Ballot Measures and Public Agencies

Questions about Specific Activities

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www.ca-ilg.org/ballot-measure-activities

Important policy decisions affecting local agencies in California are made by the electorate through the initiative and referendum process. Determining what role local agencies and their officials may play in the initiative and referendum process can be quite complicated.

The following questions and answers provide guidelines and analyses of pertinent issues associated with the use of public resources and ballot measure activities. The purpose of this guide is to provide guidance that represents the Institute's best judgment, based on the law, on how to avoid stepping over the line that divides lawful from unlawful conduct. As a general matter, the Institute believes in not snuggling right up to any such lines, but instead giving them some berth.

It is also important to remember that just because a given course of action may be lawful, it may not satisfy the agency's or the public's notions of what constitutes an appropriate use of public resources. Proper use of public resources is a key stewardship issue for public officials. In determining proper use of public resources, it is important to remember the law creates only minimum standards. In addition, there may be potential political implications of walking too close to the line in terms of the public's overall reaction to a ballot measure and where one wants the public's attention to be focused.

This guide is offered for general information only and is not intended as legal advice. Reasonable attorneys can and do disagree on where the boundaries are on these issues; moreover, the specific facts of the situation are an important element of the analysis. **Always consult an attorney knowledgeable about this area of the law when analyzing what to do in specific situations.**

For more information on legal issues associated with use of public resources and ballot measure activities, see parts 1, 3, and 4 of this resource available at *www.ca-ilg.org/ballot-measure-activities*:

- Part 1: General Framework
- Part 2: Before a Measure is Put on the Ballot
- Part 4: Activities by Individuals

Questions about Specific Activities

1. ***The ballot measure my agency is concerned about has serious legal flaws; may my agency use public resources to file suit against the measure?***

Yes. An appellate court has held that a local agency may use public resources to make a pre-election legal challenge to a ballot measure.[1]

2. ***May public resources be used for voter registration or get out the vote efforts?***

Yes. An appellate court has determined that this is an appropriate use of public resources, as long as the efforts funded with public resources did not involve urging the public to vote one way or another in upcoming elections.[2]

3. ***May an agency adopt a resolution supporting or opposing a ballot measure? Are there restrictions on the language that should be used in such resolutions?***

Taking a position on a ballot measure in an open and public meeting where all perspectives may be shared is permissible.[3] Additionally, California's Elections Code allows agencies to inform the public of its opinion on a measure by submitting written arguments in favor or against ballot measures.[4]

In terms of language, the safest practice is to apply the Supreme Court's standard of language that is "simple, measured and informative," which is language that emphasizes facts and does not use inflammatory language or argumentative rhetoric.[5] Additional good practice is to not encourage voters to adopt the agency's views or vote one way or another on the measure.[6]

Always consult with agency counsel when taking a position on a measure to ensure that the agency does not step over the line dividing permissible informational activities from impermissible campaign activities.

4. ***What about expenditures for writing a report on a ballot measure or submitting an argument for or against a measure for the ballot pamphlet?***

Prior to certification of the measure for the ballot, California's Elections Code allows for cities and counties to refer the measure to any city or county agency to report on the impact of the measure on a variety of issues.[7] After certification, the city or county must adopt the measure without amendment, submit the measure for vote of the electorate, or refer the measure for report on various impacts.[8]

As stated above, the California Elections Code also allows local agencies inform the public of its opinion on a measure by submitting written arguments in favor or against ballot measures.[9]

Both for reports and submitted arguments, it is a good idea to offer an objective, measured analysis of the issue and consider both sides of the argument when formulating and presenting the agency's position. Although stating the agency's position is allowed, the agency must be wary not to engage in activities that could be seen as *campaigning* for or against the measure.[10]

5. May an agency provide links on its website to other organizations' campaign materials on a ballot measure?

Linking to just one side of the debate on a ballot measure would be impermissible campaigning.[11]

Providing links to both sides (pro and con) may also be risky.[12] Current case law allows an agency to reserve its website or other communications vehicles to communicating the agency's *own* information.[13] A concern is that once an agency starts using its site to communicate *others'* information, including that with which it may disagree, the agency may undermine its prerogatives to exclude content.[14]

For that reason, the safest approach under both First Amendment principles and use-of-public-resources principles is not to include links to campaign websites. An agency may, however, link to nonpartisan analyses of ballot measures, such as those offered on a statewide basis by the Legislative Analyst's Office, Attorney General and the League of Women Voters' Easy Voter Guide (the latter organization also offers nonpartisan video overviews of ballot measures in English and Spanish via their YouTube channel).

6. What about using public property for press conferences and rallies relating to ballot measures?

The key question is the nature of the property. Certain kinds of public property, like streets, sidewalks and parks, have been traditionally open to public assembly and debate.[15] The notion is that everyone can use such spaces and public agencies cannot restrict access to them based on the point of view that will be expressed.[16] Because everyone has access to such spaces and no one can be excluded based on their views, using such spaces for press conference and rallies does not pose a risk of distorting the debate on a ballot measure[17] or undermining the fairness of the election.[18]

There are other kinds of public property that are not places that are by tradition or designation a forum for members of the public to communicate with each other.[19] The insides of public buildings tend to fall into this category. The notion is that rallies and press conferences will disrupt the orderly provision of public services in such places.

The basic rule is evenhandedness. If it would be disruptive for some or all perspectives to use a particular place for press conferences and rallies, then no one should be allowed to use those places for those purposes.[20]

7. What about using other agency communications channels (for example, email or intra-office mail systems) to communicate the agency's (or public official's) views on a ballot measure?

The safest approach is *not* to use systems that have been developed with public resources to disseminate campaign materials. This sends a clear message to employees, public officials and others that such systems are not for personal or political use. With respect to intra-net or internal mail systems, restricting such use also avoids putting the public agency in the position of making decisions based on the viewpoint being expressed.[21]

That being said, it should be acknowledged that there is a court of appeal decision in which the majority of justices that found that one email sent on a local official's lunch hour transmitting an editorial in favor of one side of an election issue did not constitute a punishable violation of the law.[22] The result turned on the majority's conclusion that the action constituted a minimal use of public resources—a conclusion with which the dissenting justice disagreed.

8. What guidelines should an agency follow with respect to communications relating to public access channel television coverage of the ballot measure? For example, what if either the agency or the League of Women Voters wants to produce a program presenting the views of both proponents and opponents to a ballot measure to help educate the community?

Generally speaking, the courts distinguish between situations in which public agencies have allowed "general access" to the broadcasting facilities as opposed to allowing "selective access."[23]

If a public agency makes the channel generally available to either all speakers or certain classes of speakers, then the channel is what First Amendment attorneys call a "designated public forum."[24] If the channel falls into this category, the safest approach is generally to treat political programming no differently from any other programming on the public access channel. This would comply with First Amendment protections against discriminating against certain kinds of speech,[25] as well as the reasoning in Cable TV Access Channel Rules.[26]

On the specific issue of debates, the courts have indicated that using public resources for public forums at which all may appear and freely express their views pro and con are not improper; similarly, reasonable expenses for radio and television debates between proponents of the differing sides of the proposition would also be okay.[27] The courts have recognized some latitude for those who organize debates to create *viewpoint neutral* criteria to determine who will participate.[28]

Even so, to avoid arguments over who would be the best representative for each side of the debate, it may be preferable to have an organization that does not have a position on a ballot measure organize the debate or to let each side of a ballot measure select its representative.

Having a viewpoint-neutral group like League of Women Voters organize the debate (as opposed to the local agency that has taken a position on the matter being debated) can also avoid second-guessing about the motivations underlying who was selected to participate.

9. ***Our staff is sensitive to the issue of not appearing to advocate on ballot measures. Sometimes, however, when we have presented the facts as we understand them or believe them to be, we find that those who disagree with our agency's view of the facts will try to engage staff in a debate. If we respond, we worry we look like we are going beyond our informational role (and potentially being set up to look like we are advocating instead of informing).***

A possible response to suggest staff give in such situations is:

> "We are offering this information based on our research and analysis of this issue. If others have research and analysis they want to offer, they should make it available so the public can evaluate all available information, as well as the research and analysis on which the information is based. My role here as a representative of our agency is not to debate, but to provide the information our agency has on this topic."

It may also be helpful to remind staff that, when in doubt about how to respond in a particular situation, staff may want to keep in mind the option of referring questions or issues to others in the organization. If an issue comes up relating to what the agency has done on a ballot measure, a good practice is for all staff who may receive inquiries to know to whom in the agency such inquiries should be referred.

10. ***Proposition 218 creates special procedures for the approval of assessments and certain kinds of fees. To what extent do the restrictions on campaign communications apply to agency communications relating to Proposition 218 proceedings?***

No court has squarely addressed this issue, but the prevailing view is that an agency is well-advised to conform its communications that relate to Proposition 218 proceedings to the same standards as it adheres to in typical elections.[29] This includes the advisability of communications early on that are even-toned and based on solid analytics about the need to either impose or increase a revenue source that is subject to Proposition 218's procedures. Such communications create a basis for supplemental (and still even-toned) information later on, should questions or arguably inaccurate information creep into discussions about the merits of the measure closer to the decision point.

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The Institute welcomes feedback on this resource:

- *Email:* ethicsmailbox@ca-ilg.org Subject: *Legal Issues Associated with Use of Public Resources and Ballot Measure Activities Part 2: Specific Questions*
- *Mail:* 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

References and Resources

Note: Sections in the California Code are accessible at http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

[1] *Yes on Measure A v. City of Lake Forest*, 60 Cal. App. 4th 620,625-626 (1997).

[2] *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 187-88 (2002).

[3] *Vargas v. City of Salinas*, 46 Cal. 4th 1, 35-37 (2009). *See also Choice-In-Education League v. Los Angeles Unified Sch. Dist.*, 17 Cal. App. 4th 415, 429-30 (1993).

[4] Cal. Elect. Code §§ 9282(a),(b) (for city measures placed on the ballot by petition, the legislative body mat submit an argument against the ordinance, for city measures placed on the ballot by the legislative body the body may file a written argument for or against a measure), 9162(a) (for county measures, the board of supervisors amy file a written argument for or against any county measure), 9315 (for district elections, the district board may file an argument against an ordinance), 9501(a) (for school district elections, the governing board of the district may file a written argument for or against any school measure).

[5] *Vargas*, 46 Cal. 4th at 34, 40; (compare with the tone of the newsletter described in footnote 20).

[6] *Vargas*, 46 Cal. 4th at 40. *See also* Cal. Gov't Code § 54964(a), (b)(3) (prohibiting local public agency expenditures for activities that expressly advocate the approval or rejection of a clearly identified ballot measure).

[7] *See* Cal. Elect. Code §§ 9111, 9212.

[8] *See* Cal. Elect. Code §§ 9116, 9118, 9215, 9216.

[9] Cal. Elect. Code §§ 9282(a),(b) (for city measures placed on the ballot by petition, the legislative body may submit an argument against the ordinance, for city measures placed on the ballot by the legislative body the body may file a written argument for or against the measure), 9162(a) (for county measures, the board of supervisors may file a written argument for or against any county measure), 9315 (for district elections, the district board may file an argument against an ordinance), 9501(a) (for school district elections, the governing board of the district may file a written argument for or against any school measure).

[10] *See Vargas*, 46 Cal. 4th at 36-37.

[11] *See Vargas*, 46 Cal. 4th at 24 (observing that " . . . the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure" "unquestionably constitutes improper campaign activity" citing *Stanson*).

[12] Strictly speaking, the state law that prohibits using public resources (including equipment and compensated time, *see* Cal. Gov't Code § 8314(b)(3)) for campaign purposes excludes from the prohibition referrals of visitors to private political entities. *See* Cal. Gov't Code § 8314(b)(2) (""Campaign activity" does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.") Thus, an argument exists that links to campaign resources on a website fall within this exception to the prohibition.

Does this exception satisfy *Stanson's* requirement that any use of public resources for campaign purposes be "clearly and unmistakably authorized?" One might think so, but as the *Vargas* decision illustrated, courts can find that statutory language that limits the scope of a prohibition does not constitute a clear and unmistakable authorization. *See Vargas*, 46 Cal. 4th at 29-30. The *Vargas* court also noted that even where there are explicit authorizations, such authorizations can present serious constitutional questions. *Id* at 29. Although the "reference to private political entities" would represent a fairly limited authorization, it's not clear how the courts would evaluate this issue.

[13] *See Vargas*, 46 Cal. 4th at 37 n. 18 (finding city had no obligation to provide those with a different point of view access to the city's website), *citing United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204-206 (2003); *Ark. Educ. TV. v. Forbes*, 523 U.S. 666, 673-677 (1998); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Clark v. Burleigh*, 4 Cal.4th 474, 482-491 (1992)) *See also Sutliffe v. Epping Sch. Dist*., 584 F.3d 314, (1st Cir 2009) (noting that it is possible there may be cases in which a government entity might open its website to private speech in such a way

that its decisions on which links to allow on its website would be more aptly analyzed as government regulation of private speech); *Hogan v. Twp. of Haddon*, 278 Fed.Appx. 98, 101-02 (3d Cir 2008) (rejecting elected official's claim that she had a First Amendment right to publish articles in the town newsletter and to post on the town's website and cable channel because these communications vehicles were local government-owned and sponsored, and as such are not public or limited public forums); *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275, 285-85 (4th Cir. 2008) (rejecting claims that links to other websites did not vitiate school district's retention of complete control over its website or create a limited public forum, but noting that had a linked website somehow transformed the website into a type of "chat room" or "bulletin board" in which private viewers could express opinions or post information, the issue would, of course, be different).

[14] *See also Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 329-332 (1st Cir. 2009), *citing Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576 (2005); *Computer Xpress, Inc. v. Johnson*, 93 Cal. App. 4th 993, 1009 (2001) (websites with chat rooms are public forums).

[15] *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir 2008).

[16] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 97, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); *Wirta v. Alameda Contra Costa County Transit Dist.*, 68 Cal. 2d 51, 64 Cal. Rptr. 430 (1967).

[17] *See Vargas*, 46 Cal. 4th at 31-32.

[18] *Vargas*, 46 Cal. 4th at 36-37.

[19] *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir 2008).

[20] *See generally San Leandro Teachers Ass'n v. Governing Bd. of San Leandro School Dist.*, 46 Cal. 4th 822, 839 (2009) (noting that, even for nonpublic fora, the government may only impose *reasonable* regulations and the regulation must not relate to disagreement with the speaker's view), citing *Clark v. Burleigh*, 4 Cal. 4th 474, 483 (1993).

[21] *See Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) (noting that, in addition to viewpoint neutral, time, place and manner restrictions, public agencies may reserve communication forums for their intended purposes, as long as restrictions are reasonable and are not based on a speaker's views). *See also San Leandro*, 46 Cal. 4th 822 (upholding school district's decision to prohibit use of teacher mailboxes for one-sided political endorsements against challenges under federal and state constitutional protections for free expression).

[22] *See DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236 (2010) (majority found that sending an editorial against a ballot measure via email on one's lunch hour constituted advocacy, but involved a minimal use of public resources—note dissenting opinion disagreeing with majority's minimal-use-of-public-resources conclusion).

[23] *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678-82 (1998) (finding that a state public broadcasting entity could, consistent with First Amendment principles, broadcast a debate and use criteria for determining who may participate that are reasonable and do not discriminate based on the speaker's views).

[24] *See Ark. Educ. Television Comm'n*, 523 U.S. at 678-79.

[25] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (noting that when a governmental regulation restricts core political speech like election speech, the courts apply "exacting scrutiny" to assure that the

restriction is narrowly tailored to uphold an overriding state (public) interest). S*ee also ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (noting public access channels must be open to non-discriminatory, first come first served access).

[26] 83 F.C.C.2d 147 (1980). (Note, however, that the FCC fairness doctrine rules do not apply to PEG channels, only cable providers (e.g. Time Warner Cable, Comcast etc.).

[27] *See Choice-In-Education League v. Los Angeles Unified Sch. Dist.*, 17 Cal. App. 4th 415, 429-30 (1993).

[28] *See Ark. Educ.Television Comm'n*, 523 U.S. at 678-83 (upholding candidate's exclusion from debate on the grounds that his candidacy had attracted "no appreciable public interest" and hence the exclusion was based on the candidate's status rather than his views).

[29] Government Code 53753(e)(6) states that a "majority protest proceeding" (for assessments) "shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code." This appears to be a limited exception, since Elections Code 4000 treats Proposition 218 elections (for both assessments and fees) as an "election" for the purposes of all-mail ballot proceedings. Note too that the original basis for the rule from the *Mines* case "that the electors of the city who opposed the bond issue "had an equal right to and interest in the [public] funds . . . as those who favored said bonds," seems to apply to any "measure" that has two sides - one "yes" and the other "no." *See Mines v. Del Valle*, 201 Cal. 273, 287 (1927).