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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of

CITY OF NORCO AND ANDY OKORO,

Respondents.

OAH Case No. 2024110448
FPPC Case No. 18/789

RESPONDENT CITY OF NORCO'S BRIEF IN SUPPORT OF THE PROPOSED DECISION

Hearing Judge:	Deena R. Ghaly
Hearing Date:	March 24 and 25, 2025
Hearing Time:	9:00 a.m.
Hearing Place:	Videoconference 320 W. Fourth Street Los Angeles, CA

I. INTRODUCTION

Following a two-day hearing, Administrative Law Judge, Deena R. Ghaly, issued a well-reasoned decision upholding the City of Norco's (City) outreach to residents regarding Measure R (sales tax measure); finding the outreach appropriately informational. Judge Ghaly carefully reviewed the evidence and correctly interpreted and applied the law, and the City respectfully urges the Commission to uphold Judge Ghaly's decision.

The Enforcement Division incorrectly argues that the decision states findings of fact that are not supported by the evidence and does not correctly apply the law. The Enforcement Division is wrong; Judge Ghaly's findings of fact are supported by both the evidence and the Enforcement

Division's admissions during the hearing, and Judge Ghaly's the interpretation of the law was exactly consistent with Regulation 18901.1 and the case law from which that Regulation was adopted.

II. THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE

The Enforcement Division incorrectly argues that three findings of fact are not supported by the evidence. *First*, is the finding on page 7, paragraph 5, where the decision states: "The Measure R communication was inserted into one of the regular newsletters Norco sends its constituents quarterly." The Enforcement Division argues this finding is not supported because, "The Measure R communication was a stand-alone outreach mailer; it was not an insert into a longer, regularly issued mailing." (Complainant's Opening Brief (COB) 2:5-6.) The Enforcement Division reads too much into the word "inserted." It is clear that the word "inserted" in the decision meant that City sent the communication as one of its mailers. And this is a non-issue. It does not matter for purposes of the analysis whether the mailer was a stand-alone item or part of another mailer. The vast majority of City's mailers to residents, which discussed a variety of City-related topics, were stand-alone mailers. (*See* Exs. Q-GG.)

Second, the Enforcement Division argues the evidence does not support a finding that, "Norco regularly sent a newsletter to constituents quarterly." (COB 2:1-2.) This is another non-issue. The pertinent point is City used a pre-existing medium of communication. As the Enforcement Division's brief acknowledges: "A more accurate finding would be simply that Norco had previously sent a variety of mailings to residents." (COB 3:10-11.) That is all that is required under the Regulation. (*See* 18901.1(e)(2) "Is consistent with the normal communication pattern for the agency.") The testimony of Ms. Hernandez (City of Norco Communication Specialist) further conclusively established that the City regularly sent mailers to residents discussing a variety of City-related topics. Ms. Hernandez also testified that the method of creating, printing, and mailing, and the recipient audience of, all the mailers were *identical*. (*See* Ex. YY.) As the Enforcement Division's Investigator Lance Hochigan admitted during the hearing, there was nothing unusual about this mailer.

Third, the Enforcement Division argues that the evidence does not support the finding that "Other Norco publications have similar layouts and pictures and use fonts similar to those used in

the Measure R communication." The Enforcement Division claims the layout of prior mailers was different because some were the size of postcards, informed about city happenings and policy, and the Measure R mailer was larger, and included a letter. The Enforcement Division is wrong. Judge Ghaly specifically referenced numerous mailers that had similar graphics, font, and discussed similar topics. As Judge Ghaly noted, "[o]ne of the newsletters, dated July 2018, discusses establishing an equestrian historic district within Norco. (Exh. Z, p. B212.) Another lists dates for a community outreach tour where City Hall 'pop ups' were scheduled and Norco citizens were invited to come to 'collect election information, engage in community conversation, receive City news, [and] ask questions of City staff . . . . " (Exh. U, p. B206.)'" (Proposed Decision, p. 7, para 5.) More importantly, the mailer's style and tenor were consistent with a municipal mailer, which is what the legal standard considers. The mailer contained a letter from the City Manager. The graphics were neutral and included photos of a horse, horse trail, and "walk" sign. It did not include emotional photos. The message was written in narrative form, with regular font. Nothing in the layout of the mailer suggested it was an advocacy document.

III. JUDGE GHALY CORRECTLY INTERPRETED AND APPLIED THE LAW

A. Judge Ghaly Properly Relied on *Vargas* to Interpret the Regulation Because the Commission Codified *Vargas's* Test for Determining When a Communication "Unambiguously Urges" the Election or Defeat of a Candidate or Measure

The Enforcement Division incorrectly argues Judge Ghaly's decision "overly emphasizes the case law regarding the prohibited use of public funds and Government Code section 54964." (COB 4:5-7.) The basis of the Enforcement Division's argument is, "[w]hile *Vargas* was instructive in creating a framework for Regulation sections 18420.1 and 18901.1, the regulations themselves are the authority for determining when a governmental agency has made an independent expenditure and when the governmental agency has sent a mass mailing in violation of Government Code section 89001." (COB 4.:6-9.) Essentially, the Enforcement Division argues that, while the Commission adopted the *Vargas* standard into its Regulation, the Commission should not follow *Vargas* when it applies its Regulation. The Enforcement Division's argument ignores the history of the Regulation and, particularly, its "style, tenor, and timing" test. A proper understanding and application of the

"style, tenor, and timing" test requires a review of the four California Supreme Court decisions leading up to, and forming the basis of, the Commission's adoption of Regulation 18901.1.

The first case to address public funding of campaign material was *Mines v. Del Valle* (1927) 201 Cal. 273. *Mines* held that, for a public agency to spend funds campaigning for a ballot measure, it must have "clear and unmistakable" legislative authorization. (*Mines, supra,* 201 Cal. at p. 287.)

The next case was *Stanson v. Mott* (1976) 17 Cal.3d 206, which expanded on *Mines* by noting that, even with "clear and unmistakable legislative authorization," the use of public funds on an election campaign would raise "serious constitutional questions" because government does not "take sides" in elections. (*Stanson, supra,* 17 Cal.3d at 217.) However, *Stanson* also recognized that, while government does not take sides in election contests, public agencies have clear authority to spend money for informational purposes regarding election issues. (*Stanson, supra,* 17 Cal.3d at 220.)

Stanson then discussed the distinction between improper campaign expenditures and proper informational activities. (*Stanson, supra,* 17 Cal.3d at 221.) *Stanson* noted that in some cases, the distinction is "rather clear[.]" The "use of public funds to purchase bumper stickers, posters, advertising 'floats,' or television and radio 'spots'" or the "dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure" constitutes per se campaign activity. On the other hand, a public agency pursues a proper informational role when it "gives a 'fair presentation of the facts' in response to a citizen's request for information" or "authorizes an employee to present department's view of a ballot proposal at a meeting of a public or private organization when requested by that organization." (*Stanson, supra,* 17 Cal.3d 221.) In other cases, it is "not so clear," and the determination depends upon a careful consideration of the "style, tenor and timing of the publication; no hard and fast rule governs every case." (*Stanson, supra,* 17 Cal.3d 221.) Because *Stanson* involved an appeal from a demurrer, it did not have occasion to apply its holding its facts.

Next, the Supreme Court decided *Keller v. State Bar* (1989) 47 Cal.3d 1152. *Keller* did have occasion to apply *Stanson's* holding to its facts. *Keller* considered actions of the State Bar prior to the 1982 judicial retention election. During an inaugural speech, the incoming State Bar President referred to the upcoming judicial retention election and criticized the " 'idiotic cries of … self-

appointed vigilantes … [and] unscrupulous politicians' " (*Keller, supra,* 47 Cal.3d at 1171.) The State Bar prepared a packet that included: the State Bar president's speech; a sample speech entitled, "The Case for an Independent Judiciary;" sample letters; sample press release; fact sheets on crime and conviction rates, judicial selection and retention, and judicial performance and removal criteria; and quotations concerning judicial independence from Hamilton, Madison, Jefferson, and others. (*Keller*, supra, at 1171-1172.) The State Bar then sent that packet to local bar associations and other interested groups before the 1982 election. (*Keller* at 1171.)

Keller applied *Stanson's* analysis to the State Bar's packet. The Court noted that the packet was not *per se* campaign material (bumper stickers, posters, etc.) and, therefore, reviewed it under the style, tenor, and timing test. Despite some "strident" passages in the speech (" 'idiotic cries of … self-appointed vigilantes … [and] unscrupulous politicians' "), overall the Court found the packet's style and tenor "basically informative and factual, but without claim of impartiality." (*Keller* 1172.) However, the packet contained "the kind of *material* which a state election committee distributes to local committees to help them in their campaign." (emphasis added) (*Keller* at 1172.) It included practical tools such as a sample speech and sample letter that local bar associations could use to assist in the election campaign on behalf of the Justices. (*Keller* at 1172.) Because the *material* in the packet was to assist local associations to campaign on behalf of the Justices, the Court determined the packet constituted campaign material.

Finally, the Supreme Court decided *Vargas v. City of Salinas* (2009) 47 Cal.4th 1. *Vargas* clarified that *Stanson's* "statement that the government may not 'take sides' in election contests" must properly be understood to refer to "a public entity's use of the public treasury *to mount an election campaign* as the potentially constitutionally suspect conduct, rather than as precluding a public entity from analytically evaluating a proposed ballot measure and publicly expressing an opinion as to its merits." (*Vargas, supra,* 46 Cal.4th at p. 36.) *Vargas* recognized that in many cases it will be apparent that a city supports a ballot measure, such as when it places a tax measure before the voters. (*Vargas, supra,* 46 Cal.4th at p. 36.) *Vargas* held that a city is not required to be neutral, provide a balanced analysis, or offer the opposing viewpoint, but may, instead, analyze a measure

and provide its own opinion to the public regarding its merits. (*Vargas, supra,* 46 Cal.4th at pp. 22, 36.)

Vargas noted that all the materials issued by the City of Salinas were informational and provided an extensive discussion of factors, such as whether the items were delivered consistently with past practices and avoided inflammatory rhetoric, that could be used to analyze future outreach materials. Finally, *Vargas* held that "the principles that we have applied in this setting are equally applicable without regard to the content of whatever particular ballot measure may be before the voters—whether it be a tax-cutting proposal such as that involved in this case, a 'slow-growth' zoning measure restricting the pace of development, a school bond issue providing additional revenue for education, or any other of the diverse local ballot measures that have been considered in California municipalities in recent years." (*Vargas, supra,* 47 Cal.4th at p. 40.)

The Commission adopted *Vargas's* standard for determining when a communication "unambiguously urges" the election or defeat or a candidate or measure:

> *Adopt 2 Cal. Code Regs. Section 18901.1:*
>
> Staff proposes applying Section 89001 to encompass mailings by governmental agencies paid for with public moneys that are in connection with a candidate or measure. Specifically, under proposed Regulation 18901.1, a government-funded mailing is prohibited if the item sent (1) expressly advocates or (2) unambiguously urges the election or defeat of a candidate or measure. As with proposed Regulation 18420.1, the *Vargas* standard has been incorporated in Regulation 18901.l(c) as the test for determining when a communication "unambiguously urges" the election or defeat of a candidate or measure.

(Ex. ZZ, FPPC Staff Report dated May 29, 2009 at p. 113.)

Further, the Commission codified *Vargas's* language into Regulation 18901.1's "style, tenor, and timing" test:

Regulation 18901.1(e)	*Vargas v. City of Salinas*
(1) Funded from a special appropriation related to the measure as opposed to a general appropriation.	"… expenditures in question were made pursuant to the general appropriations … not … a special measure." (*Vargas, supra,* 47 Cal.4th at p. 34-35)

(2) Is consistent with the normal communication pattern for the agency.	"information provided and the manner in which it was disseminated were consistent with established practice regarding … regular circulation of the city's official newsletter." (*Vargas, supra,* 47 Cal.4th at p. 40)
(3) Is consistent with the style of other communications issued by the agency.	"…style and tenor of the publication in question were entirely consistent with an ordinary municipal newsletter …." (*Vargas, supra,* 47 Cal.4th at p. 40)
(4) Uses inflammatory or argumentative language.	"… communications avoided argumentative or inflammatory rhetoric …" (*Vargas, supra,* 47 Cal.4th at p. 40)

Thus, Regulation 18901.1 codified *Vargas's* analysis and Judge Ghaly's reliance on *Vargas* was correct.

B. Judge Ghaly Applied the Correct Factors of the "Style, Tenor, and Timing" Test

The Enforcement Division next claims that the Regulation considers "both the 'style, tenor, and timing' and whether the communication is 'a fair presentation of facts serving only an informational purpose.'" (COB 5:2-5.) The Enforcement Division misreads and misinterprets the Regulation.

The Enforcement Division misreads the Regulation as requiring the City to demonstrate that the mailer was, "a fair presentation of facts serving only an informational purpose;" which it was, but that is beside the point. Read correctly, the Regulation states that a communication is advocacy if it is "***not*** a fair presentation of facts serving only an informational purpose." Thus, if this clause is an additional factor in the analysis, it is one that must be proved by the *Enforcement Division* in addition to proving that the mailer "can be reasonably characterized as campaign material" under the "style, tenor, and timing test."

However, it is more likely the Enforcement Division simply misinterprets the Regulation as requiring a separate analysis of "reasonably characterized as campaign material ***and*** is not a fair

presentation of facts serving only an informational purpose." (18901.1(c)(2).) Both clauses provide context to the "style, tenor, and timing" test. The actual factors used to determine "style, tenor, and timing" are contained in a different subsection: "(e)… 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." (18901.1(e).) Judge Ghaly correctly applied these factors.

C. Judge Ghaly Correctly Found that the Measure R Mailer was Consistent with City's Pattern of Communication Under Factors 2 and 3 of the Style, Tenor, and Timing Test

The Enforcement Division claims Judge Ghaly improperly relied on a mailer sent after the Measure R mailer. This argument does not fairly reflect the administrative record which contains mailers sent before the Measure R mailer and that discussed animal keeping, horse trails, City assessments (Ex. Q, City Snap Shot, August 2017), and the proposed sales tax measure itself (Ex. U. Town Hall, June 2018). Further, the Enforcement Division's analysis of "consistency" is wrong. The "consistency" portion of the analysis looks at the second and third factors of 18901.1(e).

"(2) Is consistent with the normal communication pattern for the agency."

The second factor asks whether the Mailer "(2) Is consistent with the normal communication pattern for the agency." (Reg. 18901.1(e).) This factor codified Vargas's statement that the "*information provided* and the *manner in which it was disseminated* were consistent with established practice regarding … regular circulation of the city's official newsletter." (emphasis added) (*Vargas, supra,* 47 Cal.4th at p. 34-35.)

Regarding the *information provided*, *Vargas* noted that the "council's July 16, 2002 resolution—identifying a significant number of current city services and programs that would be reduced or eliminated, should Measure O be adopted—quite clearly was an obvious and natural subject to be reported upon in a city's regular quarterly newsletter[.]" (*Vargas, supra,* 47 Cal.4th at pp. 39.) Contrast that with the information provided in the packet sent by the State Bar in *Keller*,

which included the State Bar President's speech, sample speech entitled "The Case for an Independent Judiciary," sample letters, sample press release, facts / crime sheets, and quotes on judicial independence. (*Keller* at 1171.) The information in *Vargas* was entirely consistent with an ordinary municipal newsletter while the information in *Keller* was more consistent with something a state election committee distributes to local committees to use to assist in the election campaign. (*Keller* at 1172.)

Here, the mailer outlined Measure R and the importance of preserving the equestrian lifestyle. It also summarized staff's studies of the City's finances and the Council's Resolutions. Identical to *Vargas*, these were natural things that would be included in a regular City Mailer. Unlike *Keller*, the City did not provide a packet of resources for residents to use to campaign on behalf of the measure. The City's Mailer was not sent to targeted groups. It was sent to all residents and businesses in the City. Under *Vargas* and *Keller*, the mailer was *informational*.

Regarding the *manner in which it was disseminated*, *Vargas* discussed *FEC v. Massachusetts Citizens for Life, Inc.* (1986) 479 U.S. 238, 250-251) (*Massachusetts Citizens for Life*). (*Vargas, supra,* 47 Cal.4th at p. 38.) In *Massachusetts Citizens for Life, supra,* 479 U.S. 238, the United States Supreme Court explained that the special edition of the organization's newsletter at issue in that case "cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication." (*Massachusetts Citizens for Life, supra,* at p. 250.) Similarly, in *Keller*, the California Supreme Court criticized the fact that the State Bar's mailer had been sent to targeted groups, would be voters, interested parties, committees, or organizations. (*Keller* at 1171.)

Here, the City had used and continues to use mailers. The Measure R mailer was published through the same facilities as other mailers, printed by the same company, delivered by the same means, and delivered to the same audience. City followed the same practice it had and still does for its mailers. (Ex. YY, Chart of Community Mailers.) Unlike *Massachusetts Citizens for Life*, Norco

did not use different staff, different facilities, or a group 20 times the size of its regular audience. Unlike *Keller*, the City did not send the mailer to a targeted audience of individuals who would campaign for Measure R. This factor also shows that the City's mailer was *informational*.

"(3) Is consistent with the style of other communications issued by the agency."

The third factor asks whether the item "(3) Is consistent with the style of other communications issued by the agency." (Reg.18901.1(e).) This factor codified the statement in *Vargas* that the "…style and tenor of the publication in question were entirely consistent with an ordinary municipal newsletter …." (emphasis added) (*Vargas, supra,* 47 Cal.4th at p. 38-39.) This statement was part of *Vargas's* analysis of style and tenor of the *City Round-up* newsletter.

Vargas appended the newsletter to its decision. (*Vargas, supra,* 46 Cal.4th Appx. B.) The newsletter contained the City's logo, graphics, frequently asked questions, charts, and photographs - one of a meth lab with a caption "[t]he proposed elimination of the Narcotics and Vice Unit will hamper Police Department's ability to promote the City Council's #1 goal of maintaining a safe and peaceful community", and another of a school, with the caption "Students at 27 Salinas schools will lose the benefit of supervised school crossing as a result of the repeal of the Utility Users Tax." The Court found that, "[v]iewed as a whole, the newsletter's style and tenor was readily distinguishable from a partisan newsletter." (*Vargas, supra,* 46 Cal.4th 39.)

Like the newsletter in *Vargas*, Norco's Mailer contained the City's logo, graphics, and information about the proposed sales tax. Viewed as a whole, the mailer's style and tenor were consistent with a municipal mailer and readily distinguishable from a partisan newsletter. In fact, Norco's mailer was more informational than Salinas's "City Round-up." Norco's mailer contained a single letter from the City Manager. The graphics were neutral and included photos of a horse, horse trail, and "walk" sign with a horse. Norco did not provide emotional photos of meth labs or schools that would lose crossing guards. It was written in narrative form, with regular font. Thus, under both "consistency" factors, the City's mailer was informational.

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D. The Enforcement Division Argues that the Commission Should Interpret Its Regulation In a Manner Different Than How the Regulation was Adopted

The Enforcement Division's final argument is that "[a]doption of the proposed decision would create a different standard for applying Regulation 18901.1 compared to how the Commission has ruled in prior stipulations." (COB, 6:9-10.) The opposite is true. Adoption of the Enforcement Division's arguments would create two different standards for applying Regulation 18901.1: one consistent with *Vargas* and how the Regulation was adopted, and one consistent with the Enforcement Division's misapplication of the Regulation. The Enforcement Division points to "prior stipulations" – but stipulations are merely settlements of the parties to void litigation.

IV. CONCLUSION

The City respectfully requests that the Commission adopt the proposed decision because it is consistent with the evidence in the record and accurately interprets and applies the relevant legal standards.

V. JOINDER

The City of Norco joins the arguments made by Respondent Andy Okoro.

VI. REQUEST FOR ORAL ARGUMENT

Pursuant to FPPC Regulation 18361.9, Respondent City requests oral argument before the Commission on this matter.

Respectfully submitted,

Dated: June 11, 2025

HARPER & BURNS LLP

Colin Burns
Attorney for Respondent
City of Norco

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Sarah Methum, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 453 South Glassell Street, Orange, California 92866.

On June 11, 2025, I caused to be served a copy of the foregoing document(s) described as **RESPONDENT CITY OF NORCO'S BRIEF IN SUPPORT OF THE PROPOSED DECISION** on the interested parties, in this action as follows:

SEE ATTACHED LIST

__ (BY REGULAR MAIL) I mailed a copy by enclosing it in a sealed envelope with postage fully prepaid. I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in the affidavit.

_X_ (BY EMAIL) I e-mailed such documents to the aforementioned person(s).

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

___(FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Sarah Methum

Sarah Methum

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