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By Email

San Francisco Board of Supervisors
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Board of Supervisor, District 2, Catherine Stefani
Board of Supervisor, District 3, Aaron Peskin
Board of Supervisor, District 4, Gordon Mar
Board of Supervisor, District 5, Dean Preston
Board of Supervisor, District 6 Matt Haney
Board of Supervisor, District 7, Norman Yee
Board of Supervisor, District 8 Rafael Mandelman
Board of Supervisor, District 9, Hillary Ronen
Board of Supervisor, District 10, Shamann Walton
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Re: *Legal Notices to Marina Times (Scheduled for Hearing December 8, 2020)*

Dear Members of the Board of Supervisors:

I am writing on behalf of my client the *Marina Times* (and its editor in chief Susan Dyer Reynolds), which has been singled out from other independent newspapers in the City qualified to receive legal notices under 1994's Proposition J because it dared to exercise its First Amendment rights and criticize people in public office. It appears that peacefully exercising First Amendment rights, which can get you killed in some countries, may get you punished in San Francisco even by people who call themselves progressive.

A little background is in order. On October 26, 2020 the Office of Contract Administration's acting director, Sailaja Kurella, analyzed 12 publications and held that the *Marina Times* met the standards set forth in the Administrative Code, sections 2.80 and 2.81, to run legal advertising. The *Marina Times*, along with other publications, was therefore approved as a qualified publication to run legal ads under Proposition J. The *Marina Times* has been running legal ads for 10 years. That should have been the end of it.

On December 1, however, the Board voted 7-4 to separate the *Marina Times* from the other 11 publications on the list. Why? Because Supervisor Dean Preston, in the

tradition of tyrants everywhere, said he was upset about things the Marina Times had said and that Ms. Reynolds had tweeted. Supervisor Preston praised independent publications he liked but suggested that the Marina Times was irresponsible and should be removed from the list of qualified publishers. Amazingly, six other supervisors agreed.

Supervisor Preston is not the first politician in history to get upset about critical coverage and try to punish critics. In the 1960s, the racist Commissioner Sullivan in Alabama, not content with beating black people who protested in the civil rights movement, sued the New York Times and the Reverend Martin Luther King Jr. for defamation because he was upset about an advertisement that ran in the Times headlined “Heed Their Rising Voices.” Commissioner Sullivan obtained a sizable judgment from an all-white jury, but it was reversed by the U. S. Supreme Court. In the landmark decision *New York Times v. Sullivan* (1964) 376 U. S. 254, 270, the high court observed that this country has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

The racist Commissioner Sullivan, of course, is not the last public official to get upset when people criticized him. Our country has just voted out of office a President who spent his four years ignoring a pandemic which has killed 275,000 people but raging against a press which dared to criticize him, calling everything which didn’t praise him “fake news.” If the members of the Board would like to emulate Mr. Trump, they could say it is “fake news” that San Francisco has a homeless crisis, that the City employs 35,000 public employees but can’t keep the streets clean, that the director of the Municipal Transportation Authority just admitted that the agency has a history of systemic racism, that the head of the Public Utilities Commission which has a \$700 million budget has just been indicted, and that neither the Mayor nor the Board have effectively confronted those problems. Residents of the West Side could complain that the Twin Peaks Tunnel was shut for weeks two years ago but the fix didn’t work and now it’s shut again. Is any of that fake news, or is it just what Al Gore might call An Inconvenient Truth? You be the judge.

Nor is the criticism the *Marina Times* has engaged in -- it broke the story about Harlan Kelly and PUC corruption, and it’s dared to occasionally express conservative views in deep blue San Francisco -- at all unusual or unprecedented. It’s par for the course, even understated by historical standards. As the California Court of Appeal remarked in *Desert Sun Publishing Co. v. Superior Court* (1979) 97 Cal. App. 3d 49, 51, “Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower with being a conscious agent of the Communist Conspiracy.” And all of that was long before Twitter.

You folks on the Board of Supervisors have it easy. None of you have ever been President, and none of you have your faces on currency, coins, or monuments, but the *Marina Times* has never called any of you murderers, baboons, gorillas, ghouls or traitors (although it would be within its First Amendment rights to do so).

Indeed, while San Francisco confronts a whole host of very serious problems, ranging from a pandemic to homeless issues to a Covid-induced economic problem, neither a free press in general nor the *Marina Times* in particular is one of those problems.

The City, in fact, is blessed to have many independent voices to supplement such daily newspapers as the *San Francisco Chronicle* and the *New York Times*. Supervisor Preston, while trying to punish the *Marina Times* because he didn't like its coverage, praised Joe Eskenazi and the *Mission Local* and Tim Redmond's *48 Hills*, and we agree that those publications fulfill valuable roles in San Francisco, even though they and the *Marina Times* often have different views. Other independent publications such as the *Westside Observer* and *West Portal Monthly* also fulfill valuable roles and the City should encourage, not discourage, such independent voices. The bottom line is that diversity -- not just racial and gender diversity, but viewpoint diversity -- is a very important thing and part of what makes America great. And such viewpoint diversity is important now more than ever, when newspapers are a dying breed and both the Internet and the pandemic have caused existential problems for them. As Jefferson said, "If I had to choose between government without newspapers or newspapers without government, I should not hesitate to choose the latter." Indeed, any attack on the press would be especially offensive when the City employs an army of high-paid public relations people to burnish the image, at taxpayer expense, of its elected officials.

Any action to take away legal advertising from the *Marina Times* after the city's contract administration director unambiguously concluded that it was qualified to receive legal advertisement (and after it has run such ads for 10 years) could only be viewed as unconstitutional viewpoint discrimination, especially since it was the only one of 12 publications to be singled out. See, e.g., *Tinker v. Des Moines Independent Community School Dist.*, 89 S. Ct. 733 [regulation prohibiting wearing armbands to school was unconstitutional denial of free expression; neither students nor teachers shed their rights at the schoolhouse door; wearing button saying "Fuck the Draft" protected]; *Metro Display Advertising v. City of Victorville*, 143 F.3d 1191 (9th Cir. 1998) [free speech principles clearly prohibited city officials from exercising viewpoint discrimination and requiring lessors to remove pro-union advertising from bus shelters]; *Times Picayune Pub. Corp. v. Lee*, No. 88-1325, 1988 WL 36491, at **8-11 (E.D. La., Apr. 15, 1988) [official discrimination against a news media organization in retaliation for the content of its news reporting violated civil rights laws and the First Amendment; selective denial of access to press conferences was unconstitutional].

Conclusion

The Board of Supervisors has a choice. It can ignore the pandemic, ignore the stench of corruption swirling around City Hall in the wake of FBI raids of top administrators' homes, ignore the homeless problem and income inequality, and spend its time trying to violate the First Amendment and punish someone who has the temerity to engage in free speech. It can emulate the soon-to-be gone President Trump, rage against, and try to punish people who dare to exercise First Amendment rights. Or it can try to behave like Washington, Lincoln, Eisenhower and Roosevelt and any responsible public official who knows that criticism comes with the territory and that if you can't stand the heat you should get out of the kitchen. If the Board makes the former choice and tries to punish a critic, it will make San Francisco a national laughingstock and no doubt have the

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so-called Streisand effect of drawing far more attention to unwelcome criticism than it would otherwise receive. If the Board makes the latter choice, it will avoid a constitutional issue and allow the Board to get on with the business of the City, confront the real problems facing our great City and help preserve a free press and Proposition J. It's your choice.

Please make the right one.

Sincerely,

CANNATA, O'TOOLE, FICKES & OLSON LLP



KARL OLSON

CC: Client

KO:hs