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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of CHARLES R. "CHUCK" REED, SAN JOSE FISCAL REFORMS, MAYOR REED, CHAMBER PAC AND ISSUES MOBILIZATION PAC PROPONENTS, and BENJAMIN J. ROTH, Respondents.	**FPPC No.: 12/761** **RESPONDENTS' ADMINISTRATIVE HEARING BRIEF [2 CAL. CODE OF REGS. SECTION 18361.5(A)]** **Hearing Date:** **September 19, 2013** **Hearing Time:** **10:00am** **Hearing Place:** **428 J Street, 8th Fl. Sacramento, CA**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONS & STATUTES

REGULATIONS

FPPC OPINIONS & ADVICE LETTERS

SECONDARY SOURCES

I. INTRODUCTION

This case concerns an attempt to penalize San Jose Mayor Chuck Reed for exercising his First Amendment rights, based on dubious statutory and regulatory authority and an unconstitutional prohibition on political speech. In bringing this case, the Enforcement Division has impermissibly stretched the definition of "candidate" to allege that Mayor Reed violated California Government Code Section 85501 ("Section 85501"), which prohibits candidate controlled committees from funding independent expenditures.

In fact, Mayor Reed is not a candidate under either applicable state law or applicable FPPC regulations and opinions, and thus is not subject to Section 85501's prohibitions. He is a termed-out officeholder who terminated his candidate campaign committee and who is not running for future office. The Commission must refuse to accept the Enforcement Division's overly-broad and counter-intuitive interpretation of the term candidate, particularly given the Commission's constitutional obligation to construe that term narrowly when Mayor Reed's First Amendment rights are at issue.

More fundamentally, Section 85501 is itself unconstitutional under Citizens United v. Federal Election Commission (2010) 558 U.S. 310 and recent Ninth Circuit case law, which provide that there is no constitutionally valid basis for restricting the funding of independent expenditures. Indeed, while the First Amendment states that the government "shall make no law . . . abridging the freedom of speech" (emphasis added), the state has done just that with Section 85501, and the Commission should choose not to enforce that statute, as permitted under the California Constitution and applicable case law.

For these reasons, Respondents respectfully request that the Commission dismiss this matter without finding a violation of Section 85501 or imposing a penalty.

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II. SUMMARY OF THE CASE

A. Parties.

The respondents in this case are San Jose Mayor Chuck Reed, his controlled committee, "San Jose Fiscal Reforms, Mayor Reed, Chamber PAC and Issues Mobilization PAC Proponents" ("the Fiscal Reform Committee"), and the Fiscal Reform Committee's treasurer, Benjamin J. Roth.

B. Allegations.

This case arises from a complaint filed with the Enforcement Division on October 11, 2012. The complaint alleged that the Fiscal Reform Committee's contribution to the "San Jose Reform Committee Supporting Rose Herrera for City Council 2012" ("Herrera IE Committee") on September 24, 2012 violated Section 85501, which prohibits a candidate controlled committee from funding independent expenditures for or against other candidates.

C. Procedural history.

The Enforcement Division initiated an investigation on or about October 23, 2012. Although the parties quickly agreed on the underlying facts in this matter, Respondents dispute the ability of the Commission to enforce Section 85501 both because Mayor Reed is not a "candidate" and because the prohibitions in Section 85501 are unconstitutional. Thus, after failing to settle the matter, and after multiple discussions, the parties agreed that the full Commission should decide these legal issues and, ultimately, the merits of this case, in lieu of having the matter considered by an administrative law judge. As outlined in the August 8, 2013 Memorandum submitted to the Commission by the Enforcement Division, Respondents waived certain procedural requirements in connection with this hearing.

The Commission agreed at its meeting on August 22, 2013 to hear this matter pursuant to the parties' agreement. Also pursuant to the parties' agreement, Commission staff made a finding of Probable Cause and issued an Accusation on September 3, 2013.

D. Factual background.

The relevant facts in this matter are set forth in the "Statement of Stipulated Facts," which was agreed to by the parties and has been submitted by the Enforcement Division. The facts in that Statement are incorporated into this brief.

E. Issues presented.

The primary issues before the Commission are as follows:

1. Was Mayor Reed a "candidate" for purposes of Section 85501 at the time of the contribution to the Herrera IE Committee?

2. If Mayor Reed was a candidate, does Citizens United and relevant Ninth Circuit precedent prevent the Commission from enforcing Section 85501 against Respondents, or did Section 85501 prohibit Respondents from making a contribution to the Herrera IE Committee?

III. STATEMENT OF APPLICABLE LAW

A. Constitution of the United States, Amendment 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. Government Code section 82007 ("Candidate"):

"'Candidate' means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or

filed a declaration of candidacy at such time. 'Candidate' also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. 'Candidate' does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971."

C. Government Code section 84214 ("Termination"):

"Committees and candidates shall terminate their filing obligation pursuant to regulations adopted by the commission which insure that a committee or candidate will have no activity which must be disclosed pursuant to this chapter subsequent to the termination. Such regulations shall not require the filing of any campaign statements other than those required by this chapter. In no case shall a committee which qualifies solely under subdivision (b) or (c) of Section 82013 be required to file any notice of its termination."

D. Government Code section 85501 ("Prohibition on Independent Expenditures by Candidate Controlled Committees"):

"A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates."

E. FPPC Regulation 18361.5(d) ("Administrative Hearings"):

"Factors to be considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

(1) The seriousness of the violation;

(2) The presence or absence of any intention to conceal, deceive or mislead;

(3) Whether the violation was deliberate, negligent or inadvertent;

(4) Whether the violator demonstrated good faith by consulting the

Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure."

F. FPPC Regulation18404(d) ("Termination of Candidate's and Committee's Filing Requirements"; emphases added):

"**Candidates and Officeholders**. Pursuant to Government Code Section 82007, a candidate (which term includes an officeholder) is obligated to file campaign statements under the Act until his or her status as a candidate is terminated. An officeholder must file campaign statements required under the Act during the entire time the individual holds office. The filing obligations of a **candidate or officeholder** terminate as follows:

(1) **Candidates or Officeholders** with Committees. The filing obligations of a **candidate or officeholder** who has one or more controlled committees terminate when the individual has terminated all his or her controlled committee(s) and has left office.

(2) **Candidates or Officeholders** without Committees. The filing obligations of a **candidate or officeholder** who does not have a controlled committee, and who received contributions and made expenditures of less than $ 1,000 in the calendar year and filed a Form 470, terminate at the end of the calendar year for which the Form 470 was filed if:

(A) the candidate lost, withdrew, or was not on the ballot in the election; or

(B) the individual left office during the calendar year; and

(C) the individual has ceased to receive contributions and make expenditures and has filed all required campaign statements."

IV. SUMMARY OF LEGAL ARGUMENT

This case concerns an absolute prohibition on political speech that is protected by the First Amendment. The Commission is obligated to decide this case based on three fundamental rules that flow from this fact. First, the scope of the prohibition must be narrowly construed. Second, any ambiguity as to that construction must be resolved in favor of the speaker, not the state. Finally, and most importantly, the prohibition is unconstitutional unless it withstands strict scrutiny. With these principles as guidance, the Commission may not enforce Section 85501 against Respondents for the reasons set forth below.

As an initial matter, Mayor Reed is not a candidate under either applicable statutory law or FPPC regulations and opinions. These authorities indicate that a candidate who runs for office retains his or her status as such so long as he or she continues to file campaign statements in connection with his or her campaign for office. Mayor Reed will be termed out in 2014 and is not running for future office, and filed a final campaign statement (Form 460) and a termination statement (Form 410) in 2011, thereby terminating his campaign reporting obligations. Thus, he ceased being a candidate at that point. The Enforcement Division has offered an overly-broad and counter-intuitive interpretation of the term candidate based on a convoluted reading of FPPC regulations, which are themselves less than clear. The Commission is constitutionally obligated to reject this interpretation and to construe the applicable authorities narrowly and in favor of Respondents. Construed in this manner, or simply construed fairly, these authorities indicate that Mayor Reed is not a candidate and thus is not subject to Section 85501.

More fundamentally, Supreme Court and Ninth Circuit precedent indicates that Section 85501's prohibitions are in fact unconstitutional under the First Amendment. Those cases provide that the state may not limit, let alone prohibit, either independent expenditures or contributions to independent expenditures committees because the

state's sole constitutionally permissible interest in limiting political expenditures is preventing quid pro quo corruption, which by law is not implicated by independent expenditures. The rationales for Section 85501 offered by the Legal Division are insufficient to withstand constitutionally-mandated "strict scrutiny." Thus, the Commission should choose not to enforce Section 85501 because it is unconstitutional, as permitted by the California Constitution and applicable case law. Indeed, the Commission chose not to enforce a constitutionally problematic statute as recently as 2005.

V. LEGAL ARGUMENT

A. Mayor Reed is not a candidate subject to Section 85501.

1. Mayor Reed is not a candidate under applicable statutory language.

Section 85501 provides that: "[a] controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates." (Emphasis added.) Mayor Reed does not qualify as a "candidate" under either the statutory definition or the common understanding of that term, and thus Section 85501 did not prohibit the Fiscal Reform Committee from making its contribution.

The Political Reform Act (the "Act") states that a candidate is any individual who: (1) is on the ballot; or (2) qualifies as a write-in candidate; or (3) is raising or spending funds to run for office; or (4) is the subject of a recall. (Cal. Govt. Code section 82007.) The Act also states that a candidate retains this status only until terminating his or her campaign filing obligations. (Id.; Cal. Govt. Code section 84214.) The Commission has not adopted a regulation which further defines the term "candidate."

Mayor Reed is not a candidate under this definition. His current term ends next year; he may not run for re-election; he is not running for another office; he is not a write-in candidate; and he is not the subject of a recall. His campaign committee

("Reelect Chuck Reed Mayor 2010") ceased raising and spending funds immediately after the 2010 election and he filed an FPPC Form 460 and Form 410 terminating that committee on January 19, 2011. (See Stip. Fact ¶¶ 1-2.) Thus, Mayor Reed ceased to be a candidate, as that term is defined in the law, in early 2011.

An attorney, Mayor Reed reached this conclusion prior to the Fiscal Reform Committee's contribution based on the plain language of the statute. (See Stip. Fact. ¶ 12.) He concluded, correctly, that he is an officeholder, not a candidate, and that Section 85501's prohibitions therefore do not apply to the Fiscal Reform Committee because the statute does not mention officeholders.

This interpretation is entirely reasonable and consistent with a common sense understanding of the terms candidate and officeholder.[1] It is also mandated by the First Amendment, which requires that any statute impacting political activity must be construed narrowly. (Buckley v. Valeo (1976) 424 U.S. 1, 44 [Supreme Court narrowly construed language impacting First Amendment rights]; National Ass'n for Advancement of Colored People v. Button (1963) 371 U.S. 415, 433-38 ["Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. . . . [p]recision of regulation must be the touchstone in" the First Amendment context].)

Indeed, nothing in the plain language of Section 85501 indicates that it was intended to extend to committees controlled by officeholders, particularly those like Mayor Reed who are not running for office and have terminated their campaign committees. The absence of any reference to the term "officeholder" in Section 85501 is particularly noteworthy in light of the fact that other statutes adopted pursuant to Proposition 34 (as was Section 85501) specifically refer to both candidates and

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[1]Merriam-Webster.com defines a "candidate" as "one that aspires to or is nominated or qualified for an office . . ." and an "officeholder" as "one holding public office." (www.merriam-webster.com; last visited September 8, 2013; emphases added.)

officeholders when they were intended to apply to both. Indeed, references to both "officeholders" and "candidates" is found throughout the Act (Prop. 34 statutes noted):

Section 81009	Requires filing officers to retain statements filed by every relevant "officeholder or candidate."
Section 82048.4	Indicates slate mailer organization does not include "a candidate or officeholder or a candidate's or officeholder's controlled committee."
Section 84200	Requires "elected officers, candidates, and committees" to file semi-annual campaign statements.
Section 84206	Requires "candidates or officeholders" who receive less than $1,000 to file a short form campaign statement.
Section 84605	Listing those "candidates and officeholders" required to file online.
Section 85304 (Prop. 34)	Allows state "candidate" and "elected state officeholder" to establish a legal defense fund.
Section 85304.5	Allows local "candidate" and "elected officer" to establish legal defense fund.
Section 85316 (Prop. 34)	Allows a "candidate for elective state office" to accept post-election contributions only to pay off debt while an "elected state officer" may raise funds to pay for officeholder expenses.
Section 85702 (Prop. 34)	Prohibits an "elected state officer or candidate for elective state office" from accepting lobbyist contributions.

Section 89506	Sets forth gift rules for speeches by an "elected state officer, local elected officeholder, candidate for elected state office or local elected office."

Thus, both the Act's plain statutory language and the absence of an explicit reference to "officeholders" in Section 85501 indicate that the prohibition is limited to "candidates," and does not apply to officeholders who are termed out and have terminated their campaign committee. (See Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal. App. 4th 729, 737 [statutes concerning the same subject should be construed in reference to each other so that no part of any such statute becomes surplusage]; see also La Jolla Group II v. Bruce, (2012) 211 Cal.App.4th 461, 476 [legislative intent that finds no expression in the words of a statute cannot be found to exist].) Nothing in the legislative history of Proposition 34 suggests otherwise.

2. Mayor Reed is not a candidate under applicable regulatory language.

The Enforcement Division contends that Mayor Reed is prohibited from funding independent expenditures based on a vague provision buried deep in a regulation (and partly in a parenthetical) which merely indicates how a candidate terminates his or her committee. (2 Cal. Code of Regs. section 18404(d).) Regulation 18404 – which is titled "Termination of Candidate's and Committee's Filing Requirements" – states in relevant part that:

> . . . a candidate (which term includes an officeholder) is obligated to file campaign statements under the Act until his or her status as a candidate is terminated. An officeholder must file campaign statements required under the Act during the entire time the individual holds office.

The Enforcement Division claims that this two-sentence phrase should be used to

broadly interpret a completely separate provision of the Act, even though the regulation itself does not cite Section 85501 as enabling authority.[2] (See Citizens to Save California v. Fair Political Practices Commission (2006) 145 Cal. App. 4th 736, 748 [regulation inconsistent with the Act exceeds FPPC's authority].) This claim is unfounded.

The purpose of Regulation 18404(d) is to indicate that a candidate's reporting obligations do not end solely by virtue of winning a campaign. In effect, the regulation says that, for purposes of the termination of a candidate's and committee's filing requirements (which, again, is the title of the regulation), officeholders and candidates must continue to file reports until they terminate. As stated in Section 84214, the point is to make certain that all candidate campaign activity is reported. Nothing in the regulation – or in the law, or in any other regulation, or in the legislative and regulatory history – indicates that Regulation 18404 should apply in any other context. (See Morris v. Williams (1967) 67 Cal.2d 733, 748 ["[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void."].)

The regulation merely indicates how candidates and officeholders terminate their filing obligations, not how one ceases to be a candidate per se. It instructs candidates and officeholders about the mechanics of closing their bank accounts, shutting down their committees, and filing the appropriate paperwork. It uses the term "officeholder" to emphasize that officeholders continue to have certain filing obligations even after terminating their campaign committees. The implication (and certainly the common understanding) is that a candidate terminates his or her status as such by terminating his or her committee and filing a final Form 460 and a final Form 410. In this regard, Mayor Reed in fact properly terminated his status as a candidate under the regulation when he filed his final Form 460 and final Form 410 in January 2011.

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[2]Notably, the FPPC has had many years to adopt a regulation interpreting Section 85501, but has not done so.

Indeed, the regulation does not mean what the Enforcement Division thinks it means. If the parenthetical really was intended to indicate that all officeholders are candidates, why would the very next sentence about filing requirements not begin with the more encompassing term (i.e., candidates)? Instead, it begins with the less inclusive term: "An officeholder must file campaign statements . . . " (Emphasis added.) And why would the following sentence then reference both terms: "The filing obligations of a candidate or officeholder terminate as follows." (Emphasis added.) If the parenthetical was intended as a definition of the term "candidate" (as opposed to a point of clarification), the regulation itself would have no reason to continue to use both terms.

In fact, the regulation regularly distinguishes between the two terms, specifically referencing to the reporting obligations of a "candidate or officeholder" (emphasis added) on multiple occasions. (See highlighted language of Regulation 18404 on page 5 supra.) This distinction mirrors the statutory references to both terms noted above, as well as the multiple references to both terms on the FPPC's campaign statement form (Form 460). For example, the Form 460 identifies an "Officeholder, Candidate Controlled Committee" as a type of filer, and asks for the "Signature of Controlling Officeholder, Candidate, State Measure Proponent or Responsible Officer of Sponsor." These references can only mean that there is, in fact, a difference between the two terms. (See Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1551 [the word "and" indicates "an additional thing, situation, or fact"]; Acosta v. City of Costa Mesa (9th Cir. 2013) 718 F.3d 800, 815 [California gives "disjunctive and distinct meaning to items separated by the word 'or'"].)

At a minimum, the regulation's meaning with respect to the terms "officeholder" and "candidate" is ambiguous.[3] As such, the regulation must be strictly construed in

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[3]A regulation is ambiguous if it is capable of two reasonable constructions by virtue of either the regulation's terminology or its structure. (See Stockton Savings & Loan Bank v. Massanet (1941) 18 Cal. 2d 200, 207.)

favor of Mayor Reed's interpretation given that it potentially impacts his First Amendment rights. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." (Federal Election Commission v. Wisconsin Right To Life, Inc. ("WRTL") (2007) 551 U.S. 449, 474 [ambiguity regarding whether speech fell into statutory definition of "functional equivalent of express advocacy" resolved in favor of speaker].) In other words, the Commission is constitutionally mandated to accept Mayor Reed's common sense interpretation of Section 82007 and Regulation 18404 – that he is an officeholder and not a candidate – and thus may not find that he is a candidate for purposes of Section 85501.

3. Mayor Reed is not a candidate under the In re Lui Opinion.

The Enforcement Division also relies on the Commission's 1987 In re Lui Opinion (10 FPPC Ops. 10) – an opinion pre-dating Section 85501 by thirteen years – to contend that Mayor Reed is still a candidate. The Enforcement Division points to a single statement in the opinion that "all elected officeholders are 'candidates,' even during a nonelection year." However, when considered in its full context, this statement is more narrow than construed by both the Enforcement Division and by FPPC advice letters.[4] The relevant language in the Lui Opinion is as follows:

> Once a person becomes a candidate within the meaning of the Act, he or she retains his or her status as a candidate until that status is terminated by filing a statement of termination

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[4]FPPC advice letters have admittedly cited the Lui Opinion for the proposition that an officeholder is a candidate. However, the Enforcement Division misconstrues the import of these letters. As an initial matter, these advice letters have simplified, misinterpreted, and misapplied the Lui Opinion, as discussed below. More fundamentally, Mayor Reed was under no legal obligation to consult prior FPPC written advice when determining his ability to participate in other campaigns – that advice is applicable only to the requesting party – particularly when the advice did not concern Section 85501. (2 Cal. Code of Regs. section 18329(b)(7).) Indeed, FPPC advice letters are "not legal authority," have no precedential value, and may not form the basis of an enforcement action. (Smith v. Superior Court (1994) 31 Cal.App.4th 205, 212; Downey Cares v. Downey Community Development Com. (1987) 196 Cal.App.3d 983.) Instead, the issue is what obligations and restrictions are imposed on a person based on the plain language of the applicable statutes and regulations themselves.

> pursuant to Section 84214. A statement of termination may be filed only if the candidate or committee will have no campaign activity which must be disclosed under the Act subsequent to termination. (Section 84214; Regulation 18214.) Accordingly, all elected officeholders are "candidates," even during a nonelection year. (Emphasis added.)

The Enforcement Division takes the last sentence of this paragraph out of context. The last statement is qualified by the earlier explanation that a candidate only "maintains his or her status as a candidate until that status is terminated by filing a statement of termination." In other words, the Lui holding is simply that an officeholder is still a candidate if he or she still has campaign disclosure obligations. As with Regulation 18404, this language is about reporting obligations – nothing more, nothing less. Nothing in the opinion suggests that its holding should apply in any other context, particularly when the Act at that time did not contain a prohibition on speech like Section 85501.

The apparently broad sweep of the "all elected officeholders are candidates" language in Lui is perhaps explained by the fact that, when the Commission issued the opinion in the mid-1980s, candidates, officeholders, and judges had more expansive ongoing reporting obligations, including the obligation to report their personal campaign contributions. The Act also did not at that time include any limitations or prohibitions on contributions or expenditures, and thus the Lui opinion cannot, and should not, be interpreted to define "candidate" for these non-reporting purposes. (See, e.g., Kibler v. Northern Inyo County Local Hosp. Dist. (2006) 39 Cal. 4th 192, 201 [reference to other statutory use of term applies only when statutes cover same or analogous subject matter].) Indeed, given the fundamental changes to the law since 1987, the extent to which the Lui Opinion continues to have applicability to the law as it exists today is

questionable. At a minimum, the Constitution requires that it is narrowly construed in Mayor Reed's favor not to apply to Section 85501 given that statute's infringement on First Amendment speech rights. (WRTL, supra, 551 U.S. at 474.)

Thus, any reliance on the Lui Opinion to say that an elected official is a candidate is without basis in the law.

B. Enforcement of Section 85501 is unconstitutional.

Section 85501 is a direct and absolute prohibition on political speech – it prohibits a candidate controlled committee from making independent expenditures or contributions to independent expenditure committees in any amount. As such, Section 85501 is subject to "strict scrutiny" under the First Amendment, which requires the state to prove that its prohibition "furthers a compelling interest and is narrowly tailored to achieve that interest." (Citizens United, supra, 558 U.S. at 340.) As the Supreme Court has stated, strict scrutiny is required because "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." (Citizens United, supra, 558 U.S. at 349.) The U.S. Supreme Court's 2010 Citizens United opinion as well as recent Ninth Circuit precedent make clear that the state cannot meet the strict scrutiny standard here and that the prohibitions in Section 85501 are therefore unconstitutional and unenforceable.

1. Section 85501 is unconstitutional under applicable legal precedent.

The Citizens United opinion made clear that limits on funding independent expenditure activity are unconstitutional. The opinion clearly re-affirmed that only one interest is sufficient to justify a limit on political expenditures: preventing the quid pro quo corruption of candidates or the appearance of quid pro quo corruption of candidates. (Citizens United, supra, 558 U.S. at 359.) Section 85501 fails to serve this anti-corruption interest.

Citizens United held that, as a matter of law, limitations on independent

expenditures do not serve to prevent quid pro quo corruption and thus all such limitations are unconstitutional under the strict scrutiny standard. (Citizens United, supra, 558 U.S. at 357.) Applied to the present facts, independent expenditures in support of Councilwoman Herrera could not "corrupt" her or create the "appearance" that she had been corrupted because they were not coordinated with her campaign. Thus, there is no compelling public policy reason for the state to completely ban such independent expenditures.

The Ninth Circuit and other appellate courts have similarly ruled that the anti-corruption rationale does not justify limitations on contributions to other committees for independent expenditures. (Long Beach Area Chamber of Commerce v. City of Long Beach (9th Cir. 2010) 603 F.3d 684, 696-99; Thalheimer v. City of San Diego (9th Cir. 2011) 645 F.3d 1109, 1121; see also SpeechNow.org v. Federal Election Commission (D.C. Cir.2010) 599 F.3d 686, 696 ["[B]ecause Citizens United holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."].)

The Supreme Court and Ninth Circuit cases are binding as to the Act. Thus, Section 85501's prohibitions are unconstitutional under Supreme Court and Ninth Circuit precedent that is directly on point.

2. The governmental interests for Section 85501 offered by the Legal Division do not meet the strict scrutiny legal standard.

The Legal Division has offered two governmental interests to justify Section 85501, neither of which is the anti-corruption interest sanctioned by the Supreme Court: (1) an "anti-circumvention" interest; and (2) an interest in ensuring that a candidate's campaign funds are not used for the campaign of another candidate. More specifically, the Legal Division has described the governmental interests behind Section 85501 as follows:

> At the state level and in many local jurisdictions, there is a limit on the amount that persons may contribute to a candidate and a limit on the amount that a candidate (including an existing officeholder) may contribute or transfer to another candidate's campaign. (Sections 85303 and 85305.) Limits on the amount that persons may give to a candidate or that existing officeholders may contribute or transfer to another candidate would be rendered ineffective absent Section 85501, if a candidate-controlled committee could make an unlimited amount of independent expenditures to support or oppose another candidate. (See Dichiara Advice Letter, No. I-02-040.) And contributions that donors had made under contribution limits to one candidate, might be diverted to funding independent expenditure campaigns for another candidate. As the Commission's St. Croix Opinion states, "section 85501 prohibits candidates from using their own campaign funds for the purpose of getting another candidate elected.

(FPPC Advice Letter to Ash Pirayou (12/13/2010) No. I-10-159; see also In re St. Croix (2005) 18 FPPC Ops. 1.) Each one of these interests is constitutionally problematic.

The purported anti-circumvention interest evidently seeks to avoid end-runs around contributions limits. However, it is unclear whether the Legal Division sees Section 85501 as a way to protect limits on contributions to the candidate who will benefit from the independent expenditure, or limits on contributions to the candidate making the independent expenditure. In addition, it is unclear how Section 85501 even serves this interest, let alone whether it does so in a constitutional, "narrowly tailored" manner.

In particular, it is not clear how a limit on contributions to the candidates benefitting from the independent expenditure "would be rendered ineffective absent Section 85501." As mentioned above, independent expenditures are by law deemed to be non-corrupting and thus may not be deemed to be "end runs" around contribution limits to the candidates featured in the independent expenditure.

As to the candidate making the independent expenditure, the statute is both over-inclusive and under-inclusive. It is over-inclusive because it prohibits independent expenditures by a candidate controlled committee instead of limiting contributions to that committee. (Service Employees Intern. Union, AFL-CIO v. FPPC (1989) 721 F.Supp. 1172, 1177 [total ban on certain candidate transfers over-inclusive where contributions within limits do not risk corruption].) It is under-inclusive because it does not bar candidate controlled committees from raising and spending unlimited amounts in support of ballot measures. (Citizens United, supra, 558 U.S. at 362 [ban on corporate speech 60 days before election under-inclusive to serve shareholder protection interest which exists at other times as well]; Citizens to Save California, supra, 145 Cal. App. 4th 736 [invalidating regulatory limits on candidate controlled ballot measure committees].)

There are at least three problems with the second purported interest advanced by Section 85501: ensuring that a candidate does not spend his or her campaign funds on another candidate's campaign. First, and most notably, this rationale has not been recognized as a compelling interest that may justify limits on contributions or independent expenditures. Second, the funds at issue here were not Mayor Reed's "own" campaign funds as he is not running for office again. Third, candidates are free to use campaign funds to contribute to other candidates pursuant to Government Code sections 85305 and 89512.

In short, the rationales for Section 85501 offered by the Legal Division do not meet strict scrutiny standards as they do not present a compelling governmental interest, and are not in any case narrowly tailored to meet those interests.

3. The FPPC must refuse to enforce Section 85501 against Respondents.

a. The FPPC may choose not to enforce Section 85501.

The Commission must choose not to enforce Section 85501 because the statute is unconstitutional. Article 3, Section 3.5 of the California Constitution ("Section 3.5") allows an administrative agency like the FPPC to refuse to enforce an unconstitutional statute if "an appellate court has made a determination that such statute is unconstitutional." This provision does not require an appellate court to have considered the particular statute at issue (i.e., Section 85501). Instead, a closely analogous controlling appellate court decision will suffice. (See Lockyer v. San Francisco (2004) 33 Cal.4th 1055, 1102;. LSO, Ltd. v. Stroh (9th Cir. 2000) 205 F.3d 1146, 1159-60; Schmid v. Lovette (1984) 154 Cal.App.3d 466, 473-74.) Here, Citizens United, Long Beach, and Thalheimer are closely analogous in that they held that the government may not limit, let alone prohibit, independent expenditures.

The purpose of Section 3.5 is to prevent administrative agencies from using their own interpretation of the Constitution or federal law to frustrate legislative mandates. However, administrative agencies, including the FPPC, must follow directly applicable federal and state precedent when it is clear from that precedent that "no reasonable official could believe the statute is constitutional." (Lockyer, supra, 33 Cal.4th at 1102.)

Federal and state case law interpreting Section 3.5 is instructive. In Schmid v. Lovette, a state court of appeal ruled that a local board of education was not required to enforce certain mandated loyalty oaths in light of previous decisions finding such oaths to be unconstitutional. (Schmid, supra, 154 Cal.App.3d at 473-74.) Moreover, in LSO, Ltd. v. Stroh, the Ninth Circuit rejected the contention that a state agency was required to enforce state liquor license regulations prohibiting the display of sexual imagery when similar regulations had been recently been deemed unconstitutional. "To adopt [this] contention would be to eliminate any obligation on the part of state officials to draw

even the most obvious conclusions from well-settled federal case law until the precise state law at issue is struck down. Such a result would be untenable." (LSO, Ltd., supra, 205 F.3d at 1159-60.)

As the California Supreme Court noted rhetorically: "[W]hen the United States Supreme Court, for example, repudiates the separate but equal doctrine established by the statutes of one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid [?]" (Lockyer, supra, 33 Cal.4th at 1102 [citations omitted].) The answer is "no." In fact, an agency's intentional disregard of clearly established federal rights would likely violate the Supremacy Clause. (See LSO, supra, 205 F.3d at 1160 ["It is a long-standing principle that a state may not immunize its officials from the requirements of federal law."]; see also Vikram D. Amar, Lessons From California's Recent Experience With its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General, 59 Emory L. J. 469, 474-75.)

In sum, where it is clear that a state statute violates rights guaranteed under the Constitution – as Section 85501 does in this instance – the FPPC must choose not to enforce that statute, notwithstanding Section 3.5.

b. The FPPC has chosen not to enforce unconstitutional laws in the past.

In 2005, the FPPC's five Commissioners resolved not to enforce Government Code sections 84503 and 84506 against general purpose committees based on an analogous (but not directly on point) Ninth Circuit opinion, notwithstanding Section 3.5. (See Resolution of the California Fair Political Practices Commission (3/21/05); unsigned copy attached along with accompanying Legal Division Memorandum.) A federal district court had issued a preliminary injunction prohibiting the FPPC from enforcing the disclaimer provisions of sections 84503 and 84506 against the state Republican and Democratic parties. The Commissioners later concluded that the

relevant disclaimer provisions would likely be deemed unconstitutional as applied to all other types of general purpose committees as well, under American Civil Liberties Union of Nevada v. Heller (9th Cir. 2004) 378 F.3d 979.

In its resolution, the Commission explained why it was choosing not to enforce the statutes against all general purpose committees, even though the lower court case only applied to political parties and the Ninth Circuit case did not address the statutes in question. In short, the Commission did not want "to expend staff resources defending the statutes in future challenges and, if unsuccessful, potentially be liable to pay the attorneys' fee of successful plaintiffs," and also recognized the "futility" of such efforts. Thus, it resolved that "although the Commission may not necessarily agree with the Heller decision, the Heller decision is governing law and . . . the Commission shall not enforce Government Code sections 84503 and 84506 against general purpose ballot measure committees unless and until the authority of the Heller case is overruled . . . ."

The Commission should in this instance similarly choose not to enforce Section 85501 because of the clear holdings in the Citizens United, Long Beach, and Thalheimer cases, and how they undermine any statute which attempts to prohibit independent expenditures.

VI. ADMINISTRATIVE PENALTY

The Commission should impose no penalty on Respondents both because Mayor Reed was not a candidate subject to Section 85501 and because Section 85501 violates the Constitution.

However, if the Commission decides to levy a penalty in this case, it should impose the lowest penalty possible for the one count at issue. Regulation 18361.5(d) indicates that the Commission may determine the appropriate fine amount based on a number of factors, including: "(1) The seriousness of the violation; (2) The presence or absence of any intention to conceal, deceive or mislead; (3) Whether the violation was deliberate, negligent or inadvertent; (4) Whether the violator demonstrated good faith by

consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b); (5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and (6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure."

Based on the above factors, as well as considerations of equity, the Commission should impose the lowest penalty possible for a number of reasons. Most notably, the FPPC has already penalized Mayor Reed by publicly (and mistakenly) releasing correspondence with his attorney regarding this enforcement matter prior to the November 2012 election, while the Enforcement Division's investigation was pending, and contrary to Enforcement Division policy. (See Stip. Fact ¶¶ 18-20.) As a result, Mayor Reed was subject to exactly what the Enforcement Division's disclosure policy was designed to avoid. More specifically, Mayor Reed suffered politically because of the Enforcement Division's mistake as opponents of Rose Herrera's candidacy used the Enforcement Division's letters in mailers sent to San Jose voters before the November 6, 2012 election, and these letters were covered in the local news media. The Commission must accommodate for its own agency mistake when considering potential fines.

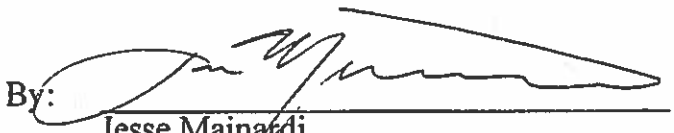
Additionally, Respondents had (and have) no intent to "conceal, deceive or mislead" anyone. The contribution at issue in this case was timely reported, which likely gave rise to the complaint initiating the Enforcement Division's investigation. Moreover, while Respondents were deliberate in their actions, they did not wish to violate the law. Indeed, the arguments set forth above are indicative of Respondents good faith belief that they did not in fact violate the law. Respondent Roth contacted the FPPC's Technical Assistance Division to confirm that the Fiscal Reform Committee could contribute to the Herrera committee, and relied on that advice. (See Stip. Fact ¶ 13.) Respondent Roth's failure to mention that the committee was "candidate controlled" was

only because it did not occur to him that it was. Moreover, Respondents have not been fined by the Enforcement Division in the past. Finally, it is unclear what public harm resulted from the Fiscal Reform Committee's contribution as the Enforcement Division has not stated a constitutionally coherent (let alone compelling) reason for Section 85501's prohibition in the first place.

VII. CONCLUSION

For the above reasons, Respondents respectfully request that the Commission dismiss this matter without finding a violation or imposing a penalty.

Dated: September 9, 2013

By: 

Jesse Mainardi
The Sutton Law Firm, PC
Attorneys for Respondents

Resolution

Of the

California Fair Political Practices Commission

The California Fair Political Practices Commission, pursuant to its statutory responsibility for the impartial and effective administration and implementation of the Political Reform Act, and in order to fully and fairly respond to litigation challenging the provisions of that Act, does hereby resolve as follows:

Whereas, Government Code sections 84503 and 84506 require any committee paying for an advertisement supporting or opposing a ballot measure to identify on the face of the advertisement the two largest contributors to the committee who have cumulatively contributed $50,000 or more to the committee; and

Whereas, the United States Court of Appeals for the Ninth Circuit, in *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (2004), struck down the Nevada statute requiring on-publication identification of contributors to committees making expenditures for political advertisements, on the ground that the statute impermissibly infringed on the committee's First Amendment rights; and

Whereas, the Fair Political Practices Commission has been named defendant in a lawsuit on file in the United States District Court for the Eastern District of California, *California Republican Party, California Democratic Party, et al., v. FPPC, et al.*, No. CIV-04-2144 FCD PAN, in which plaintiffs challenged Government Code sections 84503 and 84506 as unconstitutional under *Heller*; and

Whereas, plaintiffs in the current litigation are general purpose political party committees and, as such, have been in existence for more than one election cycle and have received large contributions in the past from sources who may not support the current political expenditures with which they are identified pursuant to Government Code sections 84503 and 84506; and

Whereas, the District Court granted a preliminary injunction enjoining the Fair Political Practices Commission from enforcing the statutes against the plaintiffs, political party committees, and any other similarly situated general purpose political party committees; and

Whereas, the resources of the Commission and the State of California are limited; and

Whereas, enforcing Government Code sections 84503 and 84506 against general purpose ballot measure committees would subject the Commission to further costly litigation, which would be futile under the authority of *Heller*; and

Whereas, the Commission would have to expend staff resources defending the statutes in future challenges and, if unsuccessful, potentially be liable to pay the attorneys' fees of successful plaintiffs;

Now, therefore, be it resolved that, although the Commission may not necessarily agree with the *Heller* decision, the *Heller* decision is governing law and the Fair Political Practices Commission hereby adopts as Commission policy that Government Code sections 84503 and 84506 are unlawful as applied against general purpose ballot measure committees; and

Be it further resolved that the Commission shall not enforce Government Code sections 84503 and 84506 against general purpose ballot measure committees unless and until the authority of the *Heller* case is overruled by the United States Court of Appeals for the Ninth Circuit, the United States Supreme Court, or rejected by the California Supreme Court or California Court of Appeal.

Subscribed this 21st day of March, 2005.

Liane Randolph, Chairman

A. Eugene Huguenin, Jr., Commissioner

Philip Blair, Commissioner

Ray Remy, Commissioner

Sheridan Downey III, Commissioner

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: C. Scott Tocher, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption of Resolution Regarding Sections 84503 and 84506

Date: March 8, 2005

****

Executive Summary

Shortly before the recent November statewide election, the state's Republican and Democratic parties, along with the Orange County Republican Party, sued the FPPC in federal district court, alleging that the advertising disclosure provisions of the Act that require on-publication identification of the two largest contributors over $50,000 were unconstitutional. (*California Democratic Party, California Republican Party, et al., v. Fair Political Practices Commission, et al.*, No. Civ-S-04-2144, E.D. Cal.) The primary ground of the complaint is based on a 2004 Ninth Circuit opinion (*American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 ("*Heller*")) that struck down a Nevada statute that also required on-publication identification of donors.

The district court in the present case found, on the strength of the *Heller* decision, the plaintiffs likely would succeed in their suit against the Commission and issued a temporary injunction enjoining the Commission from enforcing the challenged provisions against the plaintiffs and similarly situated general purpose committees.

In light of controlling appellate authority and the holding of the district court in the current litigation, staff recommends the Commission adopt a resolution clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84503 as they apply to general purpose ballot measure committees.

I. Sections 84503 and 84506.

> **"§ 84503. Disclosure; Advertisement For or Against Ballot Measures.**
>
> "(a) Any advertisement for or against any ballot measure shall include a disclosure statement identifying any person whose cumulative contributions are fifty thousand dollars ($50,000) or more.

> "(b) If there are more than two donors of fifty thousand dollars ($50,000) or more, the committee is only required to disclose the highest and second highest in that order. In the event that more than two donors meet this disclosure threshold at identical contribution levels, the highest and second highest shall be selected according to chronological sequence."
>
> **"§ 84506. Independent Expenditures; Advertisements.**
>
> "If the expenditure for a broadcast or mass mailing advertisement that expressly advocates the election or defeat of any candidate or any ballot measure is an independent expenditure, the committee, consistent with any disclosures required by Sections 84503 and 84504, shall include on the advertisement the names of the two persons making the largest contributions to the committee making the independent expenditure. If an acronym is used to specify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements. For the purposes of determining the two contributors to be disclosed, the contributions of each person to the committee making the independent expenditure during the one-year period before the election shall be aggregated."

Together, these statutes require on-publication identification of the two largest contributors to the committee making the expenditure for the political advertisement.

II. Summary of the Case and Procedural History.

On October 12, 2004, the California Republican Party, the California Democratic Party, and the Orange County Republican Party filed a Complaint in the Federal District Court seeking injunctive and declaratory relief from two "on-publication" provisions of the Act, sections 84503 and 84506, which require a committee paying for ballot measure advertisements to identify their two highest contributors of $50,000 or more. Prior to filing the complaint, the plaintiffs did not request the Commission to consider application of the statutes to them in light of the *Heller* decision. On October 20, 2004, plaintiffs amended their Complaint, and noticed a motion for preliminary injunction to be heard on October 26, 2004. The FPPC filed its Opposition to this motion on October 22, and Plaintiffs' Reply was filed and served on Monday, October 25. The matter was heard before the Honorable Frank C. Damrell, Jr. on October 26, 2004. The Attorney General's office represented the Commission.

On October 27, 2004, Judge Damrell granted Plaintiffs' motion and enjoined the Commission from enforcing these provisions against political party committees registered with the Secretary of State as general purpose committees. One of the key

arguments made by the plaintiffs was that requiring disclosure of certain contributors on the communication as "paid for by" or similar language was, in fact, misleading. The plaintiffs offered evidence that certain groups required to be identified in the parties' advertisements regarding measures on the November ballot in fact opposed the measures supported by the advertisements. At the hearing, the judge found significant that campaign reports required elsewhere in the Act show all the contributors, which allow members of the public to more fully determine donors' connections to a committee's efforts. On the other hand, the judge felt that the advertisement disclosure statutes challenged can be misleading when major donors do not support or oppose a political party ballot measure effort.

A key factor in determining whether to grant the preliminary injunction request is the likelihood of plaintiffs' success at trial. The court, in its decision, found that plaintiffs demonstrated "serious questions going to the merits of their claim" based on the *Heller* decision.

III. The *Heller* Decision.

In *Heller*, the Ninth Circuit applied strict scrutiny to strike down a Nevada statute requiring on-publication disclosure of parties responsible for any materials relating to an election of a candidate or ballot measure. In support of the disclosure requirements, the defendant in *Heller* proffered several governmental interests, including the need to provide information to voters regarding the identity of campaign donors. The Ninth Circuit rejected as "not sufficiently compelling" the government's interest of informing voters, finding that "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." (*Heller, supra,* 378 F.3d at 993.) In striking down Nevada's statute, the 9th Circuit's defining statements were: (1) "The constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements has been noted and relied upon both by the Supreme Court and by this Circuit;" and (2) "The availability of the less speech-restrictive reporting and disclosure requirement confirms that a statute like the one here at issue cannot survive the applicable narrow tailoring standard." (*Id.*, at pp. 991, 995.)

In the instant matter, although the Commission attempted to distinguish the Nevada statute, the district court found the statutes did not satisfy constitutional safeguards as to general purpose committees in light of the existence of less intrusive campaign reporting statutes. Because California's scheme requires proscription "of the speech itself" unless it complies with certain criteria, the court found that the statutes suffered the same constitutional infirmity as in *Heller*.

Of particular significance in the context of general purpose committees is the point that the required disclosures may in some cases actually be misleading. General purpose committees, by their nature, may exist over many election cycles and receive contributions from donors of such a size that the donor may be disclosed on an

advertisement regarding an issue years later with which the donor has no affiliation or indeed may oppose. Such disclosure is arguably misleading and impossible to compel under *Heller*.

IV. Recommendation.

In light of the *Heller* and District Court decisions, staff recommends the Commission adopt a resolution specifying the Commission's policy with respect to application of sections 84503 and 84506 in the context of general purpose ballot measure committees. The attached draft resolution would indicate that these statutes would not be applied to such committees, in light of controlling appellate authority, unless such authority were overruled or otherwise rejected by a California court of appeal or the Supreme Court. Such a policy will help avert unnecessary expense of staff and other state resources defending piecemeal litigation building on the precedential authority already established.

PROOF OF SERVICE

1. I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 150 Post St., Suite 405, San Francisco, CA 94108.

2. On September 9, 2013, I served the foregoing document described as "Respondents' Administrative Hearing Brief" on the following parties to this action as follows:

Angela Brereton Fair Political Practices Commission 428 J Street, Suite 620 Sacramento, CA 95814 abrereton@fppc.ca.gov	Attorney for Complainant FAIR POLITICAL PRACTICES COMMISSION
Kelli Breton Fair Political Practices Commission 428 J Street, Suite 620 Sacramento, CA 95814 kbreton@fppc.ca.gov	Commission Assistant, FAIR POLITICAL PRACTICES COMMISSION

__X___ (VIA E-MAIL) I served such document via e-mail to the persons listed above at the e-mail addresses listed above, which they provided to me and which I have used to successfully communicate with them in the past.

_____ (VIA OVERNIGHT MAIL) By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

_____ (VIA U.S. MAIL) I mailed a copy of the document(s) as follows: I am a resident of or employed in the county where the mailing occurred. I enclosed a copy in an envelope and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

Executed on September 9, 2013 at San Francisco, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____
Danny Mooney, Jr.