



VIA FACSIMILE AND U.S. MAIL

September 4, 2009

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Commissioner Ross Johnson, Chair, and  
Members of the Commission  
California Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, CA 95814-2329

Re: Proposed Regulations: Title 2 Cal. Code Regs., § 18901.1  
Agenda Item 25 (September 10, 2009)

Dear Chairman Johnson and Members of the Commission

We write on behalf of the California State Association of Counties (CSAC), League of California Cities (League) and the California School Boards Association (CSBA) to oppose adoption of regulation 18901.1.

The staff memorandum makes clear that the proposed regulation is motivated by the California Supreme Court's recent decision in *Vargas v. City of Salinas*. However, there appears to be no real connection between the *Vargas* decision and the FPPC's longstanding interpretation of Government Code section 89001. This provision of the Government Code, amended by Proposition 73 in June 1988, simply provides that "no newsletter or mass mailing shall be sent at public expense."

Section 89001 was adopted in June of 1988 as part of an initiative aimed at reforming the process of electing incumbents to office. (*See Watson v. FPPC* (1990) 217 Cal.App.3d 1059, 1074.) More specifically, Proposition 73 on the June ballot included, among other things, the current version of the mass mailing prohibition, and was presented to the voters as an alternative to Proposition 68, which would have allowed public financing of officeholder elections.

Proposition 73 was focused on removing some of the substantial advantages enjoyed by incumbent officer holders over their challengers. (*Watson, supra*, 217 Cal.App.3d at p. 1074.) As the ballot argument in favor of Proposition 73 made clear, the mass mailing restriction was designed to prevent the use of tax dollars to enhance incumbents' re-election prospects.<sup>1</sup> Based on the ballot arguments, we do not believe the voters were given notice that some 20-plus years in the future, an administrative agency might interpret Proposition

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<sup>1</sup> See, e.g. Argument in Favor of Proposition 73 ("Keeping government spending under control is hard enough. Imagine how much harder it will be to keep politicians from spending more tax money on the most important thing in their lives—getting elected and re-elected."). California Ballot Pamphlet, June 1988 at page 34.

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73 as applying to activities other than candidate activities. (*See In re Tobacco II Cases* (2009) 46 Cal.4th 298, *citing Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016 (courts consider the ballot summaries and arguments to determine how the voters understood the ballot measure and what they intended in enacting it).)

Over these more than 20 years, the FPPC has similarly focused on candidate activities. When the proposition was adopted, the FPCC recognized that a literal reading of the new amended statute would bar all mailings by a governmental agency – clearly not a result intended by the drafters of Proposition 73 or the voting public. The Commission quickly adopted an emergency regulation restricting application of the new statute to limited circumstances where a public official was featured in the mailing. This was done primarily to effectuate the clear purpose of the amended statute – preventing incumbent elected officers from gaining an electoral advantage through public mailings that featured the elected official.

The purpose of the amended section 89001 seems clear from a number of relevant documents from 1988. Prior to adopting the emergency regulation the FPPC staff advised in the Raye Advice Letter, A-88-220 (6/16/88), “Taking the ballot arguments in favor of Proposition 73 as a whole, the primary thrust of the measure was the prohibition on use of public moneys for the purpose of seeking elective office.” In the interim, the FPPC staff advised, “All mass mailings sent at public expense by governmental agencies are not prohibited. There is no basis to conclude that the voters intended this result.”

Later that year, when the FPPC was considering permanent adoption of the emergency regulation, the staff noted in a November 30, 1988 memorandum:

Read together and taken literally, these two sections [82041.5 and 89001] could be construed to ban all mailings of 200 or more substantially similar documents if the mailings are done at public expense. However, Emergency Regulation 18901 clarifies that it was not the intent of the voters to prohibit all publicly funded mass mailings. . . . The amendments made by Proposition 73 were undoubtedly intended to tighten the restrictions imposed upon publicly funded mailings which might inure to the benefit of incumbent elected officers.

Even the Chairman of this Commission recognized the purpose of the 1988 amendment to 89001, writing to the FPPC in 1988 as one of the Proponents of Proposition 73: “One of our intentions in proposing Proposition 73 was to eliminate legislative newsletters and mass mailings by incumbents at public expense. The letter goes on to conclude, “Voters who adopted Proposition 73 are looking to the FPPC for a reasonable and common sense interpretation to effectuate their intent.”

Clearly the “intent” was to prohibit incumbents from gaining a political advantage through the use of public mailings. However, the Commission is now being asked to extend the intent well beyond that original understanding to include any mass mailing that contains “express advocacy” or “unambiguously urges” a particular electoral result in connection with a ballot

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measure regardless of whether an incumbent elected official is featured. This extension of the original purpose of section 89001 is compounded by the proposed regulation's vague and broad standard for defining what constitutes "express advocacy" and "unambiguously urges a particular result" in an election.

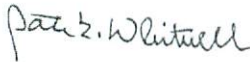
As to the regulation itself, since the language is identical in many respects to the proposed amendments to section 18420.1, CSAC, the League and CSBA have the same concerns with this proposal as expressed in our comment letter for 18420.1, and would ask that the same considerations be given to 18901.1 as well.

In short, it appears the Commission staff is requesting the Commission abandon 20 years of a clear understanding of the intent of Proposition 73's amendment to 89001 and adopt a new and novel approach. CSAC, the League and CSBA urge the Commission to reject that request.

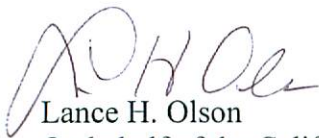
Sincerely,



Jennifer Henning  
On behalf of California Association of Counties



Patrick Whitnell  
On behalf of the League of California Cities



Lance H. Olson  
On behalf of the California School Boards Association