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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 No. 2024110448 FPPC No. 2018/00789 **Respondent Andy Okoro's Response Brief** Hearing Judge: Deena R. Ghaly Hearing Date: **March 24, 2025 – March 28, 2025** Hearing Time: 9:00am Hearing Place: via Videoconference 320 W. Fourth Street, Suite 630 Los Angeles, CA 90013

1. INTRODUCTION

After a full and thorough administrative hearing on the merits, including the testimony of witnesses, the negotiation and submission of numerous factual and legal stipulations, the submission of written evidence, and detailed legal briefing and argument, the Enforcement Division now requests the Commission to cast aside the thoughtful and reasoned decision of the Administrative Law Judge and do for the Enforcement Division what it could not do for themselves: prove that there was a violation of the Political Reform Act ("the Act"). The Commission should reject this approach and adopt the Administrative Law Judge's decision in its entirety.

The Administrative Law Judge ("ALJ") in this case has an extensive background in public ethics laws, having previously served as the Chief of Enforcement for the City of Los Angeles Ethics Commission for nearly a decade and as the Ethics Officer of the Metropolitan Water District

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of Southern California for an additional five years. Her work in this matter was the careful reflection of a seasoned ALJ with a deep and thorough background in the issues, who considered all the evidence, heard the witnesses firsthand, had the opportunity to question counsel on issues of law and fact, and come to a decision after a full hearing. This work should not be easily cast aside or substituted particularly where, as here, the Enforcement Division has engaged in an administrative case prosecution that lacked investigative rigor, lacked thoughtful legal analysis, and failed by a wide margin to make its case at the administrative hearing.

As discussed in further detail below, the FPPC conceded at the hearing that the standards articulated in the California Supreme Court's *Vargas* case, which is what initially triggered the Commission in 2009 to adopt the Regulations in question, should be applied to the FPPC's analysis of government communications. The FPPC Regulation copies the language of *Vargas*, and the FPPC staff report to the Commission at the time regarding the Regulation made clear that the *Vargas* standard was being adopted. **The ALJ in this matter asked the Enforcement Division directly at the hearing whether the *Vargas* standard should be applied, and the Enforcement Division counsel answered that it should**. Now the FPPC argues in its Opening Brief the exact opposite because it didn't like the inescapable results of the application of the standard – that the City of Norco's communications were informational, not campaign in nature. This is exactly what the ALJ found after considering the evidence and argument on the issue – because it is abundantly clear under the *Vargas* standard that the communications were permissible.

Instead, the Enforcement Division argues that the Commission (and in particular the Enforcement staff) should make their own determination using a "we know it when we see it" standard. However, as detailed further below, the Supreme Court of the United States warned against the dangers of such an approach in the federal context with the Federal Elections Commission and kept the authority to make these determinations where they belong – in the courts. Even if the FPPC chooses to make its own determinations despite these admonitions, the least it should do is be consistent with the rulings of the State's courts. To do otherwise would create multiple, conflicting standards for local governments. If the *Vargas* standards are applied, as they were here by the ALJ, then the communications can only be found to be informational in nature

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and no violation of the Act can be found to have occurred.

Further, the ALJ's decision should not be overturned for many other reasons. As noted in the ALJ's Proposed Decision (pg. 25, para. 14.), because the application of *Vargas* so clearly determined that the communications were not campaign in nature, the ALJ did not need to consider the other arguments made by Respondents. But those arguments would be dispositive as well in favor of Respondents, as detailed below.

First, **the communications at issue here used language directly taken from the Measure's official title and question.** This official ballot language was adopted by the City and was available under the Elections Code to be challenged if it was argumentative. It was not challenged and appeared on the ballot. The FPPC investigator admitted under cross-examination at the hearing that the FPPC was unaware that the language it determined was "argumentative" under the FPPC Regulation was actually official language from the Measure itself, as adopted by the City Council under the Elections Code. If the Enforcement staff's interpretation were to be allowed, then even the reproduction of official ballot language would, in effect, be banned from being disseminated by local governments. The FPPC admitted this at the hearing– that if the Enforcement staff determined that official ballot language was argumentative, regardless of whether the language withstood a court challenge under the Elections Code –it would seek to administratively prosecute a local government that disseminated it.

Second, the Regulation is unconstitutionally vague under United States Supreme Court rulings. Last, the Commission did not have the authority to promulgate the Regulation – a position the Commission itself recognized publicly for 20 years and in dozens of published advice letters – until it abruptly, and impermissibly, changed its mind in 2009 after the *Vargas* decision was published.

Finally, even if the Commission were to overturn the ALJ's thoughtfully reasoned decision, it should not do so as to Respondent Andy Okoro. Mr. Okoro was the City Manager of the City of Norco when the communications were sent in 2018. He consulted with the Norco City Attorney, who advised him that the mailers were permissible, and reviewed other mailings from other jurisdictions as part of his extensive due diligence. As detailed below, he did not

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violate the Act regardless of whether the communications are determined to be campaign in nature.

First, the mass mailing statute does not apply to non-elected officials, such as an unelected city manager. Second, Mr. Okoro did not purposely or negligently cause a person to violate the Act or aid and abet a person in violating the Act as a government entity is not a "person" under the Act's definitions. Next, in exercising due diligence by consulting with the City Attorney and reviewing other materials, Mr. Okoro did not purposely or negligently cause a person to violate the Act. Last, in 2018, the year the facts of this matter occurred, the Commission had never made the regulated community aware that non-elected officials could be held liable under Section 89001 – no Regulation addressed the issue, no advice letter had been published, and no enforcement cases had been pursued. Therefore, Mr. Okoro had no notice that such administrative liability existed for him for his actions.

2. ARGUMENT

The ALJ's Proposed Decision should be adopted because it correctly applies the applicable standard, as articulated in the *Vargas* case. It should also be adopted because the Respondents would prevail on the additional arguments they made at the hearing, which were not considered by the ALJ because they were deemed moot in light of the Proposed Decision. Specifically, even if the standard in the Regulations is somehow determined to be different than that of *Vargas* – and it should not – the communications in question do not violate the Regulation. Therefore, even if the ALJ's Proposed Decision is overturned, the ALJ would likely still not find a violation of the Act. Further, the Regulations are invalid as the FPPC did not have the authority to promulgate them. Last, the Regulations are vague and overly restrictive and the FPPC is prohibited under Federal and California case law from enforcing them. Finally, Mr. Okoro should be removed from the case regardless of any other actions taken by the Commission.

A. The Standard in *Vargas* Should be Applied and is Dispositive in this Case

The FPPC Enforcement staff conceded in the administrative hearing that the California Supreme Court's standard in the *Vargas v. City of Salinas, et al.* (2009) 46 Cal.4th 1 case should be applied to the review of government communications. This was in response to a direct question from the ALJ as to whether it applied in this case. In its Opening Brief, the FPPC Enforcement Staff now

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tries to argue, without acknowledging its contradiction, that the *Vargas* standard should not apply and the FPPC should have its own, competing standard with the Courts and other Government Code statutes. This demonstrates that Enforcement staff is not providing thoughtful analysis to this or other similar cases and demonstrates clearly why this is an issue best left to the courts to adjudicate.

Further, this issue has never been thoughtfully presented to the Commission for discussion and decision. Such an important policy decision should not be made through enforcement cases, which are generally brought to the Commission through stipulations or adversarial proceedings such as this, rather than through the presentation of the positions of all affected parties. Thus, the Commission should not make a policy decision through this enforcement matter either. It should respect the findings of the ALJ and, if it wishes, have the policy discussions in another format.

Rather than repeat the arguments of Respondent City of Norco regarding the specific alleged "factual and legal inaccuracies," as articulated in the Enforcement Division's Opening Brief, Respondent Okoro joins and concurs in the arguments present in Respondent City of Norco's Response Brief. As determined by the ALJ, the communications by the City of Norco do not meet the *Vargas* standard and should not be found to be a violation of the Act.

B. Even Solely Under the Standards of Regulations 18901.1 and 18420.1, the Communications Do Not Violate the Act.

Regulation 18901.1(a) provides that "a mailing is prohibited by Section 89001 if **all** of the . . . criteria are met .. . ." Thus, in order to constitute a campaign-related mailing, it either, "(A) Expressly advocates . .. the qualification, passage, or defeat of a clearly identified measure . . . . [or] (B) When taken as a whole and in context, unambiguously urges a particular result in an election." (2 CCR §18901.1(a)(2) (emphasis added).) Respondents' conduct did not result in the sending of a campaign mailer as defined by Regulation 18901.1, or Regulation 18420.1, which contains an identical standard. Here, because the communication did not constitute a campaign mailing under the Regulations for the reasons stated below, the matter will still be found by the ALJ not to have violated the Act.

(1) The Communication Simply Stated the Official Title Ordered by the City Council.

The FPPC Enforcement staff has focused throughout the administrative hearing process on

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the allegation that "[o]ne of the pages included a personal letter (with a signature at its conclusion) from Norco's former City Manager, Okoro . . . unambiguously urged support for local Measure R." (Rebuttal to Response to Report in Support of a Finding of Probable Cause, at p. 3, lines 6 to 8.) To support their contention that "then City Manager Okoro, clearly argues, advocates, and unequivocally urges for the public to pass local Measure R," the Enforcement staff stated that: "[t]he mailer has a non-neutral title, 'Measure R – Lifestyle Protection and Vital Services Measure.'" (Rebuttal to Response to Report in Support of a Finding of Probable Cause, at p. 4, lines 16 to 18.) Yet, the allegation that Respondent Okoro was individually liable for stating a title in the mailer which "clearly" argued, advocated, and unequivocally urged the public to pass Measure R should be rejected because the "City of Norco (Horsetown USA) Lifestyle Protection and Vital Services Measure," is simply the official title of the ballot measure ordered by the City Council.

Reproducing the City Council-directed official title in a mailer is not evidence that Respondents unambiguously urged the public to pass Measure R. State law provides that;

> "The legislative body of the city may submit to the voters, without a petition therefor, a proposition for the repeal, amendment, or enactment of any ordinance, to be voted upon at any succeeding regular or special city election . . . [a] proposition may be submitted, or a special election may be called for the purpose of voting on a proposition, by ordinance or resolution."
> (Cal. Elect. Code § 9222.)

On August 1, 2018, the Norco City Council approved Resolution No. 2018-43 to place a local tax measure also known as Measure R on the ballot of an election to be held in conjunction with the general municipal election on November 6, 2018. The City Council's Resolution No. 2018-43, which ordered the election, designated the official title of the measure to be: "CITY OF NORCO (HORSETOWN USA) – LIFESTYLE PROTECTION AND VITAL SERVICES MEASURE." (All caps in the original.) Thus, Respondents did not violate Regulation 18901.1 since the inclusion of the official title of the ballot measure was simply for informational purposes, informing City residents of the official title designated by the City Council to appear in the ballot materials and the ballot question, and would prevail on this issue as well if there were to be a second hearing of the matter.

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(2) The Mailer's Statement of Impacts Concerning the Measure was Informational and Reflected the Language of the Legally Unchallenged Ballot Question/Label.

The Enforcement staff also seeks to impose penalties on Respondents because the Communication stated: "[a]s you make your decision on Measure R, I urge you to consider these additional factors," followed by what the Enforcement Division characterized as a "list of the negative impacts on the residents of Norco if Measure R fails . . . ." (Id. at p. 4-5.)

Again, however, Respondents should not be penalized because this "list" was informational and does not unequivocally constitute a campaign-related mailer. In Resolution No. 2018-43, the City Council ordered the language for the ballot question/label to be printed on the ballot, in pertinent part, as follows:

> "To keep Norco "Norco," continue protecting Norco's unique animal-keeping lifestyle, avoid further infrastructure deterioration, continue restoring and maintaining local streets, trails, facilities, equestrian amenities and parks, and prevent additional cuts to police, fire and emergency medical services; shall the City of Norco adopt a locally-controlled one-cent sales tax . . . ."

(Resolution No. 2018-43, at pp. 2-3; *see generally* Cal. Elect. Code § 303(c); § 13119(a), (b), and (c)("The statement of the measure shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure."); § 9051(b)(1); § 13247.)

Notably, state law provides a cause of action for any elector to challenge the ballot title, ballot question, or printed ballot materials, if they violate legal requirements. Specifically, Elections Code section 13314 provides,

> '[a]n elector may seek a writ of mandate alleging an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter, or that any neglect of duty has occurred, or about to occur."

(*See also* Cal. Elect. Code § 9295; see generally *Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal. App. 4th 1445, 1452-1454; *Horneff v. City and County of San Francisco* (2003) 110 Cal. App. 4th 814, 824.) With regard to Measure R, no elector in the City of Norco filed any legal challenge to change any of the aforementioned text for being illegal, biased, argumentative, or misleading. Thus, the ballot title and ballot question

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on all relevant ballot materials remained what the City Council directed them to be, from the time that the language was approved in City Council Resolution No. 2018-43 up through the time of the election.

Accordingly, the statements made by Respondents in informational materials that were sent to City residents did not unequivocally advocate for a yes vote on Measure R by disseminating a "non-neutral title" or "inflammatory and argumentative language," as the FPPC Enforcement staff maintains. The mailer never told City residents how to vote; rather, it simply repeated the official title of the ballot measure ordered by the City Council and presented a list of information describing potential budgetary and other city impacts in a reasonable manner which reflected the ballot question and information approved by the City Council in Resolution No. 2018-43. (Cf. *Vargas v. City of Salinas* (2012) 46 Cal. 4th 1, 21-22, 36, 38-39 (holding that discussion of budgetary impacts, program cuts, and reductions in services related to ballot measure presented in City flyer and newsletter were informational and were not campaign materials).) Finally, the lack of discussion regarding opposing arguments does not indicate that the mailer was other than "informational;" indeed, courts have held that "a government communication is not improper because it fails to include opposing parties' views." (*Peninsula Guardians v. Peninsula Health Care Dist*. (2011) 200 *Cal. App. 4th 1108, 1116, 1130.)* Therefore, Respondents would prevail on this issue as well if the matter were to have a second hearing.

C. Regulations 18420.1 and 18901.1 are Invalid as The FPPC Did Not Have the Authority to Promulgate Them.

The FPPC exceeded its authority when it promulgated Regulation 18420.1 in 2009. As a result, the Respondents cannot be held liable for violations of or related to this Regulation. The FPPC explicitly stated when promulgating the regulation that it was adopting it based on the California State Supreme Court's ruling in *Vargas*. State statutes and case law, including *Vargas* have clearly and consistently stated that the determination of express advocacy in the context of public agencies is different than the determination of express advocacy in the context of campaign regulation under the Act. The determination of express advocacy in the context of the

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communications made by public agencies is determined under Government Code Section 54964 and the case law interpreting it.

In 1974, California passed the Act, which, among other provisions, requires entities that qualify as political committees to publicly disclose the contributions they receive and the expenditures they make. Shortly after the passage of the Act, the California Supreme Court issued its opinion in *Stanson v. Mott* (1976) 17 Cal. 3d 206. In *Stanson*, the court held that public agencies were not permitted to spend public funds on campaign activities without Legislative authorization. The *Stanson* court did not reference the Act in its opinion.

In 1976, the United States Supreme Court issued its opinion in *Buckley v. Valeo* 424 U.S. 1, which limited regulation of expenditures in federal election to communications that contained express advocacy. The California Legislature responded to *Buckley* in 1980, conforming the Act to its holdings, by modifying it to add in the term "independent expenditure" and adopt the *Buckley* standard of express advocacy. This standard was further confirmed in *Davis v. American Taxpayers Alliance* (2002) 102 Cal. App. 4th 449, which held that the requirement that a communication "unambiguously urge" must be construed "to apply only to those communications that contain express language of advocacy with an exhortation to elect or defeat a candidate." *Id.* At 471.

In the intervening years between the 1980 amendments to the Act and the adoption of Regulation 18420.1, the FPPC provided advice letters that stated that the definition of "committee" applied to public agencies in the same way that it applied to private actors. Examples of this include: *Sheidig* Advice Letter, A-96-262, *Hicks* Advice Letter I-98-007, and the *Bush* Advice Letter I-02-015.

In 2000, Government Code Section 54964 was enacted. Of important note is that the Legislature chose not to place 54964 in the Act. Rather it chose to place it outside the Act, having already been aware of the *Stanson* opinion and the then-existing provisions of the Act. The Legislature further considered, and ultimately rejected, a broader standard than express advocacy for public agency communications.

Before 2008, the FPPC stated, on literally dozens of occasions, that enforcement of the

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Stanson restrictions of communications by public entities were outside the scope of the FPPC's authority. As stated in 2002 by the FPPC in the *Bush* advice letter (I-02-015):

> "We frequently receive questions about the permissible extent of a public agency's involvement in supporting or opposing a ballot measure that is sponsored by or affects the agency. Unfortunately, the central issue in these questions is outside the scope of the Act."

This clear statement that a public agency's involvement is outside the scope of the Act was repeated in the following advice letters: *Cowley* Advice Letter I-05-227, *Johnson* Advice Letter A-05-028, *Smith* Advice Letter A-03-177, *Peterson* Advice Letter A-99-013, *Foote* Advice Letter A-98-114, *Hanna* Advice Letter A-96-292, *Foster* Advice Letter I-95-039, *Scheidig* Advice Letter A-96-262, *Bonner* Advice Letter I-95-076, *Hodson* Advice Letter I-94-301, *Kimbrell* Advice Letter I-93-200, *Warren* Advice Letter A-93-152, *Sluder* Advice Letter A-93-089, *Bearce* Advice Letter, I-92-298, *Martin* Advice Letter A-91-423, *Calhoun* Advice Letter A-91-276, and the *Gatling* Advice Letter I-90-048.

In December 2008, the FPPC adopted the initial version of Regulation 18420.1. In that version, the Regulation stated that a payment for public funds for a communication concerning a ballot measure could be a reportable "expenditure" under the Act even if the communication did not contain express advocacy, but "clearly identified" the measure and was not a "fair and impartial presentation of the facts" or reflected the agency's internal evaluation process.

Importantly, the 2008 version of the Regulation contained the assumption that the definition of "expenditure" for government agencies would apply only when a government agency had already qualified as a "committee" under section 82013. Therefore, it did not seek to define public agency communications until the public agency had already been determined to be a campaign committee. This continued the FPPC's recognition that the determination of when a public agency's communications became political speech was outside the scope of the Act.

Shortly after the 2008 regulation was adopted, the *Vargas* opinion was issued in April 2009. The *Vargas* opinion considered the application of the Act, specifically Regulation 18225, to express advocacy in the context of public agency communications. The Court in *Vargas* explicitly rejected the application of the campaign regulation standards to public agencies, holding that:

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> "Whatever virtue the "express advocacy" standard might have in the context of the regulation of campaign contributions to and expenditures by candidates for public office, this standard does not meaningfully address the potential constitutional problems arising from the use of public funds for campaign activities that we identified in *Stanson*." (*Vargas*, 46 Cal. 4th at 226.)

The Court further found that while section 54964 prohibited express advocacy, the absence of express advocacy did not render the expenditures automatically permissible under *Stanson*.

Instead, the Court concluded that the standards originally articulated in *Stanson* continued to govern non-express advocacy communications. The Court reaffirmed that public funds could not be used for campaign communications and that "in some circumstances it may be necessary to consider the style, tenor and timing of a communication to determine whether, from an objective standpoint, the communication or activity realistically constitutes campaign activity rather than informational material…"(*Id*. at 33-34, emphasis in original)

Despite the holding in *Vargas* rejecting the application of the Act to express advocacy in public communications, and the explicit Legislative rejection of placing the provisions of Government Code 54964 within the Act, the FPPC chose to amend Regulation 18420.1 in 2009 to adopt the express advocacy standard in *Vargas*. The FPPC explicitly stated in a May 29, 2009 Staff Memorandum that, in adopting the regulation, it wanted to "appl[y] the Supreme Court's *Vargas* standard…to determine whether a government agency is making a contribution or independent expenditure under the Act." This despite the longstanding position of the courts, the Legislature and even the FPPC itself, that enforcement of the *Stanson* restrictions of communications by public entities were outside the scope of the FPPC's authority.

After the *Vargas* case was decided, and shortly after the FPPC adopted 18420.1, the Legislature amended the definition of "independent expenditure" in the Act. In 2009 AB 9 was passed and enacted, which clarified the Act's definition of "contribution" and "independent expenditure" for a payment of public moneys by a state or local government agency. The Legislation made clear that a payment by a public entity or a communication constitutes a contribution or independent expenditure within the meaning of the Act only if it contains express

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advocacy or unambiguously urges a particular result in an election, and only if the public entity has already qualified as a campaign committee.

This position was again reinforced in 2017 with the passage and enactment of the Disclose Act (AB 249). That legislation expanded on the definition of "expenditure" in section 82025 of the Act to incorporate the expansive regulatory definition of "unambiguously urges" promulgated by the FPPC. However, the Legislature specifically chose to exclude public agencies from this definition. It also specifically chose not to adopt the provisions of 18420.1 in the Legislation. This further demonstrates the lack of authority on the part of the FPPC to implement regulation 18420.1.

In short, the FPPC had no authority to promulgate Regulation 18420.1. The determination of what constitutes a violation of the prohibition on public entities from expending public funds to support or oppose a ballot measure is determined by Government Code Section 54964 and the court cases that interpret it. The courts, Legislature and even the FPPC itself have all recognized this point. The FPPC cannot promulgate a competing standard via regulation of the statute that governs regulation of the conduct.

This is an issue Respondents are likely to prevail on if the matter continues to be litigated through rejection of the ALJ's Proposed Decision, either at the administrative level, or potentially in the California courts.

D. Regulation 18204.1 is Vague and Overly Restrictive and the FPPC is Prohibited Under Federal and California Case Law from Enforcing It.

The United States Supreme Court has, since the adoption of Regulation 18420.1, established precedent for forbidding government agencies from implementing laws that force speakers to seek discretionary rulings before discussing political issues. (*Citizens United v. FEC* (2010) 558 U.S. 310, 324.) This is coupled with State court rulings that have favorably considered the right of public agencies to provide information to the public and to advocate for public policy positions, subject to reasonable, judicially established limits on the expenditure of public funds to communicate such messages. Given this changed legal climate, Regulation 18420.1 is vague, overly restrictive and improperly infringes on these rights.

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The United States Supreme Court has criticized government actions that cause undue restrictions of speech. In *Citizens United*, the Court criticized the Federal Elections Commission (FEC) advisory process in determining political speech, because it intervened in the realm of free speech by applying an ambiguous standard and an 11-factor test to determine what constituted political speech. Similarly, the FPPC regulation puts the FPPC in the position of determining what speech may or may not be engaged in by a public entity, based on an ambiguous standard and 4-factor test. Given the FPPC's relatively new policy of enforcing Regulation 18420.1 for communications that "unambiguously urge" a particular result in an election, local governments are now practically required to submit to the FPPC all such communications to avoid subjective enforcement of the standard, and potentially steep penalties. This is exactly the type of issue addressed in *Citizens United*, where the Supreme Court stated, in striking down the FEC's regulations on corporate independent expenditures, that:

> "…the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented intervention into the realm of speech."
> (*Id*. at 336.)

Just as the FEC adopted a test with factors, the FPPC has similarly adopted four factors in Regulation 18420.1 to determine what speech can or cannot be made by public agencies. Like the speech at issue in *Citizens United*, public entities must now either refrain from speaking or ask the FPPC to issue an advisory opinion approving of the speech in question.

In short, the concept of government speech has evolved since Regulation 18420.1 was passed, and especially since the passage of Proposition 13 some 40 years ago. Governments are now required to engage in ballot measures and to provide information regarding such measures. Governments are also permitted to publicly express opinions as to the merits of ballot measures. Governments may not, however, have restrictive regulations and subjective reviews of political speech. The FPPC standard is vague and restrictive and chills government speech. It also runs contrary to the established standard in *Vargas* and *Stanson* by adding more restrictive standards to

the one articulated by the California Supreme Court. It is thus, unconstitutional under the federal Constitution and violates State case law.

This is an issue Respondents are likely to prevail on if the matter continues to be litigated through rejection of the ALJ's Proposed Decision, either at the administrative level, or potentially in the California courts.

E. Respondent Okoro Should Be Removed from the Matter Regardless of Any Other Commission Action.

Respondent Okoro has multiple, dispositive legal and factual defenses that were presented to the ALJ that were deemed moot because of the ALJ's Proposed Decision that the communications themselves do not violate the Act. However, if the Commission decides to overturn the ALJ's decision, Mr. Okoro should be removed from the matter, as he will likely prevail on one or all of his legal and factual defenses.

(1) Respondent Okoro, who is a Nonelected Official, May Not Be Held Individually Liable for Violating Government Code Section 89001.

The imposition of liability and penalties on Respondent Okoro is misplaced since Government Code Section 89001 was never intended to be applied to non-elected local government officials. The complete text of Government Code section 89001 states, "[n]o newsletter or other mass mailing shall be sent at public expense." Section 89001 contains no express language imposing or even mentioning the imposition of individual liability to a nonelected local government official. Despite this, the Enforcement Division concluded from this silence that since "Section 89001 . . . does not limit who may be charged for violating its provisions . . . both an entity and an individual may be equally liable and charged." (Accusation at p. 6, ¶ 23; Report in Support of a Finding of Probable Cause at p. 7, lines 6 – 9.)

The FPPC's inference should not stand in light of the express voter intent for Proposition 73, the statewide voter initiative that enacted the current version of Section 89001.

(a) Since Government Code Section 89001 is Silent Regarding Who Should Be Penalized, Extrinsic Sources Such as Ballot Summaries and Arguments for Proposition 73 May Be Consulted to Provide Insight Into Voter's Intent.

In 1988, Proposition 73 appeared on the ballot and was approved by the voters of

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California. Among other things, Proposition 73 enacted an amended version of Section 89001, which simply stated, "[n]o newsletter or other mass mailing shall be sent at public expense." There is no express statement on the face of Section 89001 as to who was to be made liable and penalized for violations. Given the lack of express language, courts are directed to use standardized methods for interpreting the purposes of voter initiatives instead of drawing unsupported inferences. As the California Supreme Court stated:

> "California cases have established a set of standard rules for the construction of voter initiatives. We interpret voter initiatives using the same principles that govern legislative enactments. Thus, we begin with the text as the first and best indicator of intent. If the text is ambiguous and supports multiple interpretations, we may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent."

(*People v. Valencia* (2017) 3 Cal. 5th 347, 380 (citations omitted); California Cannabis Coal. v. City of Upland (2017) 3 Cal. 5th 924, 934.)

Given the lack of language in the statute specifically addressing whether liabilities and penalties may be applied to a nonelected local official such as Respondent Okoro, the "standard rules for . . . construction" allow for an examination of extrinsic evidence of voter intent for Proposition 73, such as the ballot summaries and arguments contained in the state produced voter information guide. An examination of the sources of voter's intent for Proposition 73 reveals that its prohibitions and penalty provisions were meant to apply to state and local elected officials and were never intended to apply to non-elected public officials such as Norco City Manager Andy Okoro.[1]

(b) The Impartial "Analysis by the Legislative Analyst" Determined that Proposition 73's Provisions are Directed at Penalizing State and Local Elected Officials Who Commit Violations; Respondent Okoro is Not an Elected Official.

California's Elections Code initiative statutes provide that the state voter information guide provided to each registered voter preceding each statewide election must contain an

[1] The Enforcement Division maintains that "there were at least eight instances of public officials (elected and nonelected) also being named as respondents in cases involving violations of Section 89001." (Accusation at p. 6, ¶ 24; see Probable Cause Report at p. 7, lines 9-10.) All of these cases were decided after the facts of this case occurred. Further, no Regulation was promulgated, opinion issued, or advice letter issued that would have put the regulated community on notice of such an interpretation.

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impartial analysis of statewide initiatives to be voted upon. (See Cal. Elec. Code §§ 9084(d); 9087(a).) As set forth in Elections Code section 9087(a),

> "[t]he Legislative Analyst shall prepare an impartial analysis for the measure describing the measure . . . . The analysis may contain background information, including the effect of the measure on existing law and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure . . . ."

This document is one of the extrinsic sources that courts may examine to discern voter intent for an initiative measure. (People v. Valencia (2017) 3 Cal. 5th 347, 380.) For Proposition 73, the Legislative Analyst's impartial analysis, in pertinent part, stated that it:

- Established limits on campaign contributions for all candidates for state and
- local elective offices;
- Prohibits the use of public funds for these campaign expenditures;
- Prohibits state and local elected officials from spending public funds on newsletters and mass mailings.

(1988 Primary Election Voter Information Guide- Proposition 73 ("VIG"), Analysis by the Legislative Analyst at. p. 32 (emphasis and underlining added).) Indeed, the Legislative Analyst reinforced these points within the Voter Information Guide under the heading "Newsletters and Mass Mailings," by stating "[p]ublic funds cannot be used by state and local elected officials to pay for newsletters or mass mailings." (Id. (emphasis added).)

Notably, the impartial analysis by the Legislative Analyst does not mention that Proposition 73's provisions were intended to penalize nonelected officials such as Respondent Okoro. Rather, the Legislative Analyst's impartial analysis of the "effect of enacted legislation," only states that liabilities and penalties are directed at state and local *elected* officials.

(c) Proponents' Argument in Favor of Proposition 73 States that Proposition 73 is Directed at Elected Officials.

Ballot arguments submitted by proponents and opponents of the statewide initiatives are also required by state law to be published in the Voter Information Guide. (Cal. Elec. Code § 9084(c).) As noted above, the California Supreme Court also recognizes the value of "ballot . . .

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arguments for insight into the voters' intent." (*People v. Valencia*, 3 Cal. 5th at 380.) The "Argument in Favor of Proposition 73," submitted by the initiative proponents, stated: "Proposition 73 is the ONLY CAMPAIGN FINANCE PROPOSAL THAT APPLIES TO ALL CALIFORNIA ELECTED OFFICES, including State Senate, State Assembly, statewide constitutional offices and local offices." (VIG at p. 34 (all caps in original, italics added).) Moreover, Proposition 73's proponent ballot argument stated that the measure "flatly PROHIBITS candidates' use of any tax money in order to campaign for office." (Id. (emphasis added).)

Thus, Proposition 73's proponents expressly stated that its provisions applied to elected offices, including local elected offices. At the same time, Proposition 73's proponents never stated an intention for the proposed law to impose liabilities and penalties on nonelected officers. Nonelected public officials like Respondent Okoro were simply never intended to be the target of Proposition 73's provisions, including Section 89001. Therefore, its provisions cannot be the subject of an enforcement action against him.

(2) Okoro Did Not Purposely or Negligently Cause a Person to Violate the Act or Aid and Abet a Person in Violating the Act.

Government Code Section 83116.5 provides that:

> "Any person who violates any provision of this title, who purposely or negligently causes any other person to violate any provision of this title, or who aids and abets any other person in the violation of any provision of this title, shall be liable under the provisions of this chapter. However, this section shall apply only to persons who have filing or reporting obligations under this title, or who are compensated for services involving the planning, organizing, or directing any activity regulated or required by this title, and a violation of this section shall not constitute an additional violation under Chapter 11."

The Act does not encompass government agencies in the term "person" and, therefore, Okoro cannot have caused or aided and abetted the City of Norco, a government agency, in a violation of the Act. Second, even if applicable, Okoro did not purposely or negligently cause or aid and abet the City in the alleged violation,

Okoro did not purposely or negligently cause a person to violate the Act. Nor did he aid and abet a person in the violation of the act. The statute only applies to causing or aiding and abetting a "person" to violate the Act. A government entity is not a "person"

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under the definition of that word under the Act. Second, Okoro did not purposely or negligently cause anyone to violate the Act. He acted reasonably and exercised due diligence in sending out the mailer in question.

(a) The Term "Person" in Section 83116.5 Does Not Encompass Government Agencies.

The provisions of Government Code Section 83116.5 only apply where someone purposely or negligently cause a *person,* or aids and abets a *person* in a violation of the Act. The Act defines the term "person in Government Code Section 82047, which provides that:

> "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.

Under the plain language of the statute, this definition does not include government agencies. Since the City of Norco is a government agency, Okoro cannot have caused the City, or aided and abetted the City in any alleged violation.

(b) Okoro Exercised Due Diligence in His Actions.

As demonstrated in the evidence presented at the hearing, Okoro exercised a high level of due diligence in his actions. Okoro testified that he had no experience in working on a ballot measure in his career prior to the City of Norco placing Measure R on the ballot. Despite this lack of experience, Okoro testified that he was generally familiar with the fact that there were rules regarding government communications concerning ballot measures.

Okoro described in his testimony that he sought the advice of the City Attorney, before the newsletter was sent out. The City Attorney advised him that the mailer was compliant with all laws and could be sent out to the residents of the City. Okoro relied on this legal advice in determining whether the newsletter could permissibly be sent out.

Okoro also testified that he reviewed the communications sent out by several other cities to see if the City of Norco communication was consistent with those. His review indicated that they were.

Further, Okoro testified that the newsletter was sent to all City of Norco residents. He did not target the newsletter only to registered voters, as one would expect for a

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campaign-related effort. He also kept the newsletter consistent with other City newsletters that were sent out both before and after the newsletter that referenced Measure R. The newsletter pulled language from the City approved title and language of the measure.

Okoro also clearly stated in his testimony that his purpose in sending out the newsletter was to inform the City's residents about the Measure. He stated he was not involved in any way in the campaign activities of the Measure R committee, a campaign committee that conducted a campaign in support of the Measure, separate from any City efforts.

In short, Okoro exercised a high level of due diligence in his review and involvement with the newsletter that referenced Measure R. He did not purposely or negligently cause the City to violate the Act as the FPPC suggests. Nor did he aid or abet such an alleged violation under these circumstances. He should be removed from the matter entirely.

3. CONCLUSION

For the reasons stated above, the ALJ's Proposed Decision should be adopted in its entirety. Respondent Okoro should also be removed from the matter entirely.

4. REQUEST FOR ORAL ARGUMENT

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

Dated: June 11, 2025

Respectfully submitted,

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