ACLJ
AMERICAN CENTER
for LAW & JUSTICE

December 7, 2022

VIA EMAIL AND HAND DELIVERY

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RE: City Council of Pueblo's Viewpoint Discrimination Against Pro-Life Experts and Violation of the First Amendment to the United States Constitution; and Notice of Demand for Litigation Hold

Dear President Graham, Council Members and Mayor Gradisar:

Please be advised that the American Center for Law and Justice (ACLJ) represents Tamra Axworthy, Mark Lee Dickson, and Pastor Quin Friberg, Director of Forging Pueblo, in connection with the incident described below whereby the City Council of Pueblo, Colorado (the "Council" or the "City") violated and continues to violate the First Amendment to the United States Constitution.

Against the backdrop of news that LeRoy Carhart, the late term abortion provider, *see Gonzales v. Carhart*, 550 U.S. 174 (2007), is opening a clinic in Pueblo, CO, the Council is considering an ordinance regulating certain abortions and enhancing regulations of abortion clinics to protect women. As we understand, the vote is currently scheduled for December 12, 2022.

On December 1, 2022, Councilwoman Regina Maestri asked Pastor Friberg to line up speakers for this session. He did so. In the attached email, Councilwoman Lori Winner confirmed that these speakers were on the agenda. Then, yesterday evening at approximately 4:30pm MT, our clients, Ms. Axworthy, Mr. Dickson, and Pastor Friberg, were advised, along with Ms. Brooke Faulkner and Mr. Jonathan Mitchell, that after being invited to be heard by Councilmembers, the pro-life experts will now not be allowed to be heard at the Council's executive session set for tonight, December 7, 2022, at 5:30pm, concerning Councilwoman Regina Maestri's proposed ordinance on abortion clinic municipal regulations. Yet, individuals

who support abortion and oppose the ordinance are being allowed to be heard. According to the Council's agenda posted online, those pro-abortion presenters are still slated to be heard tonight.

The prolife experts were advised *yesterday evening*, Tuesday, December 6, 2022, that they were not going to be allowed to present because, in the words of Councilmember Sarah Martinez, they would give biased opinions and she did not need a circus in her chambers. Testimony will support that the prolife speakers were blocked because of their opinion.

The ACLJ will not allow this viewpoint discrimination in violation of the First Amendment to the United States Constitution to stand. While the injury-in-fact has already occurred, the injury is continuing to occur and must be rectified immediately.

"The First Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *McCraw v. City of Okla. City*, 973 F.3d 1057, 1065 (10th Cir. 2020) (quoting U.S. Const. amend. I; citing *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014)). "Courts use a three-step framework for analyzing the constitutional protections afforded to free speech rights": Whether the speech at issue is protected; the nature of the forum at issue and the proper standard of scrutiny to apply; and, whether the justifications for prohibiting the speech at the meeting satisfy the requisite standard. *Mesa v. White*, 197 F.3d 1041, 1044-45 (10th Cir. 1999); *see Njord*, 774 F.3d at 1263.

The speech censored here is unquestionably protected. *See Morse v. Frederick*, 551 U.S. 393, 403, 127 S. Ct. 2618 (2007) (political speech "at the core of" the First Amendment). Indeed, speech of much less substance, weight, or significance is still protected. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("Most of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation.").

To the extent the forum at issue constitutes a limited public forum, still, governments may not "exercis[e] viewpoint discrimination, even when the limited public forum is one of its own creation." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).[1]

[1] The Councilmember who chairs the working group has acknowledged in an email that at tonight's session, "both sides" will not "receive an equal amount of time" and that the "equal representation will be on December 12." She contends, it appears, that this is permissible because tonight's session is not "public," but instead, is merely for "information." But that is not how the First Amendment works. If the Council session at issue constitutes a "limited public forum," as opposed to a "public forum," that means the government may regulate the time, place, and manner of speech. *But this does not allow city councils to commit unlawful viewpoint discrimination*. That the meeting scheduled this evening is not a regular meeting on a Monday, as contemplated by Sec. 1-4-2 of Pueblo's code, does not excuse the viewpoint discrimination occurring here. Section 15.1. of the Code, entitled Order of Business, requires a public forum as part of the order of business of all council meetings, regular and special. Regardless, the Council has clearly opened up the forum to speakers of one side of the public debate, and excluded the other, because of the viewpoint being expressed.

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the [government] in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the [government] must respect the lawful boundaries it has itself set. The [government] may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," *nor may it discriminate against speech on the basis of its viewpoint.*

Id. (emphasis added) (citing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93, (1993) (internal quotations and other citations omitted). Critically, "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. Here, the comparable speech being allowed by the Council refutes any argument that the appropriate limitations of the forum could justify excluding only speakers of the pro-life viewpoint.

The scrutiny imposed on viewpoint discrimination is harsh. In the Tenth Circuit's words, "Except possibly with respect to topics such as obscenity, viewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny." *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999). Further,

> The government bears a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums. Viewpoint discrimination is an egregious form of content discrimination. Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment.

Id. (quoting *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996).

The Council's actions to consider a proposed ordinance while silencing one side of the ideological, moral, and religious debate on the weighty topic of the termination of preborn human life is outrageous. We look forward to hearing the Council's ostensible justifications for its viewpoint discrimination against pro-life experts. In the meantime, please be advised that the ACLJ is exploring all available legal options, including litigation if necessary, to rectify the Council's unconstitutional actions. The only avenue that could potentially avoid litigation is for the Council to postpone the vote until after an equal time has been provided Ms. Faulkner, Mr. Mitchell, Mr. Craddock, and Mr. Dickson.

Notice of Litigation Hold

The Council and the Mayor are hereby put on notice of anticipated litigation concerning the incident described above. We demand that any relevant City personnel, and agents thereof, preserve *all* materials that may be in any way relevant to said incident. The ACLJ anticipates legal action, including service of initial discovery request, within the next few weeks, to include interrogatories, requests for production of documents, and requests for admissions.

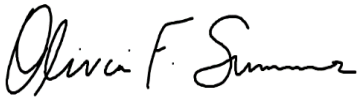
The ACLJ's discovery requests will seek records and documents including electronically stored information ("ESI"), as defined by the Federal Rules of Civil Procedure. As such, we hereby demand that the City take action to preserve all potentially relevant ESI and to prevent the deletion or spoilation of any evidence. Such evidence includes but is not limited to all information stored electronically (for example, writings, drawings, graphs, charts, and other data or data compilations, word processing files, calendaring program data, emails, text messages, photographs, computer logs, and audio and video recordings) in any and all locations within the City's possession, custody, or control (for example, servers, backup logs/tapes, personal and work computers, and other local storage devices, file servers, databases, cellular telephones, and other handheld electronic devices), even if paper copies of this information are also available. Paper copies should be preserved as well. To fulfill this duty, the City may need to disable or suspend any automatic or routine destruction or deletion procedures for electronic and non-electronic information.

We trust that the City has already taken steps to preserve this data since it had an obligation to preserve relevant evidence and protocols concerning record management. Thus, no procedures should have been implemented to alter any active, deleted, or fragmented data. Moreover, no electronic data should have been disposed of or destroyed.

We look forward to your prompt response.

Very respectfully,

Benjamin P. Sisney*
AMERICAN CENTER FOR LAW & JUSTICE



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