

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Agreement") has been made and entered into by and among Victoria Connolly and the First Amendment Coalition (collectively "Petitioners"), on the one hand, and the City of Auburn (the "City"), the Auburn City Council, Kevin Hanley, Michael Holmes, William Kirby, Keith Nesbitt and Bridget Powers on the other. Councilmembers Hanley, Holmes, Kirby, Nesbitt and Powers are collectively referenced herein as "the Individual Councilmembers." The City, City Council and the Individual Councilmembers are collectively referenced herein as "Respondents." Petitioners and Respondents (the "Parties") enter into this Agreement based on the understandings set forth in the following recitals, each of which they affirm to be true and correct.

RECITALS

WHEREAS, Petitioners filed a Petition for Writ of Mandate under the California Public Records Act (Government Code § 6259) and Article I, § 3(b)(1) of the California Constitution, and for declaratory relief in Placer County Superior Court on June 1, 2012 (Case No. SCV0031261) to obtain access to certain emails the City refused to provide in response to Petitioners' requests under the California Public Records Act and to compel the City to amend its policy regarding the preservation of emails and their disclosure under that Act as records of the City (the "Lawsuit");

WHEREAS, the Lawsuit named the City of Auburn, the Auburn City Council, and the five individual members of the Auburn City Council as defendants; and

WHEREAS, the Parties desire to fully and finally resolve the Lawsuit on the terms and conditions set forth below.

THEREFORE, in consideration of the promises, covenants, warranties and representations set forth below, the Parties agree as follows:

I. WAIVER AND RELEASE

1. **Waiver of Claims.** Petitioners, on behalf of themselves and their successors, assignees, agents, employees, directors, officers, attorneys, and other representatives, hereby waive any claims they may have against the Respondents arising from the Lawsuit and facts alleged therein, including any right to claim

attorneys' fees and costs under Government Code § 6259(d), Code of Civil Procedure § 1021.5 or any other statute.

2. **Civil Code § 1542 Waiver.** With respect to all claims related to or arising out of the Lawsuit, the Parties expressly waive the rights afforded under California Civil Code § 1542, which provides that:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

3. **Advice of Attorney.** The Parties acknowledge that they have had the opportunity to seek the advice of an attorney with respect to the advisability of making the release provided for herein and with respect to the meaning of California Civil Code § 1542. The Parties understand that if the facts giving rise to this Agreement are found later to be other than, or different from, the facts now believed by them to be true, or if new facts come to the Parties' attention, they agree that the releases above will remain effective despite these factual discoveries. The Parties acknowledge that they are aware of Civil Code § 1542 and hereby expressly waive any rights they may have thereunder, as well as under any other statutes or common law principles of similar effect.

4. **Dismissal.** Within five (5) court days of the adoption of the records retention policy referred to in Paragraph 5 and the other policies set forth below, Petitioners shall file a request for dismissal with the Placer County Superior Court that requests dismissal of all claims asserted in the Lawsuit by Petitioners against all Respondents, with prejudice. Pending the adoption of said policies, and immediately after the parties' execution of this agreement, Petitioners shall take their Petition for Writ of Mandate off calendar.

5. **Records Retention.** The City will amend its records retention policies to provide that all email sent or received by the City's email server will be preserved for two years and made available for public inspection on the same terms as other City records.

6. **City Email Addresses.** Except as provided in Paragraph 7 below, City Council members, the City Clerk and City Treasurer, and City staff will be required to use (or copy to an address on) the City server for all emails regarding matters of City business. These emails will be preserved for two years and made available for public inspection pursuant to Paragraph 5.

7. **Communications with Individuals.** The policy required by Paragraph 5 may state that City Council members, the City Clerk, and the City Treasurer need not use the City server for emails with Auburn residents, business owners, and property owners that are not addressed or copied to any other City Council member or City official or to a member of City staff. The policy required by Paragraph 5 need not require such emails to be preserved for two years or made available for public inspection.

8. **City Compliance.** The City will continue to comply with Government Code § 54957.5, which deems to be a public record any document communicated to a majority of City Council members, whether at the same time or seriatim, with respect to an item of City business regardless of the means of that communication, including via emails sent to non-City email accounts.

9. **Minimum One-Year Term.** The City agrees that the written policies required by this Agreement will not be amended for one year from the date this Agreement is signed on behalf of the City.

- a. The City will give written notice of any proposal to amend the policy required by Paragraph 5 at least 45 days prior to any vote on the proposal to Karl Olson, Esq. at the address shown for him on the website of the California Bar Association when the notice is given and to the Executive Director of the First Amendment Coalition at the address shown on its website when the notice is given.
- b. In addition, the City shall publish two notices in the **Auburn Journal**, or if it ceases to be a newspaper of general circulation in the City, in another such newspaper, the first of which must be published at least 45 days before action is taken on the proposals.

- c. Any action to amend the written policies required by Paragraph 5 must be taken in open session as required by the Ralph M. Brown Act, Government Code § 54950 et seq. as it now exists or may hereafter be amended.
- d. The parties acknowledge that the City must comply with applicable law as it now exists or may change hereafter even if such law varies from the written policies required by this Agreement.

10. **Public Hearing.** The City agrees to schedule a noticed public hearing within 60 days of execution of this Agreement to review its electronic records retention policy, to consider amendments to that policy consistent with these terms, and such other amendments that may be proposed by City Council members or members of the public at that hearing. The City Council will adopt amendments consistent with these terms within 120 days of this Agreement's execution.

11. **Emails as Records.** The First Amendment Coalition and Ms. Connolly maintain their view that emails to or from City Council members and other City officials, whether via City email accounts or otherwise, are disclosable public records of the City under the California Public Records Act. The City maintains the contrary view. Nothing in this Agreement constitutes a waiver of any party's position on this issue.

12. **City Funds.** The City agrees that it will not expend funds to promote the use of non-City email addresses for City Council members, the Clerk, the Treasurer, or other City officials.

II. GENERAL PROVISIONS

13. **Negotiated Agreement.** The Parties acknowledge that the terms of this Agreement were negotiated and drafted by the Parties with the assistance of counsel. Accordingly, any rule of construction to the effect that any ambiguity is to be construed against the drafting party will not be applied to the interpretation of this Agreement.

14. **Entire Agreement.** Each Party warrants for the benefit of all other Parties that no promise, inducement, or agreement not expressed herein has been made to it in connection with this Agreement, and that this Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings of the Parties relating to the subject matter

hereof. It is expressly understood and agreed that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by an executed written agreement signed by all Parties. The Parties hereto agree that they will make no claim at any time or place that this Agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character.

15. **Severability.** If for any reason any provision of this Agreement is determined to be invalid, unenforceable or contrary to any existing or future law to any extent, such provision will be enforced to the extent permissible under the law and such invalidity, unenforceability or illegality will not impair the operation of or otherwise affect those portions of this Agreement that are valid, enforceable, and legal.

16. **Binding Effect.** This Agreement is and will be binding upon and will inure to the benefit of the Parties hereto and their respective heirs, affiliates, predecessors, successors and assigns.

17. **Governing Law and Dispute Resolution.** This Agreement shall be construed and enforced pursuant to the laws of the State of California. Any court action to enforce the terms of this Agreement must be brought in the state courts located in Placer County, California. In any such action, the Parties agree that each side will bear their own attorneys' fees and costs in connection with any dispute arising out of the enforcement of this Agreement.

18. **Attorneys' Fees and Costs.** The Parties agree to bear their own attorneys' fees and costs, and that no further attorneys' fees or costs are owed among them, in connection with the Lawsuit or the negotiation, preparation and execution of this Agreement.

19. **Cooperation.** All Parties to this Agreement agree to cooperate with each other and to execute such additional documents, papers and pleadings as may be necessary to give effect to the Agreement.

20. **Notices.** Any notice or document required to be served by one Party on the other Party under this Agreement may be served by (1) first class mail, postage prepaid, certified, return receipt, U.S. Postal Service, or (2) personal service, at:

For the City of Auburn, the Auburn City Council. Keith Nesbitt, Kevin Hanley, William Kirby, Michael Holmes, and Bridget Powers


Michael G. Colantuono, Esq.
City Attorney, City of Auburn
Colantuono & Levin, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946

For Victoria Connolly and the First Amendment Coalition

Karl Olson, Esq.
Ram, Olson, Cereghino & Kopczynski LLP
555 Montgomery Street, Ste. 820
San Francisco, CA 94111

21. **Counterparts; Electronic Signatures.** This Agreement may be signed in one or more counterparts, each of which shall be deemed an original, but all of which together shall be deemed one and the same instrument. The Parties further agree that this Agreement may be transmitted by facsimile or other electronic means and that the reproduction of signatures by facsimile or other electronic means will be treated as binding as if originals.

DATED: July 17, 2012

By: 
Kevin Hanley, Mayor
CITY OF AUBURN

Attest:

By: _____
Joseph G.R. Labrie, City Clerk
CITY OF AUBURN

Approved as to Form:

By: _____
Michael G. Colantuono, City Attorney
CITY OF AUBURN

For the City of Auburn, the Auburn City Council. Keith Nesbitt, Kevin Hanley, William Kirby, Michael Holmes, and Bridget Powers

Michael G. Colantuono, Esq.
City Attorney, City of Auburn
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DATED: _____

By: _____
Kevin Hanley, Mayor
CITY OF AUBURN


Attest:

By: _____
Joseph G.R. Labrie, City Clerk
CITY OF AUBURN


Approved as to Form:

By:  7/12/12
Michael G. Colantuono, City Attorney
CITY OF AUBURN

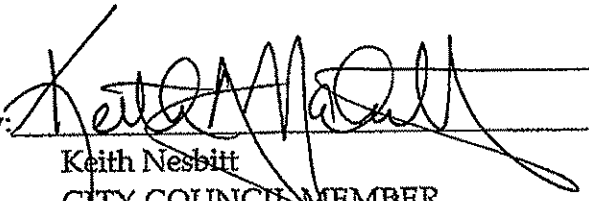
DATED: July 17, 2012

By: 
Kevin Hanley
MAYOR & CITY COUNCIL
MEMBER

DATED: _____

By: 
J.M. "Mike" Holmes
MAYOR PRO TEM & CITY
COUNCIL MEMBER

DATED: _____

By: 
Keith Nesbitt
CITY COUNCIL MEMBER

DATED: _____

By: 
William Kirby
CITY COUNCIL MEMBER

DATED: _____

By: _____
Bridget Powers
CITY COUNCIL MEMBER

Approved as to Form:

By: _____
Charles Post, Esq.
Attorney for
INDIVIDUAL CITY COUNCIL MEMBERS

DATED: _____

By: _____
Kevin Hanley
MAYOR & CITY COUNCIL
MEMBER

DATED: _____

By: _____
J.M. "Mike" Holmes
MAYOR PRO TEM & CITY
COUNCIL MEMBER

DATED: _____

By: _____
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CITY COUNCIL MEMBER

DATED: _____

By: _____
William Kirby
CITY COUNCIL MEMBER

DATED: _____

By: Bridget Powers
Bridget Powers
CITY COUNCIL MEMBER

Approved as to Form:

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Attorney for
INDIVIDUAL CITY COUNCIL MEMBERS

DATED: _____

By: _____

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MAYOR & CITY COUNCIL
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By: _____

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DATED: _____

By: _____

Keith Nesbitt
CITY COUNCIL MEMBER

DATED: _____

By: _____

William Kirby
CITY COUNCIL MEMBER

DATED: _____

By: _____

Bridget Powers
CITY COUNCIL MEMBER

Approved as to Form:

By: James K. Post FOR

Charles Post, Esq.

Attorney for

INDIVIDUAL CITY COUNCIL MEMBERS


DATED: 7-16-12

By: 
Victoria Connolly

DATED: _____

By: _____
Peter Scheer, Executive Director
FIRST AMENDMENT
COALITION

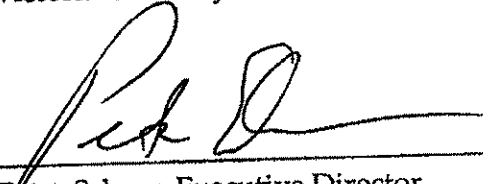
Approved as to Form:

By: 
Karl Olson, Esq.
Attorney for
VICTORIA CONNOLLY and THE
FIRST AMENDMENT COALITION

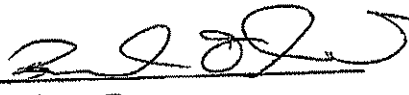
DATED: _____

By: _____
Victoria Connolly

DATED: 7/16/12

By: 
Peter Scheer, Executive Director
FIRST AMENDMENT
COALITION

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Attorney for
VICTORIA CONNOLLY and THE
FIRST AMENDMENT COALITION