CALIFORNIA STATE ASSOCIATION OF COUNTIES v. FAIR POLITICAL PRACTICES COMMISSION
Case Number: BS174653
Hearing Date: December 4, 2020

ORDER DENYING PETITION FOR WRIT OF MANDATE AND DENYING DECLARATORY RELIEF

Through their Third Amended Petition and Complaint for Declaratory Relief (petition), Petitioners, California State Association of Counties and California School Boards Association (jointly, Petitioners), seek a court order invaliding California Code of Regulations, Title 2, sections 18420.1 and 18901.1 (respectively, Regulation 18420.1 and Regulation 18901.1), and a writ of mandate enjoining Respondent, Fair Political Practices Commission (FPPC), from enforcing the regulations. The FPPC opposes the petition.

The petition is DENIED.

The FPPC's objections to the Declaration of Anne Ravel are sustained.

The FPPC's objections to the Declaration of Dan Schnur are sustained except number 7 which is overruled.

Petitioners' unopposed request for judicial notice and supplemental request for judicial notice (P-RJN) of Exhibits A through AA is granted. (Evid. Code § 452, subd. (c), (d) and (h).)

The FPPC's unopposed request for judicial notice (R-RJN) of Exhibits 1 through 10 is granted. (Evid. Code § 452, subd. (c), (d) and (h).)

STATEMENT OF THE CASE

Through Proposition 9, the People of California adopted the Political Reform Act of 1974 (PRA). (Gov. Code[1] §§ 81000 *et seq.*; P-RJN Ex. L.) The legislature established the FPPC to enforce the PRA. (§§ 83100 *et. seq.*; P-RJN Ex. N.)

Under the PRA "any person who makes one or more expenditures must report them once certain thresholds are reached." (*Yes on Measure A v. City of Lake Forest* (1997) 60 Cal.App.4th 620, 623 [citing §§ 82013, subd. (b), 84200].) " 'Expenditure' means a payment . . . unless it is clear from the surrounding circumstances that it is not made for political purposes." (§ 82025.)

[1] Unless otherwise noted, all further statutory references are to this Code.

Shortly after the enactment of the PRA, the California Supreme Court decided *Stanson v. Mott* (1976) 17 Cal.3d 206 (*Stanson*). *Stanson* held "in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign . . . ." (*Id.* at 209-210.) *Stanson* distinguished between an agency permissibly using public funds to "provide a fair presentation of the relevant facts" relating to an election (an informational role) versus impermissibly using public funds to promote a position (a promotional role). (*Id.* at 210.)[2]

In October 2008, the FPPC promulgated Regulation 18420.1 and Regulation 18901.1.

In 2009, the California Supreme Court decided *Vargas v. City of Salinas* (2009) 46 Cal.4th 1 (*Vargas*). In *Vargas,* the high court reaffirmed that "the campaign activity/informational material dichotomy set forth in *Stanson* . . . remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds." (*Id.* at 34.)[3]

Following the decision in *Vargas*, the legislature enacted Assembly Bill 9 (AB 9). AB 9 amended the PRA. According to its legislative history, AB 9:

> "clarifies existing law that an expenditure [under the PRA] includes the payment of public moneys by a state agency or local government agency . . . for a communication to the electorate within the jurisdiction of that agency regarding a clearly identified measure, except if the communication constitutes a fair and impartial presentation of the facts relating to the measure or the communication is otherwise required by law." (R-RJN, Ex. 2, p. 9.)

Among other things, AB 9 amended the PRA's definition of "independent expenditure" by adding the phrase "including a payment of public moneys by a state or local government agency." (R-RJN, Ex. 3, p. 11-14 [text of AB 9].) As amended by AB 9, the PRA's definition of "independent expenditure" reads:

> "Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee. (§ 82031.)

On September 10, 2009, after the Supreme Court issued its decision in *Vargas*, *supra*, 46 Cal.4th 1, the FPPC adopted an amended Regulation 18420.1. (Joint Appendix [JA] Ex. 1 at 530.)

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[2] As noted by Petitioners, *Stanson* did not interpret the PRA.

[3] Like *Stanson, Vargas* also did not interpret the PRA.

Regulation 18420.1 then provided in relevant part:

> (a) A payment of public moneys by a state or local governmental agency, or by an agent of the agency, made in connection with a communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Regulation 18225(b)(l), or that taken as a whole and in context, unambiguously urges a particular result in an election is one of the following:
>
>> (1) A contribution under Section 82015 if made at the behest of the affected candidate or committee.
>> (2) An independent expenditure under Section 82031.
>
> (b) For purposes of subdivision (a), a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:
>
>> (1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television or radio spots.
>> (2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.
>
> . . . .
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> (d) For purposes of subdivision (b)(2), when considering the style, tenor, timing of a communication, factors to be considered include, but are not limited to, whether the communication is any of the following:
>
>> (1) Funded from a special appropriation related to the measure as opposed to a general appropriation.
>> (2) Is consistent with the normal communication pattern for the agency.
>> (3) Is consistent with the style of other communications issued by the agency.
>> (4) Uses inflammatory or argumentative language."

In 2018, the FPPC added "electronic media" to the list of "clearly campaign material or campaign activity" in Regulation 18420.1. (JA, Ex. 1 at 72; Regulation 18420.1, subd. (b)(1).)

In 2009, concurrently with its adoption of the amendments to Regulation 18420.1, the FPPC adopted Regulation 18901.1. (JA, Ex. 2 at 682.) Regulation 18901.1 provides that a mailing is prohibited by section 89001[4] if it "unambiguously urges a particular result in an election" and:

> "meets either of the following criteria:
>
> > (1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television or radio spots.
> > (2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.
> >
> > . . . .
>
> . . . when considering the style, tenor, timing of an item, factors to be considered include, but are not limited to, whether the item is any of the following:
>
> > (1) Funded from a special appropriation related to the measure as opposed to a general appropriation.
> > (2) Is consistent with the normal communication pattern for the agency.
> > (3) Is consistent with the style of other communications issued by the agency.
> > (4) Uses inflammatory or argumentative language.

(Regulation 18901.1, subd. (c) and (e).)

On August 3, 2018, Petitioners filed the petition alleging the FPPC exceeded its rulemaking authority by adopting Regulation 18420.1 and Regulation 18901.1 purporting to incorporate those restrictions on modes of communication set forth in *Stanson, supra,* 17 Cal.3d at 206 and *Vargas, supra,* 46 Cal.4th at 1. The petition alleges the Regulations—imposing restrictions on the use of public funds to communicate with the electorate—unlawfully subject governmental entities (including cities, counties and school boards) to civil and administrative actions through the FPPC. Petitioners contend the Regulations are invalid.

The petition alleges five causes of action—four in declaratory relief and one in traditional mandamus. Petitioners seek the following relief through the petition:

- A declaration the FPPC exceeded its jurisdiction in enacting Regulation 18420.1 and the regulation is therefore unlawful and invalid;

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[4] Section 89001 provides: "No newsletter or other mass mailing shall be sent at public expense."

- A declaration the FPPC exceeded its jurisdiction in enacting Regulation 18901.1 and the regulation is therefore unlawful and invalid;

- A declaration the categorization of television, radio and electronic communication as "campaign" activity in Regulation 18420.1 and Regulation 18420.1 in its entirety is invalid and unenforceable, and the FPPC's attempt to enforce a vague regulatory content standard that impinges on protected speech is unconstitutional;

- A declaration Regulation 18420.1's *per se* categorization of electronic media as "campaign" activity is invalid and unenforceable;

- A declaration the categorization of television, radio and electronic communication as "campaign" activity in Regulation 18901.1 and Regulation 18901.1 in its entirety is invalid and unenforceable, and the FPPC's attempt to enforce a vague regulatory content standard that impinges on protected speech is unconstitutional;

- A declaration Regulation 18901.1's *per se* categorization of electronic media as "campaign" activity is invalid and unenforceable;

- A traditional writ of mandate compelling the FPPC to (1) exercise its rulemaking authority in a manner consistent with the PRA; (2) implement the PRA in a manner that does not infringe on the rights of protected speech; (3) set aside Regulation 18420.1 or remand the matter back to the FPPC for rulemaking consistent with the FPPC's authority in the PRA; and (4) set aside Regulation 1890.1 or remand the matter back to the FPPC for rulemaking consistent with the FPPC's authority in the PRA.

- Related injunctive relief.

STANDARD OF REVIEW

Petitioners seek a writ of mandate pursuant to Code of Civil Procedure section 1085 challenging the FPPC's jurisdiction or authority to promulgate the Regulations in addition to complaints concerning the substance of them. Petitioners' declaratory relief claims arise from the same arguments.

Traditional mandamus lies to compel the performance of a clear, present and ministerial duty where the petitioner has a beneficial right to performance of that duty. (Code Civ. Proc. § 1085; *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1264–1265.) "Mandamus may issue to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (*Carrancho v. California Air Resources Board, supra*, 111 Cal.App.4th at 1265.)

A petition for a traditional writ of mandate requires a court to review the complained of action for an abuse of discretion. "Abuse of discretion is established if the respondent [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Exxon Mobil Corp. v. Office of Environmental Health Hazard Assessment* (2009) 169 Cal.App.4th 1264, 1276.)

Challenged regulations, "like any agency action, comes to the court with a presumption of validity. [Citations.]" (*Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389.) Where a challenger contends a regulation "falls outside the lawmaking authority delegated by the Legislature [to the agency]" and conflicts with the law, the "contentions implicate interpretation of the relevant statutes, which is a question of law on which [the] court exercises independent judgment." (*Id.* at 389-390.) The court, however, gives great weight and respect to the administrative agency's construction. (*Id.* at 390.)

When, as here, considering whether a challenged regulation is "within the scope of the authority conferred," the courts review the regulation "for consistency with controlling law." (*California Assn of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 312.)[5] "[C]ourts exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." (*San Francisco Fire Fighters Local 798 v. City & County of San Francisco* (2006) 38 Cal.4th 653, 667).

"As a general matter, courts 'will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-13, . . .) . . . [W]e will not disturb the agency's determination without a demonstration that it is clearly unreasonable.' [Citation.] While final responsibility for interpreting a statute or regulation rests with the courts and a court will not accept an agency interpretation that is clearly erroneous or unreasonable, ' " [a]s a general rule, the courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area." ' " (*Exxon Mobil Corp. v. Office of Environmental Health Hazard Assessment*, *supra*, 169 Cal.App.4th at 1276-1277.)

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[5] " 'Consistency' means being in harmony with, and not in conflict with or contradictory to," existing provisions of law." (*Ibid.* [quoting § 11349].)

ANALYSIS

There is no question section 83112 specifically provides the FPPC with rulemaking authority. The FPPC "may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of [the PRA], and to govern procedures of the" FPPC. (§ 83112.) The rules promulgated must be "consistent with" the PRA and "other applicable law." (*Ibid.*)

The PRA sets forth its express purpose in part as follows:

> "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that voters may be fully informed and improper practices may be inhibited." (§ 81002, subd. (a).)

The PRA is to be "liberally construed to accomplish its purpose." (§ 81003.)

Finally, "when a petition seeks to invalidate a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is within the scope of authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute."[6] (*California Assn of Medical Products Suppliers v. Maxwell-Jolly*, *supra*, 199 Cal.App.4th at 312 [quoting *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at 11 [internal quotations and citations omitted].)

Regulation 18420.1:

Petitioners assert Regulation 18420.1 is an invalid "regulatory overreach." (Opening Brief 20:12.) They contend the "FPPC . . . exceeded its authority . . . to expand its jurisdiction, without statutory authorization, to allow it to enforce *Stanson/Vargas* constitutional restrictions on government campaign activity." (Opening Brief 18:2-22.) Finally, Petitioners contend Regulation 18420.1 is inconsistent with the PRA and contrary to *Vargas*.

Whether the Regulation Falls Outside of the PRA

Petitioners assert *Stanson* and *Vargas* are not "part of the PRA." *Stanson* and *Vargas,* they explain, "ha[ve] never been part of the PRA." (Opening Brief 18:23.) Therefore, Petitioners contend the FPPC could not properly "import[] the *Stanson/Vargas* standard from outside the PRA directly into Regulation 18420.1." (Opening Brief 19:2-3.)

[6] Petitioners have not argued herein the Regulations are not reasonably necessary to effectuate the purpose of the relevant statutes.

As framed by Petitioners, the operative issue then is the scope of authority delegated to the FPPC by the legislature, and whether Regulation 18420.1 falls within that authority.[7] Accordingly, this court must consider whether Regulation 18420.1 is consistent with the PRA.

Petitioners contend Regulation 18420.1 is "obvious[ly]" inconsistent with the PRA. (Opening Brief 21:9.) More specifically, Petitioners argue: "Regulation 18420.1 is inconsistent with the statutory standard it supposedly interprets—the 'unambiguously urges' standard in the definition of 'independent expenditure' . . ." contained in section 82031. (Opening Brief 21:17-18.)

Regulation 18420.1 interprets the term "unambiguously urges" as to the PRA's definition of "independent expenditure" found in section 82031. The legislature used the "unambiguously urges" language in the statute.

Section 82031 states:

> " '***Independent expenditure***' means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which ***expressly advocates*** the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, ***unambiguously urges a particular result in an election*** but which is not made to or at the behest of the affected candidate or committee." [Emphasis added.]

The obvious inconsistency escapes the court. Regulation 18420.1 expressly tracks section 82031.

Additionally, Petitioners suggest the FPPC's interpretation of section 82031 is frozen in time. That is, Petitioners argue the term "expenditure" must be defined under the United States Supreme Court's decision *Buckley v. Valeo* (1976) 424 U.S. 1 wherein the Court considered provisions of the Federal Election Campaign Act of 1971. (*Id.* at 6.) *Buckley v. Valeo* construed the term "expenditures" to apply to "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." (*Id.* at 80.) Until recently, Petitioners argue the FPPC followed the *Buckley v. Valeo* definition of "expenditure." (JA Ex. 1 at 135, 260 [August 21, 2008 FPPC Staff Memorandum].) Nonetheless, it is unclear why the FPPC is tied to a

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[7] Petitioners' assertion *Stanson* and *Vargas* are not part of the PRA (Opening Brief 18:10-21:4) does not, in and of itself, demonstrate the FPPC exceeded the scope of its rulemaking authority; Petitioners' argument appears misfocused. To determine whether the regulation is within the scope of authority conferred upon the FPPC by the legislature, " 'the judiciary independently reviews the administrative regulation for consistency with controlling law.' " (*California Assn of Medical Products Suppliers v. Maxwell-Jolly*, *supra*, 199 Cal.App.4th at 312 [quoting *Communities for a Better Environment v. California Resources Agency* (2002) 98, 108.) Thus, the focus must be on the provisions of the PRA and whether the regulations fall within them.

nearly 25-year-old United States Supreme Court decision interpreting federal law given the PRA, the specificity of section 82031 and its language—"unambiguously urges."

Petitioners also argue the regulation's definitional use of "unambiguously urges" "defies" the English language. The entirety of that particular contention is as follows:

> "It also defies the English language to define "*unambiguously* urges," Cal. Gov't Code § 82031 (emphasis added), in the manner Regulation 18420.1 purports to do: "reasonably characterized as campaign material" and "not a fair presentation of facts" based on its "style, tenor, and timing," including non-exclusive factors such as whether the materials were "[f]unded from a special appropriation . . . as opposed to a general appropriation." Cal. Code Regs. tit. 2, § 18420.1(b)(2), (d)(1). The term "unambiguously urges" is supposed to convey all-but-explicit advocacy —not create a nebulous, multi-factor analysis of whether a communication is 'fair.' " (Opening Brief 22:15-21 [footnote omitted].)

The court finds Petitioners' position—this facial challenge—unpersuasive. The court does not appreciate how the definition "defies" the English language or could even be considered unclear based on Petitioners' argument.

As noted earlier, the court must determine whether Regulation 18420.1 is consistent with the PRA—the issue framed by Petitioners—as such an inquiry determines whether the FPPC exceeded its authority when it promulgated the regulation. To do so, the court starts with the purpose and intent of the PRA.

Section 81002 sets forth the purposes of the PRA. Subdivision (a) of the statute provides:

> "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."

Courts have found "[t]he manifest purpose of the financial disclosure provisions of the [PRA] is to insure a better informed electorate and to prevent corruption of the political process." (*Thirteen Comm. v. Weinreb* (1985) 168 Cal.App.3d 528, 532; see also *Fair Political Practices Com. v. Suitt* (1979) 90 Cal.App.3d 125, 132 [holding PRA "undeniably was intended to deal comprehensively with the influence of money, all money, on electoral and governmental processes"].)[8] With this express statutory purpose in the forefront, the court notes Regulation 18240.1 is essentially a reporting requirement requiring disclosure by governmental entities of certain campaign expenditures; thus, on its face, the Regulation is consistent with the overall purpose and intent of the PRA.

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[8] On this point, as the FPPC notes, there is no exception for local governments as to the transparency requirement.

Further, the Regulation is not on its face inconsistent with section 82031 or section 82015, subdivision (b)(3).[9] Notably, Petitioners have failed to show how Regulation 18420.1 is inconsistent or in conflict with the PRA. The plain language of section 82031 suggests that a local government communication can constitute an independent expenditure if it (1) expressly advocates for or against a measure, or (2) taken as a whole and in context, unambiguously urges a particular result.

Thus, section 82031 provides the standard used by the FPPC and set forth in Regulation 18420.1. The regulation requires the disclosure of "payment of public moneys by a state or local governmental agency . . . that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure . . . or that taken as a whole and in context, unambiguously urges a particular result in an election"—as either contribution or independent expenditure.

The court finds the FPPC did not exceed the scope of its authority when it promulgated Regulation 18420.1.

Per Se Categorization

Finally, Petitioners argue Regulation 18420.1's *per se* categorization of television, radio, and electronic media as a "campaign activity" is invalid and unenforceable. Petitioners contend the regulation does not focus on the content of the message but instead focuses on the medium for that message. That is, <u>any</u> local government use of television, electronic media or radio spots concerning an election would "*per se*" constitute "unambiguously urg[ing] a particular result in an election" without regard to the content of the message—even if the message is purely informational.

Petitioners base their claim on the language of the regulation. Regulation 18420.1 provides a communication "unambiguously urges a particular result in an election," if it "is clearly campaign material or campaign activity *such as* bumper stickers, billboards, door-to-door canvassing, or other mass media advertising *including, but not limited to,* television, electronic media or radio spots." (Regulation 18420.1, subd. (b)(1).)

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[9] The PRA defines a "contribution" as

> "[t]he payment of public moneys by a state or local governmental agency for a communication to the public that satisfies both of the following:
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> (A) The communication expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, or, taken as a whole and in context, unambiguously urges a particular result in an election. (B) The communication is made at the behest of the affected candidate or committee." (§ 82015, subd. (b)(3).)

The FPPC reports Petitioners have misinterpreted the regulation and argues the regulation must be read and considered in context. The FPPC contends Regulation 18420.1 does not contain any *per se* categorization. Instead, the FPPC explains the regulation merely provides a non-exhaustive list of activities that *may* constitute campaign materials or campaign activities—depending on their content. According to the FPPC, Petitioner's interpretation improperly reads out or ignores "campaign activity" and "campaign materials." The FPPC further suggests the second part of the regulation discussing "style, tenor and timing" [Regulation 18420.1, subd. (b)(2)] "makes clear that the Regulation is targeting only campaign materials, and not the 'medium of communication.' " (Opposition Brief 22:7-8.)

Accordingly, Petitioner contends the FPPC will interpret Regulation 18420.1 in a particular manner; the FPPC responds Petitioner is wrong arguing it does not interpret the regulation in the manner suggested by Petitioner. Based on the position of the parties, the court finds there is no "actual controversy" here as required by Code of Civil Procedure section 1060. There is nothing concrete here for the court to decide; the dispute is abstract until applied to alleged specific campaign material and/or campaign activity.

Justiciability "involves the intertwined criteria of ripeness and standing. A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22.)

"California courts will decide only justiciable controversies." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) " 'The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.' " (*Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1427.) "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

In reply, Petitioners contend they "are challenging Regulation 18420.1's *per se* categorizations as written and enforced by the FPPC." (Reply 18:27-28 [emphasis added].) Petitioners are mistaken; they did not raise an as applied challenge to Regulation 18420.1.[10] The interpretation

[10] The petition expressly alleges a facial challenge to Regulation 18420.1. (Petition ¶ 153.) The petition also raises an "unconstitutionally vague multi-factor standard" in the regulation.

of Regulation 18420.1 argued by the FPPC avoids the language and/or ambiguity issues alleged by Petitioners. Without an actual controversy—in the context of sufficiently congealed facts—there is nothing for the court to decide.[11] The matter is not ripe for determination.

During argument Petitioners suggested it was "entirely inappropriate" for the court to "punt" and "side step" the issue. According to Petitioners (58 counties and various school boards), they "need guidance" so they can understand prohibited conduct under the regulation. Petitioners contend the FPPC is "disingenuous" when it contends it does not read Regulation 18420.1 as claimed by Petitioners.

To demonstrate the FPPC's alleged duplicity, Petitioners rely on Exhibit 4 of R-RJN—the FPPC's report in support of a finding of probable cause (Probable Cause Report) at page 26 (internal page 11). The FPPC filed the Probable Cause report alleging that the County and its supervisors "funded a million-dollar campaign in support of Measure H . . . without filing any campaign statements or reports, and without disclosure statements on its advertising." (R-RJN, Ex. 4, p. 16 (internal page 1.) Petitioners contend footnote 33 undermines the FPPC's claim that the FPPC does not interpret Regulation 18420.1 as argued by Petitioners.

The Probable Cause Report is 16 pages long. (R-RJN Ex. 4.) According to Petitioners, the following sentence demonstrates the FPPC has inappropriately taken one position in court and a different position in enforcement actions:

> "The television, radio, and internet advertising costs identified above qualified as independent expenditures since those items identified are clearly campaign material.[fn]
> [Fn.] See Reg. § 18420.1, subd. (b)(1)."

Petitioners' argument, however, does not account for context. The Probable Cause Report provides context supporting the FPPC's position before this court.

(Petition ¶ 153.) Petitioners appear to have abandoned that issue in their briefing. (See also footnote 11 herein.)

[11] While the court did not sustain the FPPC's demurrer on ripeness grounds, based on the parties' arguments on the petition, it is now clear this issue cannot be decided as a matter of law. The court has no basis by which to determine the true First Amendment "burden" placed on these purportedly "essential mediums" for local governments when the FPPC indicates it does not interpret the Regulations as suggested by Petitioner. Moreover, as noted by the court in its order of November 22, 2019 overruling the demurrer on ripeness grounds, the court found (based upon Petitioners' arguments) "[a]s now pled, the third, fifth and sixth cause of action do not contend the Regulations as applied are invalid. Instead, [Petitioners] assert a facial challenge—a purely legal issue—not unlike the petitioners in *Farm Sanctuary, Inv. V. Department of Food & Agriculture* [(1998) 63 Cal.App.4th 495] or *Abbott Laboratories v. Gardner* [(1967) 387 U.S. 136]." (Order filed November 25, 2019, p. 6.)

The sentence and footnote relied upon by Petitioners follows a chart, which identifies $999,993 in expenditures allegedly made by the County of Los Angeles to a vendor for a campaign supporting Measure H. The chart summarizes invoices and a narrative explaining the County's actions. The Probable Cause Report alleges:

- The County contracted with Public Finance Strategies, LLC dba TBWB Strategies to conduct campaign support in of Measure H. (R-RJN, Ex. 4 p. 16 (internal page 1).)

- TBWB used a "five-step process in the campaign to pass Measure H." (R-RJN, Ex. 4 p. 24 (internal page 10).)

- "TBWB retained a polling company to conduct a poll to determine what messages tended to persuade voters to favor an increase in funding to combat homelessness, and what messages were effective in persuading voters to oppose additional funding to combat homelessness." (R-RJN, Ex. 4 p. 24 (internal page 10).)

- TBWB "conducted substantial outreach efforts to ethnic media groups through a vendor" resulting in "a number of articles appearing in ethnic publications regarding Measure H and the Homeless Initiative leading up to the election." (R-RJN, Ex. 4 p. 24 (internal page 10).)

- "TBWB also arranged for television commercials to run on cable news stations touting the work of the Homeless Initiative . . . The advertisements included the words 'The Los Angeles County Homeless Initiative' with the Homeless Initiative logo, as well as the slogan 'Real help. Lasting Change.' The television commercials that ran before the election also included the words 'Measure H on the March 7 Ballot' and 'Are you ready? Vote March 7.' " (R-RJN, Ex. 4 p. 24 (internal page 10).)

- The advertisements also ran as digital online advertisements. (R-RJN, Ex. 4 p. 24 (internal page 10).)

- "TBWB also arranged for radio advertisements to run on Spanish-language radio stations in the Los Angeles area. The advertisements touted the County's work in assisting homeless people and encourage listeners" to access a homeless page on the County's website to obtain additional information. (R-RJN, Ex. 4 p. 25 (internal page 11).)

- The County also reimbursed TBWB for travel and printing costs. (R-RJN, Ex. 4 p. 24 (internal page 10).)

- "In total, TBWB billed the County $999,993.23 for the campaign supporting Measure H." (R-RJN, Ex. 4 p. 25 (internal page 11).)

While Petitioners are correct that there is a footnote referring to Regulation 18420.1, the FPPC's statement that the "costs identified above qualified as independent expenditures since those items are by definition clearly campaign material," must be considered in context. The FPPC did not suggest—as explained by the FPPC in court—the County's expenditures were campaign material solely because of the method of communication. It is indisputable that the Probable Cause Report makes clear whether the expenditures were campaign material turned on the context—a clear campaign to pass Measure H.

Petitioners fare no better with the FPPC's website. It too supports the FPPC's contention. On its website, the FPPC explains a bumper sticker stating, "Support our Schools" is not campaign material because it has "no relationship to an upcoming election or ballot measure." (P-RJN Ex. W p. 9.) Under Petitioner's theory the mere use of a bumper sticker constitutes campaign material because the regulation creates a bright-line test.[12] The FPPC website demonstrates otherwise.[13]

Based on the foregoing, the court finds the evidence does not support Petitioners' claim the FPPC interprets Regulation 18420.1 as alleged by Petitioners. Moreover, as there is no actual controversy here—such as a final decision after an administrative hearing before the FPPC where it has interpreted its regulation—the court finds the matter is not justiciable. Accordingly, the court does not reach Petitioners' *per se* categorization claims.

Regulation 18901.1:

Petitioners assert Regulation 18901.1 invalidly extends the reach of section 89001. (Opening Brief 29:3.) They contend "Regulation 18901.1 is not consistent with Government Code § 89001, even though the regulation was supposedly adopted to interpret and enforce this provision." (Opening Brief 28:16-17.) As with Regulation 18420.1, Petitioners contend the FPPC is using Regulation 18901.1 to "enforce *Stanson/Vargas* without legislative authorization." (Opening Brief 28:18-19.) Finally, Petitioners contend parts of Regulation 18901.1 are "unintelligible, contrary to Section 89001, and leaves governments guessing as to what Regulation 18901.1 means." (Opening Brief 30:19-20.)

[12] The court acknowledges an FPPC staff report discussing an amendment to the regulation suggested the amendment created a "bright-line test for campaign materials . . . ." (JA 512.) Nonetheless, in practice the evidence does not suggest the FPPC interprets the regulation as a bright-line test. The FPPC's website bumper sticker example proves the point. As interpreted by the FPPC, the regulation's focus is on the message not the medium.

[13] Consistent with the FPPC's position in court, its website describes a bumper sticker that would qualify as campaign material. (P-RJN Ex. W.), Such a bumper sticker might read, "The Yes on Measure A Committee – Support Our Schools – YES ON A." (P-RJN Ex. W.)

Whether the Regulation Falls Outside of the PRA

Regulation 18901.1 applies to the PRA's mass mailing provisions. The regulation prohibits the use of public funds when the item mailed either "[e]xpressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure" or "[w]hen taken as a whole and in context, unambiguously urges a particular result in an election." (Regulation 18901.1, subd. (a).)

Further, under the regulation, "an item unambiguously urges a particular result in an election" if it meets one of two tests:

> "[i]t is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots" or
>
> "[w]hen considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose." (Regulation 18901.1, subd. (c).)

Petitioners argue voters intended section 89001 to stop elected officials from using public funds for re-election purposes with "self-aggrandizing" mailers.[14] As such, Petitioners suggest the PRA did not intend to prohibit all government mailing constituting "campaigning material" such that Regulation 18901.1 was in excess of the FPPC's authority.

While Petitioner's position about legislative motivations for section 89001 may be true, section 89001 plain language provides: "No newsletter or other mass mailing shall be sent at public expense." That is, section 89001's prohibition is not limited to elected officials using public funds for self-promoting mailings; its reach extends to all mailings.

Instead, voters enacted section 89001 with the purpose of restricting the use of public funds for political campaigns. (See *Watson v. Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, 1075. ["Even a cursory review of these provisions makes it manifest that . . . the electorate who voted for Proposition 73 intended to control the conduct of both incumbents and those seeking public office by restricting the use of public funds."])

Consistent with the reasoning set forth as to Regulation 18420.1, the court finds Regulation 18901.1 does not exceed the scope of FPPC's rulemaking authority. The court finds Regulation 18901.1 Is consistent with the PRA and not in conflict with it—Petitioners have not demonstrated otherwise. Accordingly, the court finds the FPPC had the authority to promulgate the regulation based on section 89001.

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[14] Petitioners' claim is not supported by its citation to the JA. JA Exhibit 1 at pages 32 and 34 do not appear to support the claim.

Whether the Regulation is Unintelligible or Confusing

Regulation 18901.1, subdivision (a)(2)(B) prohibits a mailing when (among other things) "taken as a whole and in context, it unambiguously urges a particular result in an election." Subdivision (c)(1) of the regulation explains:

> "For the purposes of subdivision (a)(2)(B), an item unambiguously urges a particular result in an election if it meets either of the following criteria:
>
> (1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots."

Petitioners argue the regulation is unintelligible and confusing as one cannot mail billboards, door-to-door canvassing or television, electronic media or radio spots.

Of course, Petitioners are correct about what can and cannot be mailed. That said, bumper stickers and other mass media advertising are capable of being mailed. Thus, some of the examples of when "an item unambiguously urges a particular result in an election . . ." in the regulation are helpful and others obviously have no application.

As noted by the FPPC, the regulation is entitled, "Campaign Related Mailings Sent At Public Expense." Regulation 18901.1 explains in subdivision (a) the regulation applies to mailings. The inapplicable examples set forth in subdivision (c)(1) have no substantive impact on the regulation—they just do not apply. Reasonable consideration of the regulation in its entirety would not "leave[] local governments guessing as to what Regulation 18901.1 means." (Opening Brief 30:19-20.)

Based on the foregoing, the court finds Petitioners have not demonstrated Regulation 18901.1 should be set aside or remanded back to the FPPC for further rulemaking.

CONCLUSION

Based on the foregoing, the court will deny the petition is denied.

IT IS SO ORDERED.

December 14, 2020

Hon. Mitchell Beckloff
Judge of the Superior Court