclosure. The *Watchtower* Court struck down a municipal license requirement for door-to-door canvassing, but gave no consideration whatsoever to the unique government interests at stake in the context of candidate election

[8] We note that the Eighth Circuit has upheld similar laws under strict scrunity without analyzing whether that standard applies. *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Asso.*, 761 F.2d 509, 511 (8th Cir. 1985).

advertising and lobbying." *Ohio Right to Life Soc'y v. Ohio Elections Comm'n*, No. 2:08-cv-00492, 2008 U.S. Dist. LEXIS 79165, at *31 (S.D. Ohio Sep. 5, 2008).

The appropriate standard here is exacting scrutiny. LWVCS does not even attempt to show that standard is not met.

D. THE BUSINESS OR ORGANIZATION LOBBYIST PROVISION IS NOT OVERBROAD

As discussed in the moving papers, the Business or Organization Lobbyist provision regulates businesses or other non-natural persons that instruct their paid officers or employees to lobby *on behalf of the business or organization*. §.030(o)(2). This type of regulation is common in other cities,[9] as well as in state and federal law. Cal. Gov. Code §§ 82039.5, 86100(a)(2); 2 U.S.C. § 1603(a)(1).

LWVCS does not cite any case finding such a provision to be unconstitutional. Indeed, LWVCS never really explains *why* it thinks the Business or Organization Lobbyist provision—section .030(o)(2)—is unconstitutional. It simply insists, without any legal analysis, that hypotheticals it posits show that it is. LWVCS makes no response to Cupertino's showing of the interests promoted by the Ordinance. Mot. § IV.E.3. It presents no argument about how those interests are, or are not, met by the hypothetical applications of the Ordinance it poses.

Scattered through LWVCS's opposition is the implication that the government is somehow only allowed to regulate "professional lobbyists" (Opp'n p. 10) or "corporate lobbying" (Opp'n pp. 10, 12), but cannot regulate non-profits. LWVCS also insists that it is somehow improper to regulate lobbying by "nonpartisan" or "apolitical" groups. Opp'n p. 1. LWVCS cites no authority for these assertions. As discussed in the moving papers, the government's interest extends well beyond "professional" lobbyists and similar laws frequently regulate non-profits. Mot. pp. 12-13 (citing authority). LWVCS makes no response on these points.

[9] *See* Santa Clara County Code § A3-62(j)(2); San Jose Mun. Code § 12.12.180(B); Santa Clara Mun. Code § 2.155.020(j)(2); Long Beach Mun. Code § 2.08.020(K)(2); Sacramento Mun. Code § 2.15.050; San Diego Mun. Code § 27.4002.

LWVCS also continues to misrepresent the Business or Organization Lobbyist definition and exemptions. LWVCS repeatedly argues that if an organization is a lobbyist under section .030(o)(2), then its employees or members must also register. Opp'n p. 11:16-17, 13:25, 13:28. As discussed above, an individual cannot—by definition—be a Business or Organization Lobbyist. Nor can donating to an organization make someone an Expenditure Lobbyist. §.030(o)(3) ("The five thousand dollar ($5,000.00) threshold shall not include … dues payments, donations, or other economic consideration paid to an Organization, regardless of whether the dues payments, donations or other economic consideration are used in whole or in part to lobby."). Nothing in the Ordinance subjects individuals to any obligation or risk based on their relationship with a Business or Organization Lobbyist. LWVCS just makes that up.

Moreover, as discussed in the moving papers, because individuals are not regulated Business or Organization Lobbyists under that provision, the applicable exemptions that are geared toward individual action mean that such exempted action does not count for determining whether an organization is a lobbyist. Mot. p. 13. LWVCS makes no attempt to show why that acknowledgment is unreasonable. Nor does it explain why those exemptions would have any meaning if they only applied to the employees or officers themselves when such persons are, by definition, not regulated lobbyists in the first place.

Abandoning most of the hypotheticals discussed in the complaint and moving papers, LWVCS relies on four as allegedly "unconstitutional" applications of the Ordinance. It ignores Cupertino's explanation that none are subject to the Ordinance in the first place and, in all events, fails to show how any would be unconstitutional.

First, LWVCS argues that a religious organization might send a minister to "speak to a councilmember to muster support for an affordable housing project." Opp'n pp. 7, 12. As discussed in the moving papers, a religious organization is a 501(c)(3) and speech by its employee—the minister—is exempt under section .030(p)(9). Cupertino does not regulate this hypothetical conduct. But even if it did, LWVCS offers no authority for its assertion that the Constitution requires allowing religious organizations to pay their employees to lobby without

registration. LWVCS argues that registering would "jeopardize" the institution's tax exemption. But that argument confuses cause and effect.

Section 501(c)(3) provides tax exempt status to qualifying organizations if "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation…" 26 U.S.C. § 501(c)(3). Section 501(h) allows some level of lobbying, but that exception does not apply to religious organizations. 26 U.S.C. § 501(h)(5)(A). It is thus substantial lobbying activity—as defined by federal tax law—that would jeopardize a 501(c)(3)'s tax exempt status, not registration under a local lobbyist registration statute. *See Sheridan Kalorama Historical Ass'n v. D.C. Bd. of Zoning Adjustment*, 229 A.3d 1246, 1258 (D.C. 2020) (required registration with the Senate irrelevant to 501(c)(3) status where lobbying "was not substantial enough to threaten its tax exemption".)

Second, LWVCS posits that a "neighborhood group" might "encourage all of its members to write to the Community Development Department to oppose" a building project. Opp'n p. 7. Unless a neighborhood group *hired* its "members" as employees to do so—i.e. *paid them to lobby*—the group is not a lobbyist under .030(o)(2) in the first place. And members of neighborhood groups are expressly exempt under .030(p)(10) in any event. Nothing supports LWVCS's assertion that a neighborhood group must register as a lobbyist even where there is no lobbying governed by the Ordinance because any activity is exempt. And, again, LWVCS offers no explanation for why the Constitution would prohibit the City from requiring a group that paid its members to lobby to register as a lobbyist, even if exemption .030(p)(10) did not exist.

Similarly, LWVCS argues that "a school PTA asking its members to meet with their councilmembers about road construction" would make the PTA a lobbyist. Opp'n p. 7. Parents pay to join the PTA, not the other way around. PTA members are not employees of the PTA or paid by the PTA to do anything, and thus the PTA is not a lobbyist under .030(o)(2)—unless, of course, the PTA directs paid employees to engage in lobbying on its behalf, in which case it would be subject to the same rules as any other entity that pays for lobbying.

LWVCS also argues that it cannot send a representative to discuss the advertisement of polling locations. As explained in the moving papers, that is not lobbying at all because it does

not involve Legislative Action or Administrative Action, and, unless LWVCS is paying that representative more than just reasonable expenses, such contact would not make LWVCS a lobbyist in any event. Mot. p. 9. LWVCS just ignores these points in its opposition.

LWVCS is a 501(c)(*4*) entity that is allowed to lobby. But it argues that a related 501(c)(3) Fund—not a party to this case—would have its tax exempt status "jeopardized" if it had to register as a lobbyist. Opp'n pp. 13-14. LWVCS provides no meaningful explanation for why the Fund would ever qualify as a lobbyist under section .030(o)(2). It argues that providing support to LWVCS would make the Fund a lobbyist because the term "influencing" is defined broadly. Opp'n p. 14. But the Ordinance does not regulate "influencing;" it regulates lobbyists. Neither §.030(o)(2) nor §.030(o)(3) make an entity a lobbyist because it provides financial support to another entity.

And, as discussed above, substantial lobbying activity is what jeopardizes a 501(c)(3)'s tax exemption, not registration. In all events, LWVCS provides no authority for its assertion that the tax-exempt status of an entity is a relevant consideration for whether a lobbyist registration law is constitutional.

LWVCS also argues that the Fund should not be required to disclose its donor and membership lists. Opp'n p. 14. Nothing in the Ordinance requires any registered Business or Organization Lobbyists to disclose their donors or membership lists. §.090. Once again, LWVCS just invents this strawman to attack it.

In sum, none of LWVCS' strained hypotheticals address conduct regulated by the Ordinance, but even if they did, LWVCS does not show that any such application would violate the Constitution. And in all events, the fact that there could be some hypothetical unconstitutional application of the Ordinance does not support LWVCS's claims. As LWVCS admits, this is a facial overbreadth challenge. A law may be facially challenged for First Amendment overbreadth only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473; *Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022). LWVCS does not come close to showing that a substantial number of the Ordinance's applications are unconstitutional when

compared to its legitimate sweep. It does not even try to do so. Thus, LWVCS's facial overbreadth claim must also be denied on this basis.

E. THE EXPENDITURE LOBBYIST PROVISION IS NOT OVERBROAD

The other challenged provision—Expenditure Lobbyist—regulates persons who pay for advertising or public relations to cause other people to lobby state officials directly. § .030(o)(3). Again, similar provisions exist in other cities,[10] and in state law. Cal. Gov. Code § 86115(b); *FPPC*, 25 Cal.3d at 46. Indeed, LWVCS admits in its complaint that this provision "fall[s] more or less within the traditional definition of lobbying, meaning influencing city action for compensation." Complaint ¶ 42. This provision protects the government interest in identifying the source of legislative pressure and informing the public of the same. *Harriss*, 347 U.S. at 620, 625; *Fla. League of Prof'l Lobbyists*, 87 F.3d at 461; *Minn. State Ethical Practices Bd.*, 761 F.2d at 513; *see* Stemler, *Platform Advocacy and the Threat to Deliberative Democracy*, 78 MD. L. REV. 105 (2018).

LWVCS makes no effort to show that these interests do not apply or that they are somehow not advanced by Cupertino's Ordinance. LWVCS's entire argument against the Expenditure Lobbyist provision seems to be that one of its "members" publishes a newsletter called "Cupertino Matters" which, among other things, urges residents to contact their public officials about various matters. LWVCS claims that the newsletter's author no longer advocates such action because she is "chilled" by "uncertainty" over whether she needs to register as an Expenditure Lobbyist.

First, even if we were to assume *arguendo* that the Ordinance cannot constitutionally be applied to the author of this newsletter, one example does not make the Expenditure Lobbyist provision overbroad. LWVCS makes no attempt to show that "a substantial number of [this provision's] applications are unconstitutional, judged in relation to the statute's plainly legitimate

[10] *See* Santa Clara County Code § A3-62(j)(3); San Jose Mun. Code § 12.12.180(C); Santa Clara Mun. Code § 2.155.020(j)(3); Long Beach Mun. Code § 2.08.020(K)(3); Sacramento Mun. Code § 2.15.050; San Diego Mun. Code § 27.4002.

sweep." *Stevens*, 559 U.S. at 473; *Prison Legal News*, 39 F.4th at 1129. The Court does not need to address this example in the absence of the requisite larger showing.

Second, as Cupertino has already explained, this newsletter is exempt under the media exemption, section .030(p)(2).[11] Desperate to justify its lawsuit, LWVCS insists that the media exemption only applies to "professional journalists." Opp'n p. 11. Once again, LWVCS just ignores the statutory language, which says nothing about professional journalists.

Section .030(p)(2) exempts "The Media, when limiting its action to the ordinary course of news gathering or editorial activity, as carried out by members of the press. 'Media' shall mean newspapers or any other regularly published periodical, radio or television station or network or information published on the Internet. This exemption does not apply to individuals conducting media activities when that individual would otherwise qualify as a Contract Lobbyist under this chapter." §.30(p)(2).

A newsletter regularly "published on the Internet" falls within the defined meaning of "Media" in section .030(p)(2). The exemption applies to such a newsletter if it contains "news gathering or editorial activity, as carried out by members of the press." "As carried out by members of the press" does not mean that only professional journalists qualify; it explains what "news gathering or editorial activity" means: the type of activity carried out by members of the press. As described in the complaint and the opposition, the "Cupertino Matters" newsletter clearly publishes the type of news gathering and editorial information anticipated by this provision. Nothing in the Ordinance limits this exemptions application to "professional journalists." LWVCS just makes that up.

[11] LWVCS claims that the Cupertino Matters publication was "specifically called out" by one councilmember. Opp'n p. 11; Complaint ¶ 34. California law is clear: "we do not consider the motives or understandings of individual legislators who voted for a statute when attempting to construe it." *Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 4 Cal. 5th 1032, 1042-43 (2018); *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1997 U.S. App. LEXIS 41260, at *17-18 (9th Cir. June 20, 1997). LWVCS also claims that the same councilmember opined in 2022 that news media were engaged in lobbying. Complaint ¶ 38. Post-enactment statements by legislators are also "not a legitimate tool of statutory interpretation." *United States v. King*, 24 F.4th 1226, 1232 (9th Cir. 2022) (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)).

LWVCS also argues that there is some uncertainty about whether its annual expenses are aggregated with this one member's for purposes of whether she is an Expenditure Lobbyist because she is a member of LWVCS. LWVCS invents that concern too. It points to no language in the Ordinance even suggesting that members of an organization are treated as personally responsible for expenditures of the organization. Finally, insisting that its member is not covered by the press exemption, LWVCS argues that she "may continue to call for community action but only to the extent that doing so costs her less than $5,000." Opp'n p. 12. LWVCS calls this "astonishing" but makes no legal argument as to why $5,000 per year is an impermissible threshold to require registration of expenditure lobbyists. Nor, as discussed above, does LWVCS make any legal argument that requiring expenditure lobbyists to register is generally unconstitutional.

There is nothing "astonishing" about this threshold. The law upheld in *FPPC* required registration for spending more than $250 in any month ($3,000 per year) on lobbying activities. *FPPC*, 25 Cal. 3d at 46. California Government Code section 86115 currently triggers at $5,000 per quarter, but that covers activity across the whole state, not just one small city. Cal. Gov. Code § 86115(b). Long Beach, Sacramento, Santa Clara County, Santa Clara City, and San Jose all have the same $5,000 a year threshold as Cupertino.[12]

And the Ordinance does not apply to any "call for community action." It only applies to "soliciting or urging, directly or indirectly, other Persons to communicate directly with any City Official in order to attempt to influence Legislative Action or Administrative Action." §.030(o)(3).

LWVCS thus makes no showing that *any* application of the Expenditure Lobbyist provision is unconstitutional, much less that its unconstitutional sweep is so broad as to justify striking down the Ordinance as facially overbroad.

[12] *See* Santa Clara County Code § A3-62(j)(3); San Jose Mun. Code § 12.12.180(C); Santa Clara Mun. Code § 2.155.020(j)(3); Long Beach Mun. Code § 2.08.020(K)(3); Sacramento Mun. Code § 2.15.050.

F. ANY PURPORTED CONSTITUTIONAL ISSUE CAN BE RESOLVED BY A NARROWING INTERPRETATION

As discussed above, LWVCS fails to show any unconstitutional application of the Business or Organization Lobbyist or Expenditure Lobbyist provisions of Cupertino's Lobbying Ordinance. That should end the inquiry and warrant granting this motion to dismiss. But even if the Court has some reservations about a particular hypothetical, it should resolve them by construing the statute in a manner that preserves its constitutionality.

A law cannot be facially invalidated as overbroad where "a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). "It is a well-established principle that statutes will be interpreted to avoid constitutional difficulties. Thus, where an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies, we accept that construction." *Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (cleaned up).

LWVCS insists without meaningful discussion that the Ordinance cannot be construed in a constitutional manner, citing *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Dumbrowski v. Pfister*, 380 U.S. 479 (1965). Opp'n p. 15. Neither case is in any way analogous. *Erzoznik* invalidated an ordinance prohibiting drive-in theaters from showing movies containing nudity. 422 U.S. at 206-07. That restriction went far beyond what the Court's obscenity jurisprudence allows. *Id.* at 213. As for a limiting construction, none was presented to the Court and prior state cases applying the ordinance had not imposed one. *Id.* at 216-17 & n.15.

Similarly, *Dumbrowski* allowed civil rights workers to challenge the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law, finding, in relevant part, that making it a felony to support "any subversive organization" was unconstitutionally vague. 380 U.S. at 494. The Court unsurprisingly could not conceive of a proper limiting construction for these offensive laws that were being used "to discourage appellants' civil rights activities." *Id.* at 490-91.

Neither case bears any relationship to this one. Cupertino has clearly presented its reasonable interpretation of the Ordinance in its moving papers. That interpretation—which does

not regulate most, if not all, of the conduct LWVCS claims requires registration—is both a reasonable interpretation of any ambiguous language and consistent with the Ordinance's express intent "to impose registration and disclosure requirements on those engaged in efforts to influence the decisions of City policy makers for Compensation." §.010. To the extent the Court finds any portions of the Ordinance ambiguous in a manner that calls into question its constitutionality, the Court should—as required—construe the Ordinance in a constitutional manner.

III. CONCLUSION

"[O]verbreadth is 'strong medicine' that is not to be 'casually employed.'" *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1201 (9th Cir. 2022) (citation omitted). Here, LWVCS has failed to show any unconstitutional application of the Cupertino Lobbyist Registration Ordinance, much less that it is fatally overbroad. Nor does it argue that these legal questions can be altered by alleging additional facts. Cupertino's motion should be granted, and this action dismissed without leave to amend.

Respectfully submitted,

DATED: October 17, 2022

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