

Memorandum
Fair Political Practices Commission

To: FPPC Chair Ravel, and Commissioners Garrett, Eskovitz, Montgomery and Rotunda

From: Zackery P. Morazzini, General Counsel
Lawrence T. Woodlock, Senior Commission Counsel

Subject: Pending Litigation

Date: March 26, 2012

ProtectMarriage.Com et al. v. Bowen et al.

This action was filed on January 9, 2009 in the United States District Court for the Eastern District of California by plaintiffs ProtectMarriage.com - Yes on 8, a Project of California Renewal and National Organization for Marriage California - Yes on 8, Sponsored by National Organization for Marriage. It is a “defendants class action” lawsuit against defendants responsible either for enforcement of the Act, or maintenance and publication of the campaign reports at issue in this case (including the Commission, Attorney General, Secretary of State and various district and city attorneys). The Commission defendants were formally served on January 14, 2009.

Plaintiffs challenge the Act’s campaign disclosure requirements on contributions to ballot measure committees as unconstitutional. They cite a variety of adverse actions against persons who supported Proposition 8, which was on the November 2008 ballot, alleging that some of these persons were identified through campaign contribution information made public as required by the Act’s campaign reporting and disclosure provisions. The Complaint seeks to permanently enjoin the future disclosure of all of plaintiffs’ contributors, expunge the records of all of plaintiffs’ past contributors, and to invalidate as unconstitutional the Act’s \$100 disclosure threshold for contributors to ballot measure committees, the Act’s requirement for post-election disclosure of contributors to ballot measure committees, and the Act’s failure to purge the records of contributors to ballot measure committees after the election. In all counts, plaintiffs seek declaratory and injunctive relief, and an award of attorney’s fees.

Plaintiffs moved for a preliminary injunction on shortened time, which was heard on January 29, 2009 before District Judge Morrison C. England, Jr. The court denied plaintiffs’ motion from the bench, concluding that plaintiffs had failed to demonstrate the probability of success on the merits or the likelihood of irreparable injury necessary to support a preliminary injunction. The court issued a written order to this effect on January 30. On February 3, 2009 the Commission defendants timely filed their Answer to Plaintiffs’ Second Amended Complaint. On May 15, 2009 the court issued the Scheduling Order to set the timing of further proceedings and on May 27, 2009 the court issued another order granting Plaintiffs’ motion, not opposed by Defendants, to file a Third Amended Complaint adding the National Organization for Marriage California PAC to the list of Plaintiffs. The Answer to this Complaint was filed on June 5, 2009.

On June 3, 2009 Plaintiffs filed a Motion for Class Certification and a Motion for Summary Judgment, together with supporting documents. Defendants filed Notices of Non-Opposition to the Class Certification Motion, and on June 10, 2009 filed a Motion seeking denial of Plaintiffs' Motion for Summary Judgment or, in the alternative, continuance of the hearing date under Rule 56. On June 24, 2009 the Court issued an Order denying Plaintiffs' Motion for Summary Judgment, and on August 6, 2009 advised that it would decide class certification without oral argument. The parties reached agreement on class certification and, on November 9, 2009 filed a Stipulation and Proposed Order, entered by the Court on November 25, 2009.

On August 25, 2011 Plaintiffs served a Motion for Summary Judgment. Defendants served their Response and a Cross-Motion on September 15, 2011. District Judge Morrison C. England, Jr. heard argument on these cross-motions on October 20, 2011. At the conclusion of the hearing Judge England announced that he was inclined to grant Defendants' Motion for Summary Judgment, and to deny Plaintiffs' Motion. On November 4, 2011 the Court served its Memorandum and Order, and entered final Judgment in favor of Defendants.

On December 2, 2011 Plaintiffs appealed the District Court's Judgment. The Ninth Circuit Court of Appeal then set the following schedule for the parties' briefing on appeal: Plaintiffs' Opening Brief will be filed and served by March 12, 2012; Defendants' Answering Brief will be filed and served on April 10, 2012, and Plaintiffs' Response, if any, will be filed and served on April 24, 2012. No hearing date has been set. On February 29, 2012 the Ninth Circuit Denied Defendants' Motion for a hearing by the same panel that will hear a similar case from the State of Washington, relating to disclosure of persons who sign an initiative petition.

Fair Political Practices Commission v. United States Postal Service

On January 12, 2012, the Commission staff filed a complaint in the United States District Court for the Eastern District of California against the USPS under the Freedom of Information Act. The matter arises out of the Enforcement Division's attempt to obtain records from the USPS that are pertinent to an investigation regarding an alleged violation of the mass-mailing provisions of the Act.

As part of our investigation, we issued a subpoena to USPS, requesting the number of pieces of mail sent out under a bulk mail permit held by Mr. Eisen, a candidate subject to a recall election. The USPS refused to comply with the subpoena, but treated it like a FOIA request. Ultimately, the USPS denied our request for records, asserting such information is exempt under various FOIA exemptions. We pursued the administrative appeal procedures, to no avail.

In January, Mr. Eisen sought to intervene in the case. We have opposed this motion. The parties are currently negotiating a briefing schedule on cross-motions for summary judgment, which will likely be heard in August 2012.

Michelle Berman and Adrienne Lauby v. Fair Political Practices Commission

On December 15, 2010, Michelle Berman and Adrienne Lauby filed a Verified Petition for Writs of Mandate in the Superior Court of Sacramento, California. Petitioners seek relief from the Default Decisions and Orders in cases of Michelle Berman, FPPC Case 10/115, and Adrienne Lauby, FPPC Case 10/116, asking the Court to set aside the Default Decisions and Orders in these cases and to require the Fair Political Practices Commission ("Commission") to accept the Notices of Defense and to grant a hearing in these matters. Additionally, Plaintiffs seek an award of attorney fees.

On February 28, 2011, Michelle Berman and Adrienne Lauby filed a second Verified Petition for Writs of Mandate in the Superior Court of Sacramento, California, seeking relief from the Default Decisions and Orders in the cases of Michelle Berman, FPPC Case 10/115, and Adrienne Lauby, FPPC Case 10/116. Petitioners ask the Court to set aside the Default Decisions and Orders in these cases and to require the Commission to accept the Notices of Defense and to grant a hearing in these matters. The Commission was served with this Verified Petition for Writs of Mandate on March 22, 2011. Plaintiffs seek to consolidate the two Verified Petitions for Writs of Mandate. The Commission has agreed to stipulate to consolidate the two cases into one case.

On March 22, 2011, Petitioners requested the Administrative Record in the Enforcement Matters of Michelle Berman, FPPC Case 10/115, and Adrienne Lauby, FPPC Case 10/116. On April 18, 2011, the Enforcement Division served Petitioners with the Administrative Record. Further, on April 19, 2011, the Enforcement Division filed Answers to both Superior Court Case Numbers 34-2010-80000740 and 34-2011-80000800.

On or about July 7, 2011, the Superior Court of Sacramento consolidated the cases. On or about December 9, 2011, the Superior Court of Sacramento reassigned Superior Court Case Number 34-2011-80000800 to Superior Court Judge Timothy Frawley.

Tim Foley v. Fair Political Practices Commission

On May 11, 2011, Tim Foley filed a Verified Petition for Writ of Mandate in the Superior Court of Sacramento, California. Petitioner seeks relief from the Default Decision and Order in the case of Tim Foley, FPPC Case 10/117, asking the Court to set aside the Default Decision and Order in this case and to require the Fair Political Practices Commission (“Commission”) to accept the Notice of Defense and to grant a hearing in this matter. Additionally, Plaintiff seeks an award of attorney fees. The Commission was served with this Verified Petition for Writ of Mandate on May 13, 2011.

On June 9, 2011, the Enforcement Division filed an Answer to Superior Court Case Number 34-2011-80000852. On or about December 9, 2011, the Superior Court of Sacramento reassigned Superior Court Case Number 34-2011-80000852 to Superior Court Judge Timothy Frawley.

Fair Political Practices Commission v. Tim Foley

On October 3, 2011, the Fair Political Practices Commission (“Commission”) filed a Complaint for Collection of Monetary Penalty Imposed by Plaintiff, seeking a civil judgment for the monetary penalty imposed on Tim Foley in the Default Decision and Order in FPPC Case 10/117. (Sacramento Superior Court, Case No. 34-2011-00111734.) On November 15, 2011, Olson, Hagel & Fishburn, LLP, on behalf of Tim Foley, filed an answer. A motion for judgment on the pleadings by the Commission has been set to be heard at 9A.M. on May 14, 2012, in department 54.