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7
8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**
9 **STATE OF CALIFORNIA**

10
11 In the Matter of) FPPC No. 12/761
12)
13)
14) **COMPLAINANT'S REPLY TO**
15) **RESPONDENTS' ADMINISTRATIVE**
16) **HEARING BRIEF**
17) (Regulation § 18361.5, subd. (a).)
18)
19)
20) Hearing Date: September 19, 2013
21) Hearing Time: 10:00 a.m.
22) Hearing Place: 428 J Street, 8th Floor
23) Sacramento, CA 95814
24)
25)
26)
27)
28)

13 CHARLES R. "CHUCK" REED, SAN
14 JOSÉ FISCAL REFORMS, MAYOR
15 REED, CHAMBER PAC AND ISSUES
16 MOBILIZATION PAC PROPONENTS,
17 and BENJAMIN J. ROTH,

17 Respondents.

19 **I. INTRODUCTION**

20 In this matter, Complainant requests that the Commission issue a Decision finding that
21 Respondents violated Section 85501 and ordering Respondents to pay an administrative penalty.
22 Respectfully, the Commission does not have the authority to declare Section 85501 unconstitutional or
23 unenforceable.

24 **II. THE LAW IS CLEAR AND UNAMBIGUOUS**

25 Respondents' contentions that Respondent Reed was not a candidate under the Act and that
26 Respondent Committee was not a candidate controlled committee are incorrect. Respondents have
27 ignored the plain meaning of the Act to reach this conclusion. The plain meaning of Sections 82007 and
28 84214, and Regulation 18404, subdivision (d), is clear and unambiguous.

1 Respondents state several times that a candidate only retains his status as a candidate as long as
2 he still has filing obligations under the Act, and thus, when Respondent Reed terminated his campaign
3 committee, he was no longer a candidate under the Act. This conclusion is incorrect because
4 termination of committees alone does not terminate an officeholder's status as a candidate.

5 Section 82007 defines "candidate" and declares that a candidate retains his status as a candidate
6 until that status is terminated pursuant to Section 84214. Section 84214 orders the Commission to enact
7 regulations stating the requirements for terminating status as a candidate. The Commission has laid out
8 the requirements for terminating status as a candidate in Regulation 18404, subdivision (d).

9 Pursuant to Regulation 18404, subdivision (d), the Commission unambiguously declares:

- 10 1. The term "candidate" in Section 82007 includes "officeholder."
- 11 2. An officeholder must file campaign statements required under the Act during the **entire time**
12 the individual holds office.
- 13 3. The filing obligations of a candidate or officeholder who has one or more controlled
14 committees terminate when the individual has terminated **all** his or her controlled
15 committee(s) **and** has left office.
- 16 4. The filing obligations of a candidate or officeholder who does not have a controlled
17 committee, and who received contributions and made expenditures of less than \$1,000 in the
18 calendar year and filed a Form 470, terminate at the end of the calendar year for which the
19 Form 470 was filed **if**:
 - 20 (A) the candidate lost, withdrew, or was not on the ballot in the election; **or**
 - 21 (B) the individual left office during the calendar year; **and**
 - 22 (C) the individual has ceased to receive contributions and make expenditures and has filed all
23 required campaign statements.

24 None of the language of Regulation 18404, subdivision (d) is confusing or unclear. It states that
25 under all scenarios, an officeholder is a candidate pursuant to 82007, an officeholder's filing obligations
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1 do not terminate while the officeholder is in office, and consequently, an officeholder's status as a
2 candidate does not terminate while the officeholder is still in office.¹

3 The Act does not treat the terms "candidate" and "officeholder" as mutually exclusive, and using
4 both terms does not mean that an officeholder is not a candidate, as Respondents' contend. Quite the
5 contrary, by using both terms, Regulation 18404, subdivision (d) emphasizes that under Section 82007
6 all officeholders are candidates, but not all candidates are officeholders. It means that a candidate who
7 is not an officeholder need only terminate his filing obligations to automatically terminate his status as a
8 candidate, whereas a candidate who is an officeholder, continues to have filing obligations under the Act
9 until he leaves office. An officeholder's status as a candidate does not automatically terminate until he
10 has satisfied both prongs of the regulation: terminated his filing obligations and left office. As
11 Respondents correctly note in their Administrative Hearing Brief, "[Regulation 18404, subdivision (d)]
12 uses the term "officeholder" to emphasize that officeholders continue to have certain filing obligations
13 even after terminating their campaign committees." (Respondents' Administrative Hearing Brief, p. 11.)

14 Respondents' incorrectly conclude that Respondent Reed no longer had filing obligations after
15 his reelection committee filed a statement of termination. Respondent Reed's filing obligations
16 continued even though he terminated his reelection committee. Regulation 18404, subdivision (d) states
17 that an officeholder must file campaign statements required under the Act during the entire time the
18 individual holds office. Because Respondent Reed was still in office, but he closed his reelection
19 committee, Regulation 18404, subdivision (d) required Respondent Reed to file short form campaign
20 statements (Form 470) if he received/spent less than \$1,000 each calendar year he was in office. Thus,
21 his filing obligations did not end merely because he terminated his reelection committee.

22 Respondent Reed evidently concluded that he was not a candidate based upon the plain language
23 of Section 85501: since Section 85501 says "candidate" and not "officeholder," Section 85501 did not
24 apply to Respondent Reed's controlled committee. However, the definitions set forth in Sections 82001

25 _____
26 ¹ Contrary to Respondents' contention, Regulation 18404, subdivision (d) does not indicate how a candidate
27 terminates his *committees*. Regulation 18404, subdivisions (b) and (c) state the requirements for terminating a candidate's
28 committees. Regulation 18404, subdivision (d) affirmatively states how a candidate ceases to be a candidate, which is
accomplished automatically when the candidate (with or without committees) no longer has any filing obligations AND has
left office. Regulation 18404, subdivision (d) only addresses terminating candidates' status. Candidates must review the
other subdivisions of Regulation 18404 to properly meet the requirements for terminating their committees.

1 – 82055 govern the interpretation of the Act (Section 82000), and “candidate” is a specifically defined
2 term, which has long been interpreted by the Commission to include the term “officeholder”. Because
3 the Act specifically defines terms to interpret its statutes and regulations, dictionary definitions may not
4 be part of any analysis regarding those terms.

5 Because “candidate” is specifically defined, Section 82007 governs the interpretation of all
6 statutes and regulations in the Act that include the term “candidate.” Because Section 82007 references
7 Section 84214, Section 84214 also governs the interpretation of all statutes and regulations in the Act
8 that include the term “candidate.” Additionally, because Section 84214 orders the Commission to adopt
9 regulations stating the requirements for terminating status as a candidate, and the Commission has
10 codified the requirements for terminating status as a candidate in Regulation 18404, subdivision (d),
11 Regulation 18404, subdivision (d) governs the interpretation of all statutes and regulations in the Act
12 that include the term “candidate.” Section 85501 includes the term “candidate,” and therefore, no
13 analysis of Section 85501 can be made without including an analysis of Sections 82007 and 84214, and
14 Regulation 18404, subdivision (d).

15 Respondents argue that nothing in the plain language of Section 85501 indicates that it was
16 intended to extend to committees controlled by officeholders. As stated previously, Section 85501
17 cannot be evaluated in a vacuum. Any analysis of Section 85501 must include Sections 82007 and
18 84214, and Regulation 18404, subdivision (d). Additionally, Section 85501 was added to the Act in
19 2000, and last amended in 2001. Regulation 18404, subdivision (d) was enacted in its current form in
20 1999 – one year before Section 85501 was enacted – and the Commission had been interpreting
21 Section 82007 to include “officeholder” for at least 15 years before Section 85501 was enacted. It is
22 true that the Commission has not adopted any regulations to specifically interpret Section 85501, but
23 such a regulation is not needed. Most of the terms used in Section 85501 are specifically defined in the
24 Act – “candidate” (Section 82007); “controlled committee” (Section 82016); “independent expenditure”
25 (Section 82031); “contribution” (Section 82015); “committee” (Section 82013) – and the Commission
26 has already adopted regulations interpreting each of those terms.²

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28 ² Regulations for Section 82007: §§ 18404, 18531.5; Regulations for Section 82016: §§ 18217, 18405, 18521,
18521.5; Regulations for Section 82031: §§ 18225.7, 18412, 18420.1, 18530.3; Regulations for Section 82015: §§ 18117,

1 Respondents contend that the *In re Lui* Opinion does not support the allegation in the Accusation
2 that Respondent Reed was a candidate under the Act, and thus, Respondents violated Section 85501.
3 Respondents misinterpret the purpose of citing the *In re Lui* Opinion. Complainant, first and foremost,
4 has shown that the plain language of Sections 82007 and 84214, and Regulation 18404, subdivision (d),
5 dictates that Respondent Reed, because he was an officeholder, was a candidate under the Act, and
6 consequently, by making a contribution to Herrera IE Committee, Respondents violated Section 85501.
7 Complainant's use of the *In re Lui* Opinion (and Commission advice letters) is illustrative and shows
8 that the interpretation that all officeholders are candidates under the Act is not a new or unique
9 interpretation of the Act. On the contrary, since at least the mid to late 1980's, the Commission has
10 continually and consistently held that all officeholders are candidates under the Act. While the
11 Commission could rely upon a Commission Opinion as authority for a violation of the Act, the
12 Commission need not rely upon the *In re Lui* Opinion to establish a violation against Respondents in this
13 case because the plain language of Sections 82007, 84214 and 85501, and Regulation 18404,
14 subdivision (d) provide the necessary authority.

15 Further, Respondent's argument that Advice provided by the Commission may not be the sole
16 basis for an Enforcement action is not relevant here, as the statute and regulation clearly articulate the
17 violation that occurred. However, the authority cited by the Respondents in their Footnote 4, Smith v.
18 Superior Court (1994) 31 Cal App 4th 205 and Downey Cares V. Downey Community Development
19 Com. (1987) 196 Cal App 3d 983, does not go as far as Respondents contend. The cases do state that
20 the advice letters are not "legal authority," but don't address the issue of whether or not they can be the
21 basis for an enforcement action or used for precedential value. In fact, the Downey court specifically
22 states that "this advice may provide guidance to others" on how to comply with the Act. In any case, the
23 argument is irrelevant as the statute and regulations clearly delineate what was required.

24 Therefore, as alleged in the Accusation, Respondents violated Government Code section 85501,
25 and the Commission should issue a Decision finding a violation of Section 85501 and ordering
26 Respondents to pay an administrative penalty.

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28 18215, 18215.1, 18215.2, 18215.3, 18216, 18225.7, 18412, 18420.1, 18421.1, 18421.31, 18423, 18428, 18530.3, 18531.7,
18540, 18572, 18950, 18950.4; Regulations for Section 82013: §§ 18413, 18420.1, 18521.5.

1 **III. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO DECLARE**
2 **SECTION 85501 UNCONSTITUTIONAL OR UNENFORCEABLE**

3 **A. The California Constitution Prohibits the Commission from Declaring that Section 85501 is**
4 **Unconstitutional or Unenforceable.**

5 The Commission may not decide the issue of whether Section 85501 is unconstitutional or
6 unenforceable because the California Constitution prohibits the Commission from declaring that any
7 statute is unconstitutional or unenforceable. Section 3.5 of Article III of the California Constitution
8 prohibits any administrative agency, including the Commission, from declaring a statute
9 1) unconstitutional; 2) unenforceable, or refuse to enforce a statute, on the basis of it being
10 unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
11 and 3) unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations
12 prohibit the enforcement of such statute unless an appellate court has made a determination that the
13 enforcement of such statute is prohibited by federal law or federal regulations. (Cal Const, Art. III §
14 3.5.) Under part 1, the Commission has no authority to declare a statute unconstitutional. Under parts 2
15 and 3, the Commission may not declare a statute is unenforceable unless California or federal appellate
16 court has made a determination that Section 85501 is unconstitutional, prohibited by federal law or
17 prohibited by federal regulations. To date, no California or federal appellate court has made a
18 determination that Section 85501 is unconstitutional, prohibited by federal law or prohibited by federal
19 regulations. Therefore, the Commission may not decide the issue of whether Section 85501 is
20 unconstitutional or unenforceable.

21 **B. The Issue of Whether the Government May Prohibit a Candidate Controlled Committee from**
22 **Making Contributions to Other Committees for the Purpose of Making Independent**
23 **Expenditures Supporting or Opposing Other Candidates Has Not Been Determined by Any**
24 **California or Federal Appellate Court.**

25 The California Constitution prohibits an administrative agency from declaring a statute
26 unenforceable unless an appellate court determination that the statute is unconstitutional, prohibited by
27 federal law or prohibited by federal regulations has been made. Respondents urge that court decisions
28 involving statutes that are “closely analogous” to the statute at issue are enough to establish an appellate

1 court determination of a statute under Section 3.5 of Article III of the California Constitution. However,
2 a closer look at the cases cited by Respondents shows that “closely analogous” is not the standard used
3 to establish an appellate court determination of a statute. The standard, while not given a name, is much
4 more exacting than Respondents contend.

5 Respondents cite three cases to show that statutes that are “closely analogous” to the statute at
6 issue are enough to establish an appellate court determination of a statute under Section 3.5 of Article III
7 of the California Constitution: *Lockyer v. City and County of San Francisco* (2004) 33 Cal. 4th 1055,
8 1102; *LSO, Ltd. v. Stroh*, (9th Cir. Cal. 2000) 205 F.3d 1146, 1159-1160; and *Schmid v. Lovette* (Cal.
9 App. 1st Dist. 1984) 154 Cal. App. 3d 466, 473-74. None of these opinions use the words “closely
10 analogous.”

11 The *Lockyer* opinion indicated “a governing decision previously [finding] an identical statute
12 unconstitutional or in which the invalidity of the statute is so patent or clearly established that no
13 reasonable official could believe the statute is constitutional.” (*Lockyer v. City and County of San*
14 *Francisco, supra*, 33 Cal. 4th at p. 1102.) The *LSO, Ltd.* opinion found that a Supreme Court case,
15 overturning a previous Supreme Court case which upheld the validity of the California regulations that
16 were “precursors” to the regulations at issue, “clearly established that [the current] regulations could not
17 be used to impose restrictions on speech that would otherwise be prohibited under the First
18 Amendment.” (*LSO, Ltd. v. Stroh, supra*, 205 F.3d at pp. 1159-1160.) The *Schmid* opinion held that:

19 ...the former Education Code sections requiring the non-Communist loyalty oaths were
20 patently unconstitutional following decisions rendered long ago by both state and federal
21 authorities. (See, e.g. *Wieman v. Updegraff* (1952) 344 U.S. 183 [97 L.Ed. 216, 73 S.Ct.
22 215]; *Keyishian v. Board of Regents, supra*, 385 U.S. 589; *Elfbrandt v. Russell, supra*,
23 384 U.S. 11; *Vogel v. County of Los Angeles, supra*, 68 Cal.2d 18; *Monroe v. Trustees of*
24 *California State College, supra*, 6 Cal.3d 399, 412.) This conclusion, which it is rather
25 distressing to be required to reiterate at this late date, is certainly no surprise to the
26 overwhelming number of school districts in California, which prior to this action did not
27 comply with the statutes, nor to the State Board of Education, which did not enforce
28 them. (*Schmid v. Lovette, supra*, 154 Cal. App. 3d at p. 474; Citations included in
original.

25 These cases show that the courts require a much more exacting requirement than Respondents’
26 “closely analogous” standard for an appellate court determination to qualify as an appellate court
27 determination under Section 3.5 of Article III of the California Constitution. None of the court decisions
28

1 cited by Respondent – *Citizens United*, *Long Beach*, and *Thalheimer* – reach the exacting standard
2 required by the courts, and thus do not qualify as an appellate court determination of Section 85501.

3 The *Citizens United* opinion is not an appellate court determination of Section 85501 under
4 Section 3.5 of Article III of the California Constitution. In *Citizens United v. FEC*, 558 U.S. 310 (U.S.
5 2010), the United States Supreme Court was called upon to decide whether a federal statute prohibiting
6 corporations and unions from using their general treasury funds to make independent expenditures was
7 constitutional under the First Amendment. In that case, *Citizens United*, a nonprofit corporation,
8 released a documentary film critical of a presidential candidate. *Citizens United* wanted to make the
9 film available through video-on-demand within 30 days of the primary elections, and it produced
10 advertisements to promote the film. At the time, federal law prohibited corporations and unions from
11 using their general treasury funds to make independent expenditures for speech that was an
12 "electioneering communication" or for speech that expressly advocated the election or defeat of a
13 candidate. The Court found that it had previously recognized that the First Amendment applied to
14 corporations, and extended this protection to the context of political speech. (*Id.* at p. 312.) The Court
15 held that the ban imposed on corporate independent expenditures violated the First Amendment because
16 the Government could not suppress political speech based upon the speaker's corporate identity:

17 The Court returns to the principle established in *Buckley* and *Bellotti* that the Government
18 may not suppress political speech based on the speaker's corporate identity. No sufficient
19 governmental interest justifies limits on the political speech of nonprofit or for-profit
20 corporations. (*Id.* at p. 315.)

21 The *Citizens United* opinion did not determine that Section 85501 itself is unconstitutional. The
22 *Citizens United* opinion determined that a federal statute regarding corporations and unions was
23 unconstitutional. The federal statute applied specifically to corporations and unions, and Section 85501
24 applies only to candidate controlled committees. The United States Supreme Court has a history of
25 granting First Amendment rights to corporations, but not so with candidate controlled committees.
26 Additionally, the *Citizens United* opinion did not decide the issue of whether the government may
27 prohibit a candidate controlled committee from making contributions to other committees for the
28 purpose of making independent expenditures supporting or opposing other candidates. Therefore, the
Citizens United opinion is not an appellate court determination of Section 85501 under Section 3.5 of

1 Article III of the California Constitution, and the Commission may not declare that Section 85501 is
2 unenforceable.

3 The *Long Beach* opinion is not an appellate court determination of Section 85501 under Section
4 3.5 of Article III of the California Constitution. In *Long Beach Area Chamber of Commerce v. City of*
5 *Long Beach* (9th Cir. 2010) 603 F.3d 684, the United States Court of Appeals for the Ninth Circuit was
6 called upon to decide whether a local ordinance prohibiting “persons” from making any independent
7 expenditures if they received contributions above certain amounts was constitutional as applied to a
8 nonprofit mutual benefit corporation and its political action committee under the First Amendment.
9 Another local ordinance defined “person” to include “any individual, organization or political action
10 committee whose contributions or expenditure activities are financed, maintained or controlled by any
11 corporation, labor organization, association, political party or any other person or committee.” (*Id.* at p.
12 687.) The *Long Beach* court held that, based upon the case law available, the nonprofit mutual benefit
13 corporation did not have standing, and that the ordinance, as applied to the corporation’s political action
14 committee (PAC), violated the First Amendment. (*Id.* at p. 695.) The *Long Beach* opinion did not hold
15 that the ordinance was unconstitutional on its face, and thus, unenforceable as to all “persons.”

16 The *Long Beach* opinion did not determine that Section 85501 itself is unconstitutional. The
17 Ninth Circuit Court of Appeals, in the *Long Beach* opinion only determined that a local ordinance, as
18 specifically applied to a corporation’s PAC, violated the First Amendment. The ordinance in question
19 applied specifically to “persons,” as defined in another local ordinance, and Section 85501 applies only
20 to candidate controlled committees as specifically defined in the Act. The *Long Beach* court did not
21 determine that the local ordinance was unenforceable as to all “persons” under the First Amendment.
22 The *Long Beach* opinion did not decide the issue of whether the government may prohibit a candidate
23 controlled committee from making contributions to other committees for the purpose of making
24 independent expenditures supporting or opposing other candidates. Therefore, the *Long Beach* opinion
25 is not an appellate court determination of Section 85501 under Section 3.5 of Article III of the California
26 Constitution, and the Commission may not declare that Section 85501 is unenforceable.

27 The *Thalheimer* opinion is not an appellate court determination of Section 85501 under
28 Section 3.5 of Article III of the California Constitution. In *Thalheimer v. City of San Diego*

1 (9th Cir. 2011) 645 F.3d 1109, the United States Court of Appeals for the Ninth Circuit was called upon
2 to decide whether the district court properly granted a preliminary injunction against the enforcement of
3 a local ordinance prohibiting “general purpose recipient committees” from using “a contribution for the
4 purpose of supporting or opposing a candidate unless the contribution is attributable to an individual in
5 an amount that does not exceed \$500 per candidate, per election.” (*Id.* at p. 1118.) The *Thalheimer*
6 court held that the district court correctly concluded that, based upon the case law available, the
7 plaintiffs were likely to succeed on the merits, and therefore the preliminary injunction was properly
8 granted. (*Id.* at p. 1121.) The *Thalheimer* opinion did not hold that the local ordinance violated the First
9 Amendment.

10 The *Thalheimer* opinion did not determine that Section 85501 itself is unconstitutional. The
11 Ninth Circuit Court of Appeals, in the *Thalheimer* opinion, only determined that the lower court
12 properly granted a preliminary injunction against the enforcement of a local ordinance, not whether the
13 ordinance was constitutional. The Court of Appeals could not determine whether the ordinance was
14 constitutional because the lower court did not determine whether the ordinance was constitutional since
15 a full trial on the merits had not yet occurred. The preliminary injunction was a temporary order,
16 prohibiting local officials from enforcing the ordinance until after a full trial on the merits.³ Also, the
17 ordinance in question applied specifically to general purpose recipient committees, and Section 85501
18 applies only to candidate controlled committees. General purpose recipient committees and candidate
19 controlled committees are distinct entities as defined in the Act. (See Sections 82016 and 82027.5.) The
20 *Thalheimer* opinion did not decide the issue of whether the government may prohibit a candidate
21 controlled committee from making contributions to other committees for the purpose of making
22 independent expenditures supporting or opposing other candidates. Therefore, the *Thalheimer* opinion
23 is not an appellate court determination of Section 85501 under Section 3.5 of Article III of the California
24 Constitution, and the Commission may not declare that Section 85501 is unenforceable.

25 Respondents also cited *SpeechNow.org v. FEC* (D.C. Cir. 2010) 599 F.3d 686, however, this
26 case is similarly distinguishable from the present dispute. In *SpeechNow.org* the D.C. Circuit held that

27 ³ Generally speaking, the lower court could, after hearing all of the evidence presented at a full trial on the merits,
28 determine whether the ordinance violated the First Amendment. If one or more of the parties then appealed the final decision
after the full trial, only then could the Court of Appeals decide the constitutional issue.

1 the contribution limits in a federal statute were unconstitutional as applied to contributions made by
2 “individuals” to an independent expenditure committee. (*SpeechNow.org v. FEC*, 599 F.3d at p. 695-
3 96.) As previously stated, Section 85501 applies, not to individuals, but only to candidate controlled
4 committees which are distinct entities as defined in the Act. (See Sections 82016.) The *SpeechNow.org*
5 opinion did not decide the issue of whether the government may prohibit a candidate controlled
6 committee from making contributions to other committees for the purpose of making independent
7 expenditures supporting or opposing other candidates. Therefore, the *SpeechNow.org* opinion is not an
8 appellate court determination of Section 85501 under Section 3.5 of Article III of the California
9 Constitution, and the Commission may not declare that Section 85501 is unenforceable.

10 Respondents argue that because the Commission, in the past, has chosen not to enforce
11 provisions of the Act, the Commission should refuse to enforce Section 85501 against Respondents,
12 citing to the Resolution of the California Fair Political Practices Commission dated March 21, 2005
13 involving Sections 84503 and 84506. In that matter, the state Republican and Democratic Political Party
14 Committees brought an action in federal district court against the Commission seeking injunctive and
15 declaratory relief, challenging Sections 84503 and 84506 as unconstitutional. The Commission had not
16 opened an enforcement action against either of the political party committees. The federal district court
17 found that the political party committees were likely to prevail on the merits, and granted their request
18 for a preliminary injunction prohibiting the Commission from enforcing Sections 84503 and 84506
19 against the political party committees until the trial on the merits of the matter. Rather than continuing
20 to trial, the Commission agreed to adopt a resolution clarifying the Commission’s enforcement policy
21 with respect to Sections 84503 and 84506 as they apply to general purpose ballot measure committees.

22 The present action is distinguishable. Here, Complainant requests that the Commission issue a
23 Decision finding that Respondents violated Section 85501 and ordering Respondents to pay an
24 administrative penalty. Respondents have not brought an action in federal district court against the
25 Commission seeking injunctive and declaratory relief, challenging Section 85501 as unconstitutional.
26 No court has granted Respondents a preliminary injunction prohibiting the Commission from enforcing
27 Section 85501. Thus, regardless of whether the Commission has refused to enforce provisions of the
28 Act in the past, the circumstances here are entirely different.

1 Respectfully, the Commission does not have the authority to declare Section 85501
2 unconstitutional or unenforceable.

3 **IV. AN ADMINISTRATIVE PENALTY SHOULD BE IMPOSED**

4 A significant fine should be levied against Respondents in this matter, as alleged in the
5 Accusation and discussed in Complainant's Administrative Hearing Brief. Whether Respondents
6 "suffered politically" because of this enforcement matter is irrelevant to the violation at issue, and is not
7 a factor enumerated in Regulation 18361.5, subdivision (d). Whether the contribution at issue in this
8 case was timely reported is not a fact under consideration by the Commission because those facts are not
9 included in the Statement of Stipulated Facts. Even so, the reporting of the contribution helped to
10 quickly bring to light Respondents' prohibited contribution, and thus, is a mitigating factor, but does not
11 reduce the appropriate fine amount to the "lowest penalty possible" as Respondents suggest.

12 Further, the contribution made by Respondents was not permissible under the Act and gave one
13 candidate a significant advantage in the race that could not be remedied because the funds illegally given
14 to the recipient committee had already been largely expended by the time the FPPC requested the
15 spending of these funds cease. It also frustrated a major purpose of the Act to restrict the influence of
16 campaign spending by placing certain limits on expenditures.

17 Respondent Reed is the Mayor of one of the largest Cities in America, a seasoned candidate and
18 officeholder, and an attorney. He is a sophisticated party who should have known to seek out competent
19 counsel in this field of practice. In the alternative, he should have provided all the facts when seeking
20 advice so he could have received accurate advice on the issue. The fact that he sought advice on the
21 contribution and thought to research the issue on his own demonstrates that he realized there could have
22 been laws and regulations that applied to his circumstances. It is inexcusable that a party as
23 sophisticated as Respondent Reed failed to get competent advice and also fails to take responsibility for
24 his error.

25 **V. CONCLUSION**

26 For the foregoing reasons, Complainant respectfully requests a proposed decision imposing an
27 administrative penalty of at least Three Thousand Five Hundred Dollars (\$3,500) and not more than Five
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1 Thousand Dollars (\$5,000) for one violation of Government Code section 85501. Respectfully, the
2 Commission does not have the authority to declare Section 85501 unconstitutional or unenforceable.

3 Dated: 9.13.2013

Respectfully Submitted,

4 **FAIR POLITICAL PRACTICES COMMISSION**

5 By: Gary S. Winuk
Chief of Enforcement

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7 Angela J. Brereton
8 Senior Commission Counsel

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814. On September 13, 2013, I served the following document(s):

1. COMPLAINANT'S REPLY TO RESPONDENTS' ADMINISTRATIVE HEARING BRIEF, FPPC No. 12/761; In the matter of CHARLES R. "CHUCK" REED, SAN JOSÉ FISCAL REFORMS, MAYOR REED, CHAMBER PAC AND ISSUES MOBILIZATION PAC PROPONENTS, and BENJAMIN J. ROTH

By Personal Delivery. I personally delivered the document(s) listed above to the person(s) at the address(es) as shown on the service list below.

By email or electronic transmission. I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the delivery occurred. The envelope was delivered in Sacramento County, California.

SERVICE LIST

Email and Personal Delivery

Fair Political Practices Commission
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Email Transmission

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And Issues Mobilization PAC Proponents, and Benjamin J. Roth
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 13, 2013.



Camille Marzion