June 16, 2021

VIA E-MAIL

Richard C. Miadich, Chair
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: Agenda Item #9: Henning-Bray Opinion

Dear Chair Miadich:

We submit these comments on behalf of the California State Association of Counties (CSAC) and the California School Boards Association (CSBA) concerning the draft *Henning-Bray Opinion* that is before the Commission on June 17, 2021. CSAC and CSBA appreciate the Commission's consideration of our request for the opinion to provide clarity and to aid our members in their continuing efforts at regulatory compliance.

As you know, FPPC Regulations 18420.1 and 18901.1 were promulgated in 2009, shortly after the California Supreme Court issued its decision in *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1. Regulation 18420.1 states that "[a] payment of public moneys by a state or local government agency . . . made in connection with a communication to the public that expressly advocates the . . . qualification, passage, or defeat of a clearly identified measure, as defined in Section 82025(c)(1), or that taken as a whole and in context, unambiguously urges a particular result in an election" is a contribution or independent expenditure. (FPPC Regulation 18420.1(a).)

The Regulation goes on to define when a communication will be considered as one that unambiguously urges a particular result, stating:

> a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:
>
> (1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots.
>
> (2) When considering the style, tenor, and timing it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.

(FPPC Regulation 18420.1(b).)

At the same time as Regulation 18420.1 was promulgated, the FPPC enacted Regulation 18901.1, regulating when a "mailing" sent at public expense "is prohibited by [Government Code] Section 89001." Regulation 18901.1 prohibits a mass mailing by a public agency that "is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots" or if it can be characterized as campaign material by its "style, tenor, and timing . . . ." (*Ibid*.)

The regulation appears on its face to state a per se rule, e.g., that bumper stickers, billboards, door-to-door canvassing, or other mass media advertising (including, but not limited to, television, electronic media or radio spots) are considered to be communication that unambiguously urge a particular result in an election. Indeed, FPPC staff indicated as much in an August 21, 2009 Staff Memorandum, which explained that that purpose of the language was to "provide…a bright-line test for campaign materials such as bumper stickers, billboards, door-to-door canvasing, or other mass media advertising." Electronic media was added to that list in 2017.

However, in litigation related to these regulations (*CSAC and CSBA v FPPC,* Los Angeles Superior Court Case No. B174653), this Commission declared in its briefing that there is no per se rule. Though the regulation states that a communication unambiguously urges a particular result in an election if it does "*either one*" of the two options listed in the regulations (i.e., *either* "bumper stickers, billboards, door-to-door canvassing, or other mass media advertising" *or* campaign speech as determined by the "style, tenor and timing" test), the Commission argued in the litigation that both elements of the regulation are in fact governed by the style, tenor and timing test.

The confusion over this issue prompted our opinion request. For purposes of providing guidance to our members and other public agencies, and to gain maximum compliance with the regulations, we believe it would be helpful to have a formal opinion of this Commission on how the regulations will be interpreted. In other words, is there a per se test such that any communication using one of the specified sources (billboards, electronic media, etc.) will be considered campaign communication subject to regulation, or does the style, tenor and timing test apply regardless of the means of communication?

The draft opinion before this Commission provides such clarity by stating that there is no per se rule, and that the means of communication is not determinative when deciding whether a communication unambiguously urges a particular result in an election.

We believe this is clearly the right result. An example helps to illustrate the point. In the *Vargas* decision, the California Supreme Court upheld communications generated by the City of Salinas. These communications related to the impacts on the City if a ballot measure to repeal a utility user tax were successful. The communications included a one-page summary document that was made available to the public at City Hall and in the City's libraries, and articles published in the City newsletter that was mailed to residents at City expense. The Supreme Court applied the style, tenor and timing test, and concluded that the communications did not constitute unlawful campaign activities.

In today's environment, it is reasonable to expect that the same type of information that was mailed by the City of Salinas may very well be disseminated to residents through electronic media. Rather than paying to print and mail hard copies of a newsletter, an agency might pay a software company to manage email lists of residents who have registered to receive electronic communications, and distribute the information through that electronic media. If the exact same communication that was upheld by the Supreme Court in *Vargas* when sent in hard copy via mail – same text, same tone, sent at the same proximity to the election – were sent using electronic media today, it should similarly be found not to constitute unlawful campaign activity, notwithstanding the fact that Regulation 18420.1 specifies "electronic media" as a form of communication that unambiguously urges a particular result in an election.

The draft opinion's directive that the style, tenor and timing test will be applied regardless of the form of the communication helps achieve that result, and provides clarity to the regulated community on how the Commission will view the means of communication in enforcing this regulation.

We thank you for your consideration of this draft opinion.

Very truly yours,

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California State Association of Counties

Keith J. Bray
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California School Boards Association

cc: Vice Chair Catharine Baker
Commissioner Abby Wood
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