LIEBERT CASSIDY WHITMORE
A PROFESSIONAL LAW CORPORATION
LOS ANGELES | FRESNO | SAN FRANCISCO

6033 WEST CENTURY BOULEVARD, SUITE 500
LOS ANGELES, CALIFORNIA 90045
T: (310) 981-2000 F: (310) 337-0837

MDOWELL@LCWLEGAL.COM
(310) 981-2085

October 11, 2010

VIA E-MAIL RJBEZEMEK@BEZEMEKLAW.COM
VIA FACSIMILE AND MAIL 510.763.4255

Robert J. Bezemek
David Conway
Law Offices of Robert J. Bezemek
1611 Telegraph Avenue, Suite 936
Oakland, California 94612

Re: *Santa Barbara City College*
Client-Matter: SA410-001

Dear Mr. Bezemek and Mr. Conway:

This letter further responds to your letter of September 28, 2010 to Vice President Susan Ehrlich at the Santa Barbara Community College District (the "District") on behalf of your client the Santa Barbara Instructors Association ("SBIA"). My firm represents the District in this matter. I wrote to you on September 29, 2010 to address the single issue of expressive activity during the candidates' forum that was scheduled on campus for Thursday, September 30, 2010. My letter assured you and your clients that persons wishing to engage in free speech activity outside the building where the forum is scheduled to occur would be permitted to do so. In fact, that is what occurred.

Your letter of September 28, 2010 contains a number of contentions regarding the Santa Barbara Community College District's alleged conduct relating to upcoming Board elections and regarding the District's policies on expressive activity. Your letter contends (1) that Santa Barbara City College has only a single free speech area and that it is inadequate; (2) that the timing of the District's promulgation of "Election Guidelines for Employees and Students of SBCC" (the "Election Guidelines") prior to the upcoming elections is somehow improper; (3) that the Election Guidelines somehow violate free speech principles, even though they carry out the specific requirements of California law set forth in California Education Code section 7054; and (4) that college administrators "entered faculty in-boxes and destroyed all unread copies" of a September 21, 2010 e-mail sent by SBIA over the District's listserv Groupwise service. You concede that the e-mail contained "information regarding the upcoming candidate forum for September 30, and the Union's endorsements for the SBCC Board of Trustees." (See, Letter from Robert J. Bezemek to Susan C. Ehrlich dated September 28, 2010, at 2 (hereafter "SBIA Letter").)

Each of these contentions wholly lacks merit. First, Santa Barbara City College has not one but *three* free speech areas. The areas are Friendship Plaza, Campus Center Patio (across from the Cafeteria), and West Campus Walk Way (across from the Library). The areas occupy or are directly adjacent to the heavily trafficked areas of the school. They are neither "miniscule" nor do they occupy only 1% of the area of the campus as your letter claims. Almost all students pass through one or the other area while on campus.

Second, there is absolutely nothing improper about the timing of the promulgation of the Election Guidelines. Indeed, promulgation in time for, and sufficiently in advance of, the November 2, 2010 elections is ideal, because the Election Guidelines provide important information to members of the campus community at a time when campaign activity on campus and elsewhere will be at its highest level. Not only are candidates for the Board of Trustees seeking to challenge incumbents, something that has not happened frequently in the past, but there are a number of hotly contested elections that involve all California voters. The Election Guidelines, among other things, explain the important provisions of California Education Code section 7054, which provides that no one can use specified community college district resources for the political purposes enumerated by that statute. Advice on the statute is important -- it is a misdemeanor to violate section 7054.

Third, the Election Guidelines track the requirements of Education Code section 7054, and are reasonable and viewpoint-neutral. They do not violate free speech principles. Instead they carry out the important public policies described in cases like *Stanson v. Mott* (1976) 17 Cal.3d 206, 217-18, of protecting against the distortion of the political processes that would occur if public resources were used, by anyone for political advantage. Indeed, the California Supreme Court, in *San Leandro Teachers Association. v. Governing Board of San Leandro Unified School District* (2009) 46 Cal.4th 822, 845, recently determined that section 7054 comported with free speech principles as applied to communications delivered through teacher mailboxes, a circumstance clearly analogous to a District's e-mail services and its listserv.

Fourth, our information is that the District did not remove or destroy any SBIA e-mails sent through the District's Groupwise listserv. That said, the SBIA's utilization of the District's electronic communication services to advocate in favor of political candidates, including candidates for the Board of Trustee, violates the properly promulgated Election Guidelines and Education Code section 7054.

The remainder of this letter explains, in detail, each of these points.

A. The District's Election Guidelines do not Restrict Free Speech

The "Election Guidelines" prohibit the use of College funds and resources to advocate for candidates and ballot measures. This is simply a restatement and clarification of Education Code section 7054, which prohibits using "school district or community college district funds, services, supplies, or equipment . . . for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." Thus, the law requires the college to abide by the "Election Guidelines"

and the policy is not unconstitutional.

Nonetheless, your letter characterizes the "Election Guidelines" as a prior restraint and a "content based" restriction. However, neither concept applies. Rather, as discussed below, the "free speech zones" that you take issue with are reasonable time, place, and manner restrictions in a limited, designated, public forum.

1. The Election Guidelines are viewpoint neutral

A policy that regulates speech without reference to the type of speech is a content neutral policy. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1573-1574 ["The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.]) In *Savage,* the court determined that Trammell's policy of preventing leafleting in its parking lot was constitutional because it was "[a] regulation that serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." (*Id.*)

For example, in *Cogswell v. City of Seattle* (9th Cir. 2006) 347 F.3d 809, 815-16, the court found that an ordinance that prohibited all references to political opponents in city voters' pamphlets was not viewpoint biased, and therefore constitutional. Further, the blanket prohibition on all advocacy is content neutral. Similarly, a college's policy of prohibiting an event if it "takes sides" is a content neutral "'blanket exclusion' as it does not discriminate against any speaker's viewpoint to the advantage of another speaker's viewpoint" (*Hickok v. Orange County Community College* (S.D.N.Y.,2006) 472 F.Supp.2d 469, 475 -476.)

Here, the "Election Guidelines" impose a blanket prohibition on using college resources for advocacy of any candidates or ballot initiatives. It is a content neutral restriction and must be analyzed as such.

2. The Election Guidelines are not an illegal prior restraint

A prior restraint occurs where a government gives itself discretion to permit or deny speech. (*Forsyth County, Ga. v. Nationalist Movement* (1992) 505 U.S. 123, 130.) Prior restraints are not illegal in and of themselves and may be imposed as long as the government does not have too much discretion to deny speech and is a reasonable, content neutral, "time, place, and manner restriction." (*Id.*) In *American Civil Liberties Union v. Mote* (4th Cir. 2005) 423 F.3d 438, 445-446, the court found that a policy requiring permits for public speaking, limiting permits to specified areas of the campus and granting preference to activities related to the university, was reasonable, content neutral and "not an impermissible prior restraint."

The Election Guidelines do not seek to give the college discretion in approving or denying speech. The blanket prohibition on using college resources to advocate for candidates and ballot initiatives does not give the college discretion in deciding what speech to permit. The policy is also reasonable given the requirements of the Education Code. Moreover, under *American Civil Liberties Union, supra,* 423 F.3d 438 at 445 -446, restricting public speech to certain areas does not act to create an illegal prior restraint.

B. The District May Appropriately Enforce Reasonable Time, Place and Manner Restrictions

Your letter takes issue with the "free speech zones" referenced in the Election Guidelines and in other District's regulations. A great deal of your discussion is based on an incorrect assertion, namely that the College is a public forum and thus any restrictions must be subject to strict scrutiny. However, as described below, there is little support for this position and it is incorrect. The College may create free speech zones as a reasonable content neutral restriction.

1. The College is a limited public forum

A traditional public forum is a place the public has traditionally used for the free exchange of ideas (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 482-84 [citing *Cornelius v. NAACP Legal Defense and Education Fund, Inc.* (1985) 473 U.S. 788, 799-800].), and "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (*Roberts v. Haragan* (N.D. Tex. 2004) 346 F.Supp.2d 853, 859, citing *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45.) This category is narrow, essentially encompassing only public streets, sidewalks, and parks. (*Id.*) Speech regulations in a public forum are subjected to heightened scrutiny. (*Capital Square Review & Advisory Board v. Pinette* (1995) 515 U.S. 753, 761.)

The government may also create a designated forum, by intentionally opening a "place or channel of communication, not traditionally considered a public forum, for use by the public at large for assembly and speech." (*Cornelius, supra,* 473 U.S. at 802.) This category is rare. (*Id.*) The relevant inquiry for whether a designated public forum exists is whether the government so intended; the government does not create a public forum by inaction or by permitting limited discourse, but only "by intentionally opening a nontraditional forum for public discourse." (*Id.* [emphasis added].) Further, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." (*Bowman v. White* (8th Cir. 2006) 444 F.3d 967, 978.) Courts consider the open nature of these spaces, the traditional use of the property, the objective use and purposes of the space, and the government intent and policy with respect to the property, although these factors are not dispositive. (*Id.*)

An entire college campus cannot be labeled as a traditional public forum. (*Bowman v. White* (2006) 444 F.3d 967, 977 (["labeling the campus as one single type of forum is an impossible, futile task."]) While universities may share some characteristics of traditional public fora, the:

> "university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."

(*Widmar v. Vincent* (1981) 454 U.S. 263, 268, fn. 5.) In *Roberts, supra,* 346 F.Supp.2d at 860, the court stated that "[t]his Court begins its analysis of the facts of this case by recognizing one axiom: the entire University campus is not a public forum subject to strict scrutiny." In *Widmar, supra,* 454 U.S. at 268, plaintiff argued that all outdoor areas of the college were a public forum. However, the court dismissed this argument noting that "[w]e have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." Although access to the outdoor areas is not limited to students, faculty and staff, and are open to the public, the college was a limited public forum. (*Id.*)

The court in *American Civil Liberties Union, supra,* 423 F.3d 438 at 444 found similarly. There, the court found

> "[e]xamining the circumstances of this case, we are of opinion and agree with the district court that the College Park campus is a limited public forum. Contrary to plaintiff's arguments, the campus is not akin to a public street, park, or theater, but instead is an institute of higher learning that is devoted to its mission of public education. This mission necessarily focuses on the students and other members of the university community. Accordingly, it has not traditionally been open to the public at large, but instead has been a 'special type of enclave' that is devoted to higher education."

You cite *Bowman, supra,* 444 F.3d at 977-78 for the proposition that colleges are unlimited designated forums, but this case is distinguishable. Whether a forum is a designated forum is a fact intensive determination that takes into account the characteristics of the space at issue and its historical uses. (*Id.*) In *Bowman,* the court ruled that, under the facts of that case, the college's historic use of the area in question determined that the particular area was a designated public forum. (*Id.*) This limited holding is not useful here. You also cite *Roberts, supra,* 346 F.Supp.2d 853 and assert that it held that the sidewalks were public fora but the court actually held that "these areas are public forums, *at least for the University's students.*" (*Id.* at 861 [emphasis added].)

Under the above authority, it is evident that the College is not itself a public forum. Although it is undisputed that there are sidewalks and park-like areas, these are not necessarily public fora. These areas are not a traditional public forum and may not be considered designated fora unless the College intentionally designates them as such. Thus, your assertion that the Election Guidelines are an attempt to transform a public forum into a limited one is not supported by any facts or the face of the Guidelines. The existing policy and the Guidelines place legitimate, reasonable restrictions on areas that the College has every right to regulate.

2. Reasonable Restrictions

It is a basic tenet of law that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" (*Heffron v. International Soc. for Krishna Consciousness, Inc.* (1981) 452 U.S. 640, 647.) Even in a traditional public forum, the college "may impose reasonable time, place, and manner restrictions on demonstrators' activities, so long as these restrictions also pass constitutional muster." (*Kuba v. 1-A Agr. Ass'n* (9th Cir. 2004) 387 F.3d 850, 857.)

You are correct in your assertion that *Jews for Jesus, Inc. v. City College of San Francisco* ((N.D.Cal.,2009) 2009 WL 86703, *4, is instructive. In that case, the court noted that "Restricting expressive activity to specific areas in a public forum is not per se unconstitutional. *See Heffron v. ISKON*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (allowing a state fair to restrict religious missionaries to specific areas of a fairgrounds)." (*Id.*) Although the court found that there was not enough evidence to determine whether the free speech zone in that particular case was constitutional, the court stated the general rule that, under both the U.S. and California constitutions,[1] the government may enforce permissible restrictions on expression in a public forum, that are "(1) content-neutral, (2) narrowly tailored to serve an important government interest, and (3) leave open ample alternative channels for the communication of the message. *Kuba* at 856." (*Id.*) (*See also Savage, supra,* 223 Cal.App.3d at 1573.) This rule holds even if a court were to determine the College is a public forum. (*Id.*)

In *American Civil Liberties Union, supra*, 423 F.3d at 445, the court analyzed a policy that required permits before speaking and distributing literature and required speakers to reserve a specific place on campus. The court determined that the restriction was not a total ban on speech, was content neutral, and was "reasonable in light of the purpose served by the forum." (*Id.*) A reasonable time, place, and manner restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." (*Id. quoting Cornelius, supra*, 473 U.S. at 808.) The court considered the policy reasonable because it did not deny access to speakers, allowed them to reserve a space as much as five days ahead of time, and the areas reserved for speaking or handbilling were high traffic areas. (*American Civil Liberties Union, supra*, 423 F.3d at 445)

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[1]Although you assert that California's law regarding first amendment protection is broader than the federal standard, the " power to impose time, place and manner restrictions on such activity is nonetheless measured by federal constitutional standards." (*Savage, supra,* 223 Cal.App.3d at 1572.)

Concerns about congestion, traffic, and safety are legitimate concerns that justify restrictions on free speech. (*Roberts, supra,* 346 F.Supp.2d at 864 [court found that request to move speaker, in a public forum, "was a legitimate, viewpoint-neutral, location consideration that was narrowly tailored to meet a significant University concern, i.e., 'vehicular traffic and safety issues . . . '"]) The court in *Savage* found that a complete ban on handing out literature in a parking lot was reasonable because it allowed leafleting on the sidewalk and was justified by concerns for traffic congestion and littering. (*Savage, supra,* 223 Cal.App.3d at 1575.)

The primary purpose of the College is to educate students (*Widmar, supra,* 454 U.S. at 268, fn. 5.) In furtherance of this goal, the College has a right, and a duty, to protect the safety of its students and ensure that its primary mission is served. Regardless of whether a court ultimately determines the College's outdoor areas are public fora, it cannot be argued that the College has no right reasonably to regulate access to those areas.

You characterize the policy as the "'creation' of a miniscule 'free speech' area," but relevant case law shows this assertion is incorrect. The court in *American Civil Liberties Union, supra*, 423 F.3d at 442 found that a restriction authorizing the use of the amphitheater and designated sidewalks outside the student union in a 1,200 acre campus, was reasonable. Santa Barbara City College, on the other hand, has created *three areas* in a 74 acre campus. The policy at issue here is content neutral and designates three significant free speech areas for all speakers, even if the speakers are not associated with the College. The three areas are among the *most highly trafficked areas of campus* and, thus, leave open significant channels of communication. Accordingly, it is a reasonable regulation in a limited public forum.

C. The Prohibition on Political Buttons in the Instructional Setting is Proper Under California Law

Your letter also challenges the paragraph of the Election Guidelines that provides: "[W]hile school employees have the right to express to others their respective political views, such expression does not extend to the instructional setting. Faculty in instructional settings should refrain from advocating, including the *wearing of political buttons*." Your letter contends that this prohibition on buttons is "unconstitutional." (See, SBA Letter at 17.) It is not. *California Teachers Assn. v. Governing Board* (1996) 45 Cal.App.4th 1383, 1389-92, held that a District may prohibit teachers from wearing political buttons in this instructional setting. The Election Guidelines comply with this holding by limiting the prohibition on political buttons to the instructional setting.

You attempt to distinguish *California Teachers* by explaining that its holding should not extend to the college-level instruction. Your letter describes that at the college level there is not the risk of "impressionable younger students" being "confuse[d] that the message of the teacher is the message of the government." (SBIA Letter at 17.) The Court in California Teachers, however, relied on school district authorities' "power to dissociate themselves from political controversy" to support its holding, as established by Supreme Court precedent. (*Id.* at 1393-93.)

Your letter cites no authority providing that an instructor at a community college, or at any college or university, has a First Amendment right to wear a political button in the instructional setting. Your letter claims buttons are "passive expression," but clearly instructors' wearing of political buttons presents students with a direct political message regardless of whether they are willing recipients, it associates the college directly in a political controversy, and it allows the instructor to exploit the academic environment – they have an essentially captive audience of students to which to deliver their message, which they would not have but for the resources of the college and the desire of the students to obtain an education. The prohibition on political buttons is sound and appropriate. [2]

D. <u>The Election Guidelines Properly Apply to the District's E-mail Service, Including Its Groupwise Listserv</u>

1. The District's E-mail Service, Including its Groupwise Listserv, Constitute "Services" and Involve Use of "Equipment" For Purposes of Education Code section 7054

California Education Code section applies broadly to District "services" and "equipment." It provides:

> No school district or community college district funds, *services*, supplies, or *equipment* shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.

(Educ. Code, § 7054 subd. (a) (emphasis added).) The California Supreme Court in *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 834, held that section 7054 applied to distribution of political material, by a union, in teacher mailboxes. The Court's reasoning applied the legislative history of section 7054. The Court reasoned as follows:

> Two aspects of the above legislative history are noteworthy. First, it refers to "materials produced *with taxpayer monies*," which school mailboxes clearly are. Second, and more significantly, as the legislative history of section 7054 makes clear, it was designed to avoid the use of public resources to perpetuate an incumbent candidate or his or her chosen successor, or to promote self-serving ballot initiatives, thereby compromising the integrity of the electoral process. The District contends that permitting *employee organizations* to use the mailboxes to endorse school board candidates *will unfairly advantage those organizations and the candidates they endorse*, because it allows them, but not other candidates and organizations, to use the mailboxes to communicate with

[2] Your letter cites *Burnham v. Ianni* (8th Cir. 1997) 119 F.3d 668, but the case is inapposite because it involved censorship from a collection of spoof faculty photographs of teachers who posed with weapons – it did not involve political expression and it did not involve an instructional setting.

> teachers about these endorsements. *We agree* that this special access to an internal channel of communication to influence elections is a potential abuse that section 7054, and the *Stanson* decision, were designed to guard against. (See also *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 92 Cal.Rptr.3d 286, 205 P.3d 207 [reaffirming *Stanson's* basic principles].) Therefore we conclude, consistent with the purpose of section 7054, that the broad term "equipment" was intended to encompass mailboxes specially constructed at taxpayer expense to serve as a school's internal communication channel, which one group may not use to its exclusive political advantage. We agree with the Court of Appeal that, unlike school furniture, for example, which may be incidentally used for a host of different purposes, the term "equipment" is plausibly applied to fixtures dedicated to a specific use. (*Id.* at 834 [emphasis added].)

The plain language of section 7054(a) supports that the District's e-mail service and Groupwise listserv are covered by the statute in the context of political e-mails sent to faculty or others. First, the e-mail systems and the listserv are "services" within the meaning of the statute. They are paid for by the District with taxpayer funds, and indeed payment must be made by the District on a periodic basis. Moreover, communication of a political message through District e-mail and the listserv relies on the "use" of District "equipment," in particular the District server and computers. E-mail sent by SBIA to a District account will most likely be read by the recipient faculty member on a workplace computer at the District, i.e., on District "equipment." Indeed, many District employees are not authorized to access their e-mail accounts outside work hours, thus making it so that SBIA e-mails in question could be viewed only by individuals using District "equipment."

The purposes of section 7054, articulated by the California Supreme Court in *San Leandro*, also require that section 7054 apply. First, taxpayer funds support the e-mail system and listserv. Second, the Union's access to the e-mail system and listserv allows the Union a unique advantage of being able to advocate in favor of its political candidates, without others having similar access. (*San Leandro, supra,* 46 Cal.4th at 834.) Your letter does not contend that District administration or others at the District could utilize the services at issue to advocate in favor of political candidates. SBIA claims a right of access prohibited under the plain language of section 7054, and the concerns of the California Supreme Court in *San Leandro* that use of District resources not be used to distort the political process.

Your letter also makes the related argument that Article 4.1 of the SBIA/SBCC collective bargaining agreement gives the SBIA a right of access to "electronic mail services." (SBIA Letter at 22.) Your letter suggests that this gives the SBIA the right to use the services for political advocacy. The union in *San Leandro* made this same argument, however, and the California Supreme Court rejected it. The union's right of access to teacher mailboxes for bargaining purposes did not make the mailboxes any type of public forum, and did not allow the Union to violate section 7054 by using the mailboxes. (*San Leandro, supra,* 46 Cal.4th at 842.)

2. The District's Listserv and E-mail Services Are Non-Public Forums

Your letter argues that notwithstanding section 7054, the District's e-mail service and listserv are public forums so that free speech considerations supposedly (your letter appears to argue) trump the statute's prohibitions and preclude the District's Election Guidelines. The contention lacks merit because the District has not opened up its electronic communication services for speech on any topic and has instead maintained them as non-public forums.

A public forum may be created by special government designation of a place or channel of communication. As described above, however, the government does not create a public forum by inaction or by permitting limited discourse in such a forum; it creates such a public forum only by "by *intentionally* opening a nontraditional forum for public discourse." (*Cornelius*, *supra*, 473 U.S. at 802-803 ["We will not find that a public forum has been created in the face of clear evidence of a contrary intent"].)[3]

Administrative Procedure AP 3720 makes clear that the electronic communications services of the District, including e-mail, are only to be used for administrative and educational purposes, and only for personal use that is "incidental." AP 3720 provides:

> **Use of District electronic communications resources is allowable subject to the following conditions:**
>
> **Section 3720.41 Intended Use**
> Electronic communications resources are provided by the District units to support the *teaching, research, and public service* missions of the College, and the *administrative functions* that support this mission.
>
> **Section 3720.42 Personal Use**
> Users of a District electronic communications systems or service may use that facility or service for *incidental* personal purposes provided that such use does not:
> directly or indirectly interfere with the District's operation of electronic communications resources;
> interfere with the user's employment or other obligations to the District; or

[3] This letter discusses public forum principles in these sections with reference to federal law. The California Constitution's free speech protection has been viewed as having a different scope than the federal standard, but as you know it is very close to the federal standard. (See, *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab.* (1984) 154 Cal.App.3d 1157, 1163 ["While the free speech provisions differ, California courts draw upon both state and federal law for their state constitutional analyses."].) Indeed, the California Supreme Court did not view the standards as appreciably different in the *San Leandro* case when it applied the standards to the factual scenario of teacher mailboxes. The Court's conclusion with regard to teacher mailboxes is on-point with regard to the electronic communications services involved here.

burden the District with incremental costs.

(Emphasis added.) Section 3720.47 placed additional restrictions on use of the system, as do other provisions on Intellectual Property and illegal uses.

The District policy does not open up the e-mail service for use as a forum for debate on any topic, by the public, or even by employees or students. Indeed, the fact that the District sought to limit the uses to which the electronic communications service can be put shows that the District clearly did not "intentionally" or otherwise intend the service to be a designated public forum. (See, *Cornelius*, *supra*, 473 U.S. at 802-803.) The policy certainly does not open up the e-mail service for debate on political topics by interested parties or others, and certainly does not do so in contravention of Education Code section 7054, violation of which can result in criminal liability.

To support the contention that "Listserv and e-mail are public forums" (see, SBIA Letter at 20), your letter quotes numerous provisions from AP 3720 and other District policies. But none states that the District intends its listserv or e-mail service to constitute a public forum, that the District invites discussion on any and all topics on these services, that the District intends to abrogate the general restrictions in Sections 3720.41 and 3720.42 on Intended Use and Personal Use, or that the District intends its electronic communications services to be used for political advocacy including political advocacy that uses these resource in a way that violates Education Code section 7054. Rather, your letter points only to generalized language concerning *inter alia* the District's commitment to protecting free expression. (See, SBIA Letter at 20-22.) Indeed, AP 3720.47 quoted above contains the proviso that "District electronic communications resources may not be used for: unlawful activities . . . ." These include using the resources in a manner that violates Education Code section 7054.

Your letter contends that "the listserv is a virtual bulletin board" where "employee viewpoints [are] to be exchanged, on every imaginable issue." (SBIA Letter at 23.) But the letter cites no actual policy language describing that this is the case. Nor is any policy cited stating that the listserv is to be opened up for use in a way that goes beyond AP 3720. As described above, that policy does not establish a designated or other public forum as to any of the District's electronic communications resources.[4]

[4] SBIA representatives have recently been accusing the District of blocking or deleting email from the SBIA to staff in order to prevent communication about the election. This has not occurred. The District has learned, however, that addresses on emails from SBIA representatives on September 20 and September 29, 2010 to adjunct faculty were mistyped, and therefore could not reach the addressees. In addition, the District learned that last week there was an unrelated interruption to delivery of email to adjunct faculty due to a system problem.

3. The Election Guidelines as Applied to the District's E-Mail and Listserv Comply with Free Speech Standards Because the Guidelines are Reasonable and Viewpoint-Neutral

A non-stringent standard of review applies to restrictions on speech that occur on public property that is neither by tradition nor by designation a forum for public communication. Such a forum is considered a nonpublic forum. The District's electronic communications resources, which have not specifically been designated for public use, constitute nonpublic forums. (*Cornelius, supra,* 473 U.S. 788; *Perry, supra,* 460 U.S.37.)

The United States Supreme Court has specifically stated that a government agency "has the power to preserve [a non-public] property under its control for the use to which it is lawfully dedicated," subject only to a reasonableness test. (*Perry, supra,* 460 U.S. at 46.) Thus, to restrict access to a nonpublic forum, a government agency must simply demonstrate that its restrictions are reasonable and do not constitute an effort to suppress expression merely because public officials oppose the speaker's viewpoint. (*Cornelius, supra,* 473 U.S. at 806 ["Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral"].)

Restrictions against expending public funds or resources to support or oppose political candidates or ballot measures are reasonable because they are consistent with the District's purpose of preserving its property for the use to which it is dedicated by AP 3720. It is reasonable and justified because it avoids the appearance of political favoritism.

Nor are the District's restrictions on political campaigning by use of the District's internal mailboxes overly burdensome to employees or others. Abundant alternative channels of communication for political activity exist and are readily available, including personal emails, a union Internet website, U.S. mail, and in-person solicitation. The District's restrictions on the use of one particular District-controlled and provided forum cannot be deemed unduly restrictive or unreasonable, particularly when the restriction is mandated by California law. (See, *Cornelius, supra,* 473 U.S. at 788; *Perry, supra,* 460 U.S. at 53-55.)

Indeed, the California Supreme Court in *San Leandro* confronted the issue of whether, even if section 7054 applied to teacher mailboxes, the First Amendment and California Constitution precluded application of the statute to a Union's political communications. The Court found that the neither federal nor state free speech principles barred application of the statute by the school district. (*San Leandro, supra,* 46 Cal.4th at 838-45.)

4. The District Policies, Including its Election Guidelines, Comply Even With Public Forum Standards, Because Education Code section 7054's Prohibition on Use of District Services on Behalf of by Incumbents, Challengers, or Others Advances a Compelling Interest and is Narrowly Tailored

Speech regulations in a public forum are subjected to heightened scrutiny. (*Capital Square Review & Advisory Board v. Pinette* (1995) 515 U.S. 753, 761.) But even if the District's e-mail service and listserv were public fora (and they are not), the Election Guidelines would pass constitutional muster because they comply with the applicable standards. They implement Education Code section 7054, which itself advances the compelling interest of avoiding distortion of the political process through exploitation of enumerated District resources. As the California Supreme Court described in the *San Leandro* case, section 7054 and its predecessor statutes have the purpose, in part, of effectuating the public policies motivating the Court's decision in *Stanson v. Mott* (1976) 17 Cal.3d 206. There, the Court described it is a "fundamental precept of this nation's democratic electoral process . . . that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." (*Id.* at 217.) The selective use of public funds in election campaigns raises the specter of an improper distortion of the democratic electoral process. (*Id.* at 217-18.)

The Election Guidelines' implementation of section 7054 is narrowly tailored. It specifically delineates both the types of political advocacy that are prohibited and the resources of the District that are off limits. It specifically references in particular ballot initiatives and Board of Trustee elections, which are political disputes that pose the greatest risk of mis-use of District funds.

CONCLUSION

For the foregoing reasons, the contentions in your letter of September 28, 2010 described above lack merit. Nor does the District agree with any specific contention in your 26-page letter that is not mentioned here. Any legal proceedings you or your client institutes based on the contentions in your letter will be unfounded and very likely frivolous.

That said, my client looks forward to interacting positively with your client in the free expression of ideas concerning upcoming elections through means that comply with the District's policies and with California and federal law.

You can reach me at (310) 981-2085 if you wish to discuss this matter.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Mary L. Dowell

MLD:dlr
cc: Dr. Andreea Serban
Susan Ehrlich

TRANSMISSION VERIFICATION REPORT

TIME : 10/11/2010 16:18
NAME : LIEBERT CASSIDY
FAX : 310-568-9354
TEL : 310-981-2000
SER.# : M7J590011

DATE,TIME	10/11 16:15
FAX NO./NAME	15107634255
DURATION	00:02:57
PAGE(S)	15
RESULT	OK
MODE	STANDARD ECM

LIEBERT CASSIDY WHITMORE
A PROFESSIONAL LAW CORPORATION
6033 W. Century Boulevard, Suite 500
Los Angeles, California 90045
Tel: (310) 981-2000 • Fax: (310) 337-0837
www.lcwlegal.com

FAX COVER SHEET

DATE: October 11, 2010 **CLIENT-MATTER NUMBER:** SA410-001

To:

NAME:	FAX NO.:	PHONE NO.:
Robert J. Bezemek David Conway Law Offices of Robert J. Bezemek	(510) 763-4255	

FROM: Mary L. Dowell **PHONE:** (310) 981-2085

RE: *Santa Barbara City College*

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Message:

Please see attached correspondence.