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David Bainbridge, General Counsel
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: *In Re Henning–Bray* Opinion Request

Dear Mr. Bainbridge,

The California State Association of Counties (CSAC) and California School Board Association (CSBA) requested a Commission opinion on the following question: "Do the [Political Reform] Act and FPPC Regulations 18420.1 and 18901.1 create a per se reportable campaign expenditure whenever public agencies engage in communications regarding ballot measures through the means of television, radio, and electronic media (including social media), regardless of the content of the communications?"

Because the requesters are parties in litigation against the FPPC and their request is for an opinion on the very issue that is the subject of that litigation, an initial question from staff to the Commission was whether it would be appropriate to issue the requested opinion. At its May 20, 2021 meeting, the Commission directed staff to prepare a proposed opinion, consistent with the FPPC's position in the litigation, for consideration by the Commission at its June meeting. The Howard Jarvis Taxpayers Association (HJTA) took no position on *whether* the FPPC should issue an opinion, but now wishes to comment on what staff's proposed opinion will say.

A. The Question Practically Answers Itself

CSAC and CSBA asked whether FPPC regulations create a per se reportable campaign expenditure when public agencies "engage in communications *regarding ballot measures* through the means of television, radio, and electronic media (including social media), regardless of the content of the communications?"

Counties and school boards do not use television or radio ads or paid social media ads as a routine method of communicating with citizens or parents. Counties have communicated with their citizens about many important concerns lately – COVID restrictions, vaccine availability, census participation, wildfire preparedness, etc. – but have relied on low-cost traditional governmental means of communication such as email, cell phone texts, banners on county websites, on-hold recordings on county phones, and posts on county social media accounts. The most expensive form of communica-

tion a county board of supervisors might authorize for a non-election issue would be printed inserts in billing envelopes or newspaper ads. Unless a local radio station offers the county free advertising for a public service announcement, counties simply do not spend the money for radio, television, or paid social media advertising. With one exception: when they're trying to influence the outcome of an election. The same is true for school boards.

B. The Reason for Expensive Ads: the Ends Justify the Means

Why do counties and school boards break out their checkbooks to buy expensive advertising to influence elections? Because they hope that by investing a few hundred thousand dollars now, they will reap many millions of dollars if they win the election.

Not counting candidate elections, counties and school boards do not face the voters very often. California law requires counties and school boards to get approval from the electorate only when they want money. Proposals for new or increased taxes, assessments, or bond issuances must be voter approved.

This is important for the FPPC staff to keep in mind. When CSAC and CSBA ask whether "engag[ing] in communications *regarding ballot measures* through the means of television, radio, and electronic media" are per se reportable, those unique and expensive communications are *always* regarding ballot measures asking the voters for money – lots of money.

C. Television, Radio, and Paid Social Media Ads Should Be Reported

CSAC and CSBA hope staff will draft a proposed opinion stating that, whether television, radio, or paid social media ads targeting ballot measures must be reported depends on "the content of the communications." But that cannot logically be the law.

Stanson v. Mott (1976) 17 Cal.3d 206, the seminal case regarding unlawful publicly funded communications, ruled that television and radio advertising "*unquestionably* constitutes improper campaign activity." The Court stated, "Problems may arise, of course, in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities. With respect to some activities, *the distinction is rather clear*; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' *unquestionably* constitutes improper campaign activity." (17 Cal.3d at 221.)

The *Stanson* Court's logic followed our reasoning above: television and radio advertising is not the way government informs its citizens in other contexts, so when it writes a big check for mass media advertising during the weeks when voters are deciding how to mark their ballots, it is per se "campaigning," not just "informing," regardless of the content of the communication. Multimedia ads carry much more emotional force to the senses of their audience than any traditional form of

government communication. They can use actors who are attractive or popular or evoke sympathy, who can use non-verbal cues such as facial expressions, gestures and postures, and tone of voice cues like sarcasm, warning or sincerity. Multimedia ads can send messages through sounds. We all know that the musical score of a movie can make an audience happy, frightened, or sad. But other, more subtle sounds communicate as well, from car horns in a traffic jam, to a clock ticking, to a lone bugle playing Taps. Multimedia ads can use scenes, props, and special effects. By their very nature, television, radio and paid social media ads do more than simply "inform."

Whether used for politics, sales, solicitation or entertainment, multimedia is "campaigning" for a certain reaction from the audience. And that is exactly why counties and school districts are willing to shell out the money for professionally designed and produced television, radio and pop-up social media ads. They get results.

Requiring counties and school boards to always report their expenditures and disclose their sponsorship on television, radio and paid social media ads is not an unreasonable hardship. And it provides a bright line test. Allowing county and school board lawyers to decide when the "content of the communication" warrants reporting and disclosure defeats the purpose of reporting and disclosure. The purpose of filing reports and inserting disclosures on ads is transparency.

Reporting and disclosure alerts members of the public that their tax dollars purchased that advertisement. Then, so alerted, members of the public can decide for themselves whether the communication was accurate, fair, and impartial, or whether it violated their statutory and constitutional rights against compelled advocacy. (See *Miller v. Miller* (1978) 87 Cal.App.3d 762, 767 [discussing "the serious threat to First Amendment rights posed by governmental partiality in electoral matters" where a state agency used television and radio advertising to promote passage of the Equal Rights Amendment]; *Stanson*, 17 Cal.3d at 218 ["use of the public treasury ... to influence the resolution of issues which our Constitution leaves to the 'free election' of the people (see Cal. Const., art. II, § 2) does present a serious threat to the integrity of the electoral process"]; Gov. Code § 54964(a) [barring the use of public funds "to support or oppose the approval or rejection of a ballot measure"].) If the public is kept in the dark, it will never come to light whether the county or school district obeyed the law, or broke it. Only a per se rule provides transparency.

For these reasons, we urge staff to propose an opinion interpreting FPPC regulations to require expenditure reporting and disclosure whenever a public agency employs paid television, radio, or social media advertising to communicate to voters regarding a ballot measure.

Sincerely,

Tim Bittle

Timothy A. Bittle
Director of Legal Affairs