WEST HOLLYWOOD
ETHICS REFORM TASK FORCE
SPECIAL MEETING AGENDA
THURSDAY, JULY 12, 2018
6:30 P.M.

AMENDED – JULY 11, 2018

CITY HALL COMMUNITY MEETING ROOM
8300 SANTA MONICA BOULEVARD
WEST HOLLYWOOD, CA 90069

1. **CALL TO ORDER**
   A. Pledge of Allegiance
   B. Reminder to Speak Clearly into Microphone and to Turn Off All Mobile Devices
   C. Roll Call
   D. Approval of the Minutes (May 23, 2018)

2. **PUBLIC COMMENT: This time is set aside for members of the public to address the Task** Force on matters related to ethics reform and the City's regulations. The City Council created the Task Force to develop recommendations relating generally to regulation of campaign finance, government ethics, and lobbyists. The Task Force is looking to hear from community members and all other interested persons on these topics. **PLEASE NOTE THAT YOU MAY ALSO EMAIL YOUR COMMENTS TO THE TASK FORCE AT EthicsTaskForce@weho.org.** Emails sent to the Task Force are public records.

3. **TASK FORCE comments, questions, deliberations**

DISCUSSION TOPICS
Topics Remaining for Discussion from May 23, 2018 Meeting

A. Lobbyist Regulations
- **Additional Disclosure Requirements**
- **Reporting Requirements**
- **Best Practices**
- **Additional thoughts**

B. Enforcement
- **What is the enforcement mechanism?**
- **Who enforces it?**
- **Additional Thoughts**

Additional Topics for Discussion

A. Follow-up discussions for Possible Recommendations to City Council
- **AB 249-- California Disclose Act**
- **Campaign Contribution Limits**
- **Public Financing Systems**
- **Review of WHMC provisions for consistency with state law**
- **Disclaimer rules for General Purpose and Independent Expenditure Committees**
- **Campaign Contributions from City Contractors**

- **Better uses for election/campaign reporting data, repository of mailers and other potential improvements to provide more data on city's website.**

4. **COMMENTS FROM STAFF**
This time is set aside for staff to provide any announcements or updates relevant to the Task Force's business and to confirm the next meeting date.

5. **ADJOURNMENT** – The Ethics Reform Task Force will adjourn to its next meeting.

ETHICS REFORM TASK FORCE MEMBERS: Joseph Guardarrama, Max Kanin, and Elizabeth Ralston.
STAFF: Melissa Crowder, Assistant City Clerk; Yvonne Quarker, City Clerk; Lauren Langer, Assistant City Attorney

If you require special assistance to participate in this meeting (e.g., a signer for the hearing impaired), you must call, or submit your request in writing to the Office of the City Clerk at (323) 848-6356 at least 48 hours prior to the meeting. The City TDD line for the hearing impaired is (323) 848-6496.

Special meeting-related accommodations (e.g., transportation) may be provided upon written request to the Office of the City Clerk at least 48 hours prior to the meeting. For information on public transportation, call 1-323-GO-METRO (323/466-3876) or go to www.mta.net.

This agenda was posted at City Hall, the West Hollywood Library on San Vicente Boulevard, and the West Hollywood Sheriff's Station.

If you would like additional information on any item appearing on this agenda, please contact Melissa Crowder at (323) 848-6356 or via email at mcrowder@weho.org.

WEST HOLLYWOOD
ETHICS REFORM TASK FORCE
SPECIAL MEETING
MINUTES

WEDNESDAY, MAY 23, 2018
6:30 P.M.

Plummer Park
Rooms 1 & 2
7377 Santa Monica Boulevard
West Hollywood, CA 90046

1. **CALL TO ORDER** – Chair Joseph Guardarrama called the meeting to order at 6:30 p.m.

2. **ROLL CALL & INTRODUCTIONS** -

PRESENT: **Task Force Member Guardarrama, Task Force Member Kanin, and Task Force Member Ralston.**

ABSENT: **None.**

ALSO PRESENT: **Assistant City Attorney Langer, City Clerk Quarker and Assistant City Clerk Crowder.**

Joe Guardarrama introduced himself. He is an attorney with Kaufman Legal Group specializing in campaign finance, governmental ethics, lobbying, and conflicts of interest. Elizabeth Ralston introduced herself. She indicated that she is the past president of the League of Women Voters of Los Angeles and is involved with State of California League of Women Voters on campaign ethics issues. Max Kanin introduced himself. He is an attorney specializing in campaign finance law, election law, and government ethics law.

3. **SELECTION OF A CHAIR FOR THE PURPOSE OF CONDUCTING MEETINGS** Task Force Member Joseph Guardarrama was selected as the Chair for this meeting. The Task Force Members will rotate as Chair for future meetings.

4. **COMMENTS FROM THE PUBLIC**- None.

5. **TOPICS FOR DISCUSSION** – Chair Guardarrama reviewed the topics for discussion. He suggested that the Task Force conduct a review of how the City's campaign finance ordinances are working given the City's experience with the last election.

Staff commented that the proposed discussion topics are not exclusive. The Task Force may suggest additional topics for Tast Force to consider during this process.

The City Council intended for the Task Force to meet three times. As part of the first two meetings, they will scope and discuss the topics and during the final meeting they will finalize the recommendations and staff report to City Council.

6. REFERENCE DOCUMENTS

Chair Guardarrama mentioned the documents that were provided to the Task Force in their packet. The documents were:

- Final Staff Report to City Council June 5, 2017 (Attachment A)
- Code Of Conduct For Elected Officials Revised August, 2016 (Attachment B)
- Administrative Regulation 414 – Political Activity (Attachment C)
- Municipal Code Section 2.72 – Lobbying (Attachment D)

Campaign Finance

The Task Force members discussed AB 249, the California Disclose Act, which changed disclaimer requirements. They commented that the Disclose Act is broader than the City's ordinance. The City's ordinance currently only affects committees that are Primarily Formed to support a candidate or ballot measure. They discussed expanding Ordinance 16-981 to include General Purpose Committees to comply with the Disclose Act, but some members expressed concern that portions of State law may be unconstitutional. They directed staff to return with an item for further discussion of AB 249, specifically as it applies to §2.67.065 of the City's municipal code.

The Task Force inquired with staff how the City's electronic campaign filing system is working. Staff responded that the system is working well. The Task Force recommended that the City explore working with NetFile to create useable data pulled from the campaign finance statements, such as charts and graphics to provide the public a fuller picture of contributions and spending on campaigns. This item will be placed on the next agenda for potential recommendations to City Council.

The Task Force discussed the efficacy of the City's campaign contribution limit by the annual cost of living increase. They mentioned setting a specific dollar amount and then creating a mechanism for it to increase with the cost of living increase. They indicated that the lower contribution limit encourages Independent Expenditure Committees and requires a lot of fundraising by the candidates. Staff indicated that they would report back to the Task Force on Council's decision not to increase the

campaign contribution limit after the last Ethics Reform Task Force convened. By consensus, the Task Force agreed with increasing the campaign contribution limits.

Chair Guardarrama commented that since the last Ethics Reform Task Force the Political Reform Act amended to permit municipalities to adopt their own Public Financing systems. The Task Force commented that the City should consider some sort of Public Financing system to allow for matching funds of campaign donations.

Task Force Member Kanin inquired if §2.76.030(b) of the City's municipal code is compliant with current State law. Staff will return with a discussion of this issue at the next meeting.

Chair Guardarrama requested that the Task Force discuss the City's disclaimer requirements on political advertising. The Task Force Members and staff discussed adding campaign communications to candidate pages via NetFile (a potential repository for all campaign mailings similar to a City of LA program). Staff will inquire with NetFile if this is possible and report back to the Task Force.

A brief discussion about the constitutionality of applying the Disclaimer rule to General Purpose Committees as well as Independent Expenditure Committees ensued. Chair Guardarrama indicated that §2.76.020(c) should be removed and use the language in the Political Reform Act. Task Force Kanin provided his thoughts on the Disclose Act. This item is a discussion item for the next meeting.

Governmental Ethics

Chair Guardarrama commented that the City of Los Angeles passed a Charter Amendment that banned campaign contributions by contractors and the City of Los Angeles City Council passed an enabling ordinance to enact this legislation. A discussion ensued about creating legislation that would ban both contractors and developers from donating to campaigns. The Task Force indicated that they would need evidence that there is corruption in order for them to recommend banning campaign contributions from contractors and/or developers and that they were not aware of such evidence (or reports of corruption in this city).

Chair Guardarrama inquired about what Council meant by the item "financial conflicts of interest". Further, he indicated that under the Political Reform Act financial conflicts of interest are prohibited, therefore, he is not sure how the Task Force would augment these requirements. In addition, he stated that Government Code §1090 that states that Council members can't be financially interested in a contract. Staff will inquire with City Council about the intent with regard to "financial conflicts of interests".

A brief discussion took place regarding recusals. Chair Guardarrama commented that it would be extremely difficult to develop an ordinance that would require a Councilmember recuse themselves due to campaign contributions. Task Force Member Kanin inquired about requiring contractors to disclose their campaign

contributions for the preceding twelve months when applying for a development permit. The Task Force discussed this and whether it would solve the perception of the public.

7. FUTURE MEETING DATES

The Task Force discussed availability for future meetings and decided on June 12th and July 14th, noting that Task Force Members Guardarrama and Kanin may be unavailable for the June 12th meeting depending on the results of the June 5th Primary election. If they are unavailable the June 12th meeting will be cancelled and the next meeting of the Task Force will be on July 14th.

8. COMMENTS FROM STAFF

This time is set aside for staff to provide any announcements or updates relevant to the Task Force's business and to confirm the next meeting agenda.

9. ADJOURNMENT – The Ethics Reform Task Force adjourned at 7:34 p.m.

ETHICS REFORM TASK FORCE
SPECIAL MEETING

JULY 12, 2018

SUBJECT: ETHICS REFORM TASK FORCE MEETING

INITIATED BY: Melissa Crowder, Assistant City Clerk
Yvonne Quarker, City Clerk
Lauren Langer, Assistant City Attorney

STATEMENT ON THE SUBJECT:

Second meeting of Ethics Reform Task Force.

RECOMMENDATIONS:

1) Discuss remaining two topics for discussion (1) lobbyist regulation; and (2) enforcement;

2) Review topics raised for further discussion at the May 23, 2018 meeting and form some recommendations for the City Council; and

3) Provide direction to staff for next task force meeting.

BACKGROUND AND ANALYSIS:

Based on City Council direction, the agenda for the initial Ethics Reform Task Force meeting in May 2018, contained three *general* topics for discussion: (1) government ethics/campaign finance; (2) lobbyist regulation; and (3) enforcement. At the first meeting, the Task Force raised and discussed issues related to (1) and decided to continue discussions of (2) and (3) until the following meeting. Following that same format, the agenda for this meeting has been arranged to allow the Task Force to delve into the general topics of Lobbyist Regulations and Enforcement first. A copy of West Hollywood Municipal Code Chapter 2.72 *Lobbying*, is attached for reference. Should the Task Force have questions or need additional information on those two topics based on the discussion, staff can report back at the next meeting.

The second part of the agenda is set up to allow the Task Force to review the topics raised at last meeting and discuss whether any recommendations to City Council are appropriate. The following information can provide a framework for those discussions.

1. The Disclose Act and WHMC Section 2.76.065:

The Task Force requested to have a discussion about the relationship between the Disclose Act and WHMC Section 2.76.065; which provides:

2.76.065 Committee Disclosure of Top Donors.

All primarily formed committees shall identify on all campaign materials the names of the top three donors that have made the highest total contributions to the

committee as reported in the Form 497 filings submitted to the City Clerk, or any equivalent form required by law, at the time the campaign materials are disseminated to the public. For purposes of this section, the term primarily formed committee shall be as defined in the Political Reform Act.

(A copy of the Disclose Act is attached to this report for reference.)

The Task Force may continue analyzing the Disclose Act and whether it would be appropriate to make a recommendation to include General Purpose Committees in Section 2.76.065.

The Task Force also requested to have a discussion on the constitutionality of applying the Disclaimer rule to General Purpose Committees as well as Independent Expenditure Committees.

For reference, the following materials have been provided from a Task Force Member.

1. ACLU of Nevada v. Heller (9th Cir. 2004) 378 F. 3d 979;
2. http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/Comment%20Letters/2017/September/13%20bell%20mcandrew%20hiltachk%20item%2042.pdf
3. California Republican Party, California Democratic Party and Orange County Republican Party v. FPPC (ED Cal. Oct. 27, 2004) USDC/ED#CIV-S-04-2144 FCD PAN. (case cited but no copy provided)

2. Campaign Contribution Limits Generally

During the May 2018 Task Force meeting, the members discussed the efficacy of the City's campaign contribution limit of $500 per person to candidate for City Council in any single election. In 2015, the then convened Ethics Task Force recommended increasing the limit by a cost of living increase. On April 4, 2016, the City Council considered this matter with other Task Force recommendations and WHMC changes, and elected not to adopt an increase to the campaign contribution limit. For a historical perspective, the City lowered its campaign contribution limit from $1000 to $500 in 2009.

During the April 4th meeting, the City Council considered various ways to increase the limit (e.g. CPI now with various additional increases every few years); but in the end, there was not a consensus that the amount needed to be increased. Some members of the City Council were in favor of an increase while others expressed that a small increase would not make a significant difference. One Councilmember believed that having a lower contribution limit may create a more even playing field for new candidates that are not incumbents.

At the last meeting, the Task Members suggested that the lower contribution limit can encourage Independent Expenditure Committees and require more fundraising activities by the candidates, and that the Task Force may want to consider again recommending an increase. The Task Force should consider reasons why an increased campaign contribution limit would best serve the interests of the City, and if there is consensus, those reasons can be reported to the City Council as part of its substantive recommendations.

3. Public Financing Systems

One theory for ways to improve campaign financing is through public campaign financing. In 2017, the Political Reform Act was amended through Senate Bill 1107 (attached) to allow cities to adopt systems for public campaign financing. The Task Force noted this change in the law at its last meeting and may discuss the efficacy of such systems for West Hollywood through programs that could include, for example, matching funds of campaign donations.

4. Review of WHMC provisions for consistency with state law

As noted at the last meeting, the Task Force may review the WHMC (applicable provisions found in Chapters 2.72 and 2.76 attached) to confirm consistency with state law.

5. Campaign Contributions from City Contractors

At the last meeting, the Task Force Members considered whether it would be appropriate to look further into restricting campaign contributions by contractors. The Task Force members noted that the City of Los Angeles has adopted such restrictions that could provide some guidance. However, the Task Force also acknowledged that because of first amendment concerns, those types of restrictions are typically more appropriate in other cities where there is evidence of corruption, where those rules can be narrowly tailored to address actual problems.

7. Better uses for election/campaign reporting data, repository of mailers and other potential improvements to provide more data on city's website.

At the last meeting, the Task Force inquired into whether the City's electronic filing system, NetFile, could be used to create useable data pulled from the campaign finance statements, such as charts and graphics to provide the public a fuller picture of contributions and spending on campaigns. The Task Force Members also asked staff to investigate the possibility of adding campaign communications to candidate pages via NetFile (a potential repository for all campaign mailings similar to a City of LA program). Staff agreed to report back on with information from the City's vendor. The NetFile system was adopted by the City Council on September 19, 2016. Staff has contacted NetFile to discuss its capabilities and can report that NetFile plans to upgrade its system to allow graphing capability using information from campaign finance forms. They indicated that they have plans to upgrade the public site with this capability in 2019. Staff also inquired about uploading political mailers to the site and NetFile commented that they can set-up the City's account to allow the upload of political mailers immediately.

Based on these discussions, the Task Force can provide direction to staff to draft a substantive recommendation report to the City Council for review and approval at the next Task Force meeting, or direct staff to research any issues and report back for additional discussion at the next meeting.

Attachments:

WHMC Chapter 2.72 Lobbying

WHMC Chapter 2.76 Election and Campaign Regulations

AB 249 (The Disclose Act)

SB 1107 (Public Campaign Financing)

West Hollywood Administrative Regulation 414: Political Activity

ACLU of Nevada v. Heller (9th Cir. 2004) 378 F. 3d 979

http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/Comment%20Letters/2017/September/13%20bell%20mcandrew%20hiltachk%20item%2042.pdf

Chapter 2.72 Lobbying

2.72.010 Lobbyist – Defined.

"Lobbyist" shall mean any individual who is employed, retained or contracts for economic consideration to communicate with any elective official or any officer or employee of the City of West Hollywood for the purpose of influencing a legislative or administrative action.

(Ord. 85-44, 1985; prior code § 21000)

2.72.020 Registration.

Prior to conducting any activities for the purpose of influencing any action by the City of West Hollywood, any lobbyist shall register with the City Clerk by filing a written statement containing:

a. The lobbyist's full name, business address and telephone number;

b. The name, business address and telephone number of any individual or entity by whom the lobbyist is employed or with whom he or she contracts to perform lobbying services in the city; and

c. A description of the subject matter of the lobbyist's engagement.

(Ord. 97-491 § 1, 1997; Ord. 85-44, 1985; prior code § 21001)

2.72.030 Registration Equivalents.

A lobbyist is deemed to be registered with the City Clerk if he or she has otherwise provided the City of West Hollywood in writing with the information required by Section 2.72.020 or has appeared at a public meeting of the City of West Hollywood and has stated the required information for the record.

(Ord. 85-44, 1985; prior code § 21002)

2.72.040 Registration Fee.

The City Clerk may charge a fee for filing, amending and/or renewal of a registration, the amount of which shall be determined by resolution of the City Council.

(Ord. 97-491 § 2, 1997; prior code § 21003)

2.72.050 Registration – Time.

Every lobbyist required to file a registration statement under this chapter shall register with the City Clerk no later than ten days after being engaged as a lobbyist, and shall renew the registration annually as required in Section 2.72.060.

(Ord. 97-491 § 3, 1997; prior code § 21004)

2.72.060 Registration – Duration.

Registration shall be renewed with the City Clerk on an annual basis between May 21st and June 1st of each year. Registration shall be valid for one year.

(Ord. 97-491 § 3, 1997; prior code § 21005)

2.72.070 Amendment of Registration Information.

If any change occurs concerning any of the information required by Section 2.72.020, the lobbyist shall file an amendment reflecting the change within ten days of the change.

(Ord. 97-491 § 2, 1997; Ord. 85-44, 1985; prior code § 21006)

2.72.080 Notice of Termination.

Lobbyists may file a notice of termination with the City Clerk within ten days after ceasing all activity which required registration.

(Ord. 97-491 § 2, 1997; prior code § 21007)

2.72.090 Post-Employment Lobbying.

a. Members of the City Council and their deputies, members of the Planning Commission, department heads, and division managers are "designated employees and officials" for purposes of this section.

b. Designated employees and officials shall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, the City Council or any committee, subcommittee, Board, Commission, or present member thereof, or any officer or employee of the City, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

c. Subsection (b) shall not apply to any individual who is, at the time of the appearance or communication, a board member, officer, employee, or representative of another local government

agency, a public agency, or a nonprofit organization, and is appearing or communicating on behalf of that agency or organization.

(Ord. 14-941 § 1, 2014)

Chapter 2.76 Election and Campaign Regulations

2.76.010 Purpose.

The purpose of this chapter is to establish limits on the amounts of money that may be contributed to political campaigns in municipal elections for City Council office. It is the City Council's intent to address the perception that unregulated campaign contributions lead to improper influence over elected officials and to establish realistic, narrowly tailored and enforceable limits on the amounts which may be contributed to political campaigns consistent with rights of political expression protected by the United States Constitution.

The City Council finds that the establishment of campaign contribution limits is authorized by Section 10202 of the California Elections Code and Section 81013 of the California Government Code.

The Council further finds that the limit imposed herein is not so low as to infringe on candidates' ability to communicate with the voters, as evidenced by the research and report prepared by the City Clerk indicating that in recent municipal elections the large majority of contributions were in amounts at or lower than the limit imposed herein.

(Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.020 Definitions.

The definitions set forth in the Political Reform Act of 1974, as amended (California Government Code Section 81000 *et seq.*) shall govern the interpretation of this chapter. As used in this chapter:

a. The word "candidate" shall include a candidate's controlled committee.

b. "Campaign materials" means written materials created for the purpose of expressing support or opposition to a candidate for City Council, including, without limitation, mass mailers, websites, emails and campaign signs.

c. A "committee" shall be limited to a committee formed or existing primarily to support or oppose a candidate for City Council.

(Ord. 16-981 § 1, 2016; Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.030 Contribution Limitations.

No person shall make a contribution to any candidate that would cause the total amount contributed by such person to exceed five hundred dollars ($500.00) in connection with any single election. No candidate for City Council shall solicit or accept a contribution from any person that would cause the total amount received from such person to exceed five hundred dollars ($500.00) in connection with any single election.

For purposes of this section:

a. Contributions by spouses or domestic partners shall be treated as separate contributions and shall not be aggregated.

b. Contributions by children under the age of eighteen shall be attributed equally to each parent or guardian.

This section shall not apply to expenditures by a candidate of his or her own funds in support of his or her own campaign.

(Ord. 11-866 § 1, 2011; Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.040 Election Cycle.

No person shall make a contribution to any candidate or any committee prior to the date that is twenty-four months before the election for which the contribution is made. No candidate for City Council or any committee shall solicit or

accept a contribution from any person prior to the date that is twenty-four months before the election for which the contribution is made.

(Ord. 13-907 § 1, 2013; Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.050 Campaign Accounts.

No candidate for City Council or committee shall expend contributions received in connection with a particular election on campaign expenses associated with a subsequent election. Campaign accounts of candidates elected to office in which there is a surplus following payment of campaign debts shall be redesignated as officeholder accounts and maintained in compliance with Section 2.76.060. Any surplus funds beyond those permitted to be retained in an officeholder account shall be expended exclusively in compliance with Government Code Section 89515 or remitted to the city to be used for programs that enhance voter education and participation in elections. Candidates shall provide the City Clerk with documentary evidence that the balance in their campaign accounts complies with Section 2.76.060 within ten days of redesignation of the account as an officeholder account.

(Ord. 13-907 § 1, 2013; Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.060 Officeholder Accounts.

Following the municipal election at which a candidate is elected or re-elected, the candidate's campaign account shall be redesignated as an officeholder account. No person shall make and no City Councilmember shall solicit or accept a contribution directly into an officeholder account. An officeholder account shall not hold more than ten thousand dollars ($10,000.00) at any one time. Funds in an officeholder account shall be used only for officeholder expenses associated with holding office in accordance with Sections 89512 through 89519 of the California Government Code, excluding that part of Subsection 89513(g) pertaining to loans to candidates, political parties or committees. Funds in an officeholder account shall not be used or expended: (a) in connection with an election of the City Councilmember or any other person for any elected office; (b) for campaign consulting, research, polling or similar services in connection with an election; (c) for membership dues in any athletic club or similar club or organization membership in which is primarily personal or social (but excluding membership in or contributions to community-serving or civic organizations); (d) as supplemental compensation for city employees for performance of an act that would be required or expected of that person in the regular course of his or her duties; or (e) for any expenditure that would violate the provisions of Government Code Sections 89506 and 89512 through 89519. Every City Councilmember who establishes and maintains an officeholder account shall file with the City Clerk a semi-annual report on a form provided by the Clerk enumerating all deposits into the officeholder account and identifying all disbursements from the account in excess of one hundred dollars ($100.00) by showing the payee, date, amount, person(s) whose expenses were reimbursed and purpose of each such disbursement. The Councilmember shall retain all receipts, invoices and other documents documenting disbursements from the account.

(Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

2.76.065 Committee Disclosure of Top Donors.

All primarily formed committees shall identify on all campaign materials the names of the top three donors that have made the highest total contributions to the committee as reported in the Form 497 filings submitted to the City Clerk, or any equivalent form required by law, at the time the campaign materials are disseminated to the public. For purposes of this section, the term primarily formed committee shall be as defined in the Political Reform Act.

(Ord. 16-981 § 2, 2016)

2.76.067 Electronic Filing of Campaign Statements.

a. Any elected officer, candidate, committee, or other person required to file statements, reports or other documents prescribed by Chapter 4 (Campaign Disclosure) of Title 9 (Political Reform) of the California Government Code that has received contributions and made expenditures of one thousand dollars ($1,000.00) or more, shall electronically file such statements using procedures established by the City Clerk.

b. Once an elected officer, candidate, committee, or other person files a statement, report, or other document electronically pursuant to subsection (a), all future statements, reports, or other documents on behalf of that filer shall be filed electronically.

c. In any instance in which an original statement, report, or other document must be filed with the California Secretary of State and a copy of that statement, report, or other document is required to be filed with the City Clerk, the filer may, but is not required to file the copy electronically.

d. If the City Clerk's electronic system is not capable of accepting a particular type of statement, report, or other document, an elected officer, candidate, committee, or other person shall file that document with the City Clerk in an alternative format.

(Ord. 16-987 § 2, 2016)

2.76.070 Remedies for Violations.

In addition to any other remedy provided by law, the portion of any contribution that exceeds the maximum contribution permitted by this chapter shall be remitted to the city and used for programs that enhance voter education and participation in elections.

(Ord. 09-835 § 1, 2009; Ord. 09-830 § 1, 2009)

View the mobile version.

Assembly Bill No. 249

CHAPTER 546

An act to amend Sections 82025, 84305, 84310, 84501, 84505, 84506.5, 84510, 84511, and 85704 of, to add Sections 84504.1, 84504.2, 84504.3, 84504.4, and 84504.5 to, to repeal Sections 84506, 84507, and 84508 of, and to repeal and add Sections 84502, 84503, 84504, and 84509 of, the Government Code, relating to the Political Reform Act of 1974, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 7, 2017. Filed with Secretary of State October 7, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

AB 249, Mullin. Political Reform Act of 1974: campaign disclosures.

(1) Existing law, the Political Reform Act of 1974, provides for the comprehensive regulation of campaign financing and activities. The act requires a committee that supports or opposes ballot measures to name and identify itself using a name or phrase that clearly identifies the economic or other special interests of its major donors of $50,000 or more. The act also requires that the identity of a common employer shared by major donors be disclosed.

This bill would repeal these provisions.

(2) The act defines "expenditure" as a payment, a forgiveness of a loan, a payment of a loan by a 3rd party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes.

This bill, which would be known as the California Disclose Act, would describe circumstances in which a payment would be made for political purposes within the meaning of the definition of "expenditure."

(3) The act prohibits a candidate or committee from sending a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing, as specified.

This bill would additionally require the name of such an entity to be disclosed in a mass electronic mailing, as defined, that the entity sends. The bill would provide that these disclosure requirements do not apply if the mass mailing or mass electronic mailing is paid for by an independent expenditure.

(4) The act prohibits a candidate, committee, or slate mailer organization from expending campaign funds to pay for specified telephone calls that advocate support of, or opposition to, a candidate, ballot measure, or both, unless the name of the organization that authorized or paid for the call is disclosed to the recipient of the call during the course of each call.

This bill would instead apply these requirements to a candidate, a candidate controlled committee established for an elective office for the controlling candidate, a political party committee, and a slate mailer organization that expends campaign funds to pay for such telephone calls. The bill would provide that these disclosure requirements do not apply if the telephone call is paid for by an independent expenditure.

(5) The act also requires advertisements, as defined, to include prescribed disclosure statements, including, among others, a requirement that the disclosure statements include the names of the persons who made the 2 highest cumulative contributions, as defined, to the committee paying for the advertisement.

This bill would repeal and recast provisions of the act relating to advertisement disclosure statements. The bill would revise the definition of "advertisement" to exclude a number of communications, including communications that involve wearing apparel, sky writing, and certain electronic media communications, as specified. The bill would also replace existing advertisement disclosure statements with newly prescribed disclosure statements that identify the name of the committee paying for the advertisement and the top contributors to that committee. The bill would define "top contributors" for purposes of these provisions as the persons from whom the committee paying for the advertisement received its 3 highest cumulative contributions, as specified. The bill would exempt certain committees, including committees that make independent expenditures totaling $1,000 or more in a calendar year, from the requirement to disclose the top contributors in advertisement disclosure statements. The bill would also prescribe location and format criteria for the disclosure statements that are specific to radio and telephone, television and video, print, and electronic media advertisements.

(6) The act imposes, in addition to other penalties, a fine of up to triple the amount of the cost of an advertisement on a person who violates the disclosure requirements for advertisements.

This bill would revise the scope of violations subject to that fine by specifying that it applies to certain disclosure requirements and intentional violations.

(7) The act prohibits a person from making a contribution as an intermediary on behalf of another person without disclosing to the recipient of the contribution specified information about both the intermediary and the source of the contribution. The act also prohibits a person from making a contribution to a committee on the condition or with the agreement that it will be contributed to a particular candidate unless the contribution is disclosed in compliance with those requirements for contributions made by an intermediary.

This bill would prohibit a person from making a contribution to a committee or candidate that is earmarked unless the contribution is disclosed in compliance with the requirements for contributions made by an intermediary. The bill would also describe circumstances in which a contribution is deemed to be earmarked. The bill would impose additional

disclosure requirements in connection with earmarked contributions from one committee to another.

(8) Because a violation of the act is punishable as a misdemeanor, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(9) The Political Reform Act of 1974, an initiative measure, provides that the Legislature may amend the act to further the act's purposes upon a ⅔ vote of each house of the Legislature and compliance with specified procedural requirements.

This bill would declare that it furthers the purposes of the act.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the California Disclose Act.

SEC. 2. (a) For voters to make an informed choice in the political marketplace, political advertisements should not intentionally deceive voters about the identity of who or what interest is trying to persuade them how to vote.

(b) Disclosing who or what interest paid for a political advertisement will help voters be able to better evaluate the arguments to which they are being subjected during political campaigns and therefore make more informed voting decisions.

SEC. 3. Section 82025 of the Government Code is amended to read:

82025. (a) "Expenditure" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. "Expenditure" does not include a candidate's use of his or her own money to pay for either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to Section 13307 of the Elections Code. An expenditure is made on the date the payment is made or on the date consideration, if any, is received, whichever is earlier.

(b) A payment is made for political purposes if it is any of the following:

(1) For purposes of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure.

(2) Made by any of the following:

(A) A candidate, unless it is clear from surrounding circumstances that the payment was made for personal purposes unrelated to his or her candidacy or status as an officeholder.

(B) A controlled committee.

(C) An official committee of a political party, including a state central committee, county central committee, assembly district committee, or any subcommittee of such committee.

(D) An organization formed or existing primarily for political purposes, as described in paragraph (1), including, but not limited to, a political action committee established by any membership organization, labor union, or corporation.

(c) "Expenditure" includes any monetary or nonmonetary payment made by any person, other than the persons or organizations described in subdivision (b), that is used for communications that expressly advocate the nomination, election, or defeat of a clearly identified candidate or candidates, or the qualification, passage, or defeat of a clearly identified ballot measure.

(1) "Clearly identified" is defined as follows:

(A) A candidate is clearly identified if the communication states his or her name, makes unambiguous reference to his or her office or status as a candidate, or unambiguously describes him or her in any manner.

(B) A group of candidates is clearly identified if the communication makes unambiguous reference to some well-defined characteristic of the group, even if the communication does not name each candidate. A communication that clearly identifies a group of candidates and expressly advocates their election or defeat is reportable as an expenditure, but the expenditure need not be allocated among all members of the class or group on the campaign statement reporting the expenditure.

(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title, or popular name associated with the measure. In addition, the measure is clearly identified if the communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

(D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and the qualification drive.

(2) A communication "expressly advocates" the nomination, election, or defeat of a candidate or the qualification, passage, or defeat of a measure if it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for," or, within 60 days before an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.

(A) Except for those communications paid for with public moneys by a state or local government agency, a communication, taken as a whole, unambiguously urges a particular result in an election if it is not susceptible of any reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure. A communication is not susceptible of any

reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure when, taken as a whole, it could only be interpreted by a reasonable person as containing an appeal to vote for or against a specific candidate or measure because of both of the following:

(i) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning.

(ii) Reasonable minds could not differ as to whether it encourages a vote for or against a clearly identified candidate or measure, or encourages some other kind of action on a legislative, executive, or judicial matter or issue.

(B) The following nonexhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that in most contexts would not be susceptible of any reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure: "Smith's the One"; "No Measure A"; "Rally 'round O'Malley"; "Create jobs with Measure X"; "Only Nancy Brown can clean out City Hall"; "Proposition 123 - your last chance to save California"; "Joe Green will earn your trust"; "Bob Boone is unqualified for office and a special-interest puppet"; "Shirley Hall - bad for California, bad for you."

(C) The following nonexhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that would be susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure: "Assembly Member Nancy Brown needs to be tough on criminals. Call her and tell her to stand firm on AB 100"; "Poor children need a home too. Support the Mayor's stance against more budget cuts"; "Thank you, Supervisor Smith, for continuing to support our farmers."

(D) Safe Harbor. A communication does not expressly advocate the nomination, election, or defeat of a candidate, or the qualification, passage, or defeat of a measure, within the meaning of this section, if both of the following apply:

(i) The communication does not mention an election, candidacy, political party unless required by law, opposing candidate, or voting by the general public, and it does not take a position on the character, qualifications, or fitness for office of a candidate or officeholder, or the merits of a ballot measure.

(ii) The communication focuses on a legislative, executive, or judicial matter or issue, either urging a candidate to take a particular position or action with respect to the matter or issue, or urging the public to adopt a particular position and to contact the candidate with respect to the matter or issue.

(E) Rules of Interpretation. If a communication does not qualify for the safe harbor described in subparagraph (D), the commission shall consider if the communication has an interpretation other than as an appeal to vote for or against a clearly identified candidate or measure, in order to determine if, on balance, the communication is not susceptible of any reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate or measure.

(3) Reporting Expenditures.

(A) The amount of an expenditure reportable pursuant to this subdivision shall include all costs directly attributable to the communication, including, but not limited to, salaries, production, postage, space or time purchased, agency fees, printing, and any additional administrative or overhead costs attributable to the communication. The expenditure does not include any of the regular ongoing business overhead that will be incurred in similar amounts regardless of the communication.

(B) When a printed or broadcast communication circulates outside the state, the expenditure may be calculated on the basis of the fraction of the total cost attributable to circulation within the state.

(C) Costs directly traceable to the communication are reportable when the communication is made, or when payments are made in connection with the development, production, or dissemination of the communication, whichever occurs first.

(D) The costs of printing and distributing petitions, recruiting, training, and paying expenses of petition circulators, and other costs incurred in connection with the qualification of a measure are reportable expenditures.

(4) Notwithstanding this subdivision, "expenditure" does not include costs incurred for communications that expressly advocate the nomination, election, or defeat of a clearly identified candidate or candidates, or the qualification, passage, or defeat of a clearly identified measure or measures by either of the following:

(A) A broadcasting station, including a cable or satellite television operation, programmer, or producer, Internet Web site, or a regularly published newspaper, magazine, or other periodical of general circulation, including an Internet or electronic publication, that routinely carries news and commentary of general interest, for the cost of covering or carrying a news story, commentary, or editorial.

(B) A regularly published newsletter or regularly published periodical, other than those specified in subparagraph (A), whose circulation is limited to an organization's members, employees, shareholders, other affiliated individuals, and those who request or purchase the publication. This subparagraph applies only to the costs regularly incurred in publishing the newsletter or periodical. If additional costs are incurred because the newsletter or periodical is issued on other than its regular schedule, expanded in circulation, or substantially altered in style, size, or format, the additional costs are expenditures.

(5) The term "expenditure" also does not include uncompensated Internet activity by an individual supporting or opposing a candidate or measure as stated in Section 18215.2 of Title 2 of the California Code of Regulations.

(d) A payment used to make contributions, as defined in Section 82015, is an expenditure.

SEC. 4. Section 84305 of the Government Code is amended to read:

84305. (a) (1) Except as provided in subdivision (b), a candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee shall not send a mass

mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type that is in a color or print that contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the candidate's, candidate controlled committee established for an elective office for the controlling candidate's, or political party committee's address is a matter of public record with the Secretary of State.

(2) Except as provided in subdivision (b), a committee, other than a candidate controlled committee established for an elective office for the controlling candidate or a political party committee, shall not send a mass mailing that is not required to include a disclosure pursuant to Section 84502 unless the name, street address, and city of the committee is shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type that is in a color or print that contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the committee's address is a matter of public record with the Secretary of State.

(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

(c) (1) A candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee shall not send a mass electronic mailing unless the name of the candidate or committee is shown in the electronic mailing preceded by the words "Paid for by" in at least the same size font as a majority of the text in the electronic mailing.

(2) A committee, other than a candidate controlled committee established for an elective office for the controlling candidate or a political party committee, shall not send a mass electronic mailing that is not required to include a disclosure pursuant to Section 84502 or 84504.3 unless the name of the committee is shown in the electronic mailing preceded by the words "Paid for by" in at least the same size font as a majority of the text in the electronic mailing.

(d) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a).

(e) For purposes of this section, the following terms have the following meaning:

(1) "Mass electronic mailing" means sending more than two hundred substantially similar pieces of electronic mail within a calendar month.

(2) "Sender" means the candidate, candidate controlled committee established for an elective office for the controlling candidate, or political party committee who pays for the largest portion of expenditures attributable

to the designing, printing, and posting of the mailing which are reportable pursuant to Sections 84200 to 84217, inclusive.

(3) To "pay for" a share of the cost of a mass mailing means to make, to promise to make, or to incur an obligation to make, any payment: (A) to any person for the design, printing, postage, materials, or other costs of the mailing, including salaries, fees, or commissions, or (B) as a fee or other consideration for an endorsement or, in the case of a ballot measure, support or opposition, in the mailing.

(f) This section does not apply to a mass mailing or mass electronic mailing that is paid for by an independent expenditure.

SEC. 5. Section 84310 of the Government Code is amended to read:

84310. (a) A candidate, candidate controlled committee established for an elective office for the controlling candidate, political party committee, or slate mailer organization shall not expend campaign funds, directly or indirectly, to pay for telephone calls that are similar in nature and aggregate 500 or more in number, made by an individual, or individuals, or by electronic means and that advocate support of, or opposition to, a candidate, ballot measure, or both, unless during the course of each call the name of the candidate, candidate controlled committee established for an elective office for the controlling candidate, political party committee, or slate mailer organization that authorized or paid for the call is disclosed to the recipient of the call. Unless the organization that authorized the call and in whose name it is placed has filing obligations under this title, and the name announced in the call either is the full name by which the organization or individual is identified in any statement or report required to be filed under this title or is the name by which the organization or individual is commonly known, the candidate, candidate controlled committee established for an elective office for the controlling candidate, political party committee, or slate mailer organization that paid for the call shall be disclosed. This section does not apply to telephone calls made by the candidate, the campaign manager, or individuals who are volunteers.

(b) Campaign and ballot measure committees are prohibited from contracting with any phone bank vendor that does not disclose the information required to be disclosed by subdivision (a).

(c) A candidate, committee, or slate mailer organization that pays for telephone calls as described in subdivision (a) shall maintain a record of the script of the call for the period of time set forth in Section 84104. If any of the calls qualifying under subdivision (a) were recorded messages, a copy of the recording shall be maintained for that period.

(d) This section does not apply to a telephone call that is paid for by an independent expenditure.

SEC. 6. Section 84501 of the Government Code is amended to read:

84501. For purposes of this article, the following definitions apply:

(a) (1) "Advertisement" means any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures.

(2) "Advertisement" does not include any of the following:

(A) A communication from an organization, other than a political party, to its members.

(B) A campaign button smaller than 10 inches in diameter; a bumper sticker smaller than 60 square inches; or a small tangible promotional item, such as a pen, pin, or key chain, upon which the disclosure required cannot be conveniently printed or displayed.

(C) Wearing apparel.

(D) Sky writing.

(E) An electronic media communication for which inclusion of the disclosures required by Section 84502, 84503, or 84506.5, is impracticable or would severely interfere with the committee's ability to convey the intended message because of the nature of the technology used to make the communication.

(F) Any other communication as determined by regulations of the Commission.

(b) "Cumulative contributions" means the cumulative amount of contributions received by a committee beginning 12 months before the date of the expenditure and ending seven days before the time the advertisement is sent to the printer or broadcaster.

(c) (1) "Top contributors" means the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars ($50,000) or more.

(2) If two or more contributors of identical amounts qualify as top contributors, the most recent contributor of that amount shall be listed as the top contributor in any disclosure required by Section 84503.

(3) If a committee primarily formed to support or oppose a state candidate or ballot measure contributes funds to another committee primarily formed to support or oppose the same state candidate or ballot measure and the funds used for the contribution were earmarked to support or oppose that candidate or ballot measure, the committee receiving the earmarked contribution shall disclose the contributors who earmarked their funds as the top contributor or contributors on the advertisement if the definition of top contributor provided for in paragraph (1) is otherwise met. If the committee receiving the earmarked contribution contributes any portion of the contribution to another committee primarily formed to support or oppose the specifically identified ballot measure or candidate, that committee shall disclose the true source of the contribution to the new committee receiving the earmarked funds. The new committee shall disclose the contributor on the new committee's advertisements if the definition of top contributor provided for in paragraph (1) is otherwise met.

(A) The primarily formed committee making the earmarked contribution shall provide the primarily formed committee receiving the earmarked contribution with the name and address of the contributor or contributors who earmarked their funds and the amount of the earmarked contribution from each contributor at the time the contribution is made. If the committee making the contribution received earmarked contributions that exceed the

amount contributed or received contributions that were not earmarked, the committee making the contribution shall use a reasonable accounting method to determine which top contributors to identify pursuant to this subparagraph, but in no case shall the same contribution be disclosed more than one time to avoid disclosure of additional contributors who earmarked their funds.

(B) The committee receiving the earmarked contribution may rely on the information provided pursuant to subparagraph (A) for purposes of complying with the disclosure required by Section 84503 and shall be considered in compliance with Section 84503 if the information provided pursuant to subparagraph (A) is disclosed as otherwise required.

(C) For purposes of this paragraph, funds are considered "earmarked" if any of the circumstances described in subdivision (b) of Section 85704 apply.

SEC. 7. Section 84502 of the Government Code is repealed.

SEC. 8. Section 84502 is added to the Government Code, to read:

84502. (a) (1) Any advertisement paid for by a committee pursuant to subdivision (a) of Section 82013, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the words "Paid for by" followed by the name of the committee as it appears on the most recent Statement of Organization filed pursuant to Section 84101.

(2) Any advertisement paid for by a committee pursuant to subdivision (a) of Section 82013 that is a political party committee or a candidate controlled committee established for an elective office of the controlling candidate shall include the words "Paid for by" followed by the name of the committee as it appears on the most recent Statement of Organization filed pursuant to Section 84101 if the advertisement is any of the following:

(A) Paid for by an independent expenditure.

(B) An advertisement supporting or opposing a ballot measure.

(C) A radio or television advertisement.

(b) Any advertisement paid for by a committee pursuant to subdivision (b) or (c) of Section 82013 shall include the words "Paid for by" followed by the name that the filer is required to use on campaign statements pursuant to subdivision (o) of Section 84211.

SEC. 9. Section 84503 of the Government Code is repealed.

SEC. 10. Section 84503 is added to the Government Code, to read:

84503. (a) Any advertisement paid for by a committee pursuant to subdivision (a) of Section 82013, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the words "committee major funding from" followed by the names of the top contributors to the committee paying for the advertisement. If fewer than three contributors qualify as top contributors, only those contributors that qualify shall be disclosed pursuant to this section. If there are no contributors that qualify as top contributors, this disclosure is not required.

(b) The disclosure of a top contributor pursuant to this section need not include terms such as "incorporated," "committee," "political action

committee," or "corporation," or abbreviations of these terms, unless the term is part of the contributor's name in common usage or parlance.

(c) If this article requires the disclosure of the name of a top contributor that is a committee pursuant to subdivision (a) of Section 82013 and is a sponsored committee pursuant to Section 82048.7 with a single sponsor, only the name of the single sponsoring organization shall be disclosed.

(d) This section does not apply to a committee as defined by subdivision (b) or (c) of Section 82013.

SEC. 11. Section 84504 of the Government Code is repealed.

SEC. 12. Section 84504 is added to the Government Code, to read:

84504. (a) An advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, that is disseminated over the radio or by telephonic means shall include the disclosures required by Sections 84502, 84503, and 84506.5 at the beginning or end of the advertisement, read in a clearly spoken manner and in a pitch and tone substantially similar to the rest of the advertisement, and shall last no less than three seconds.

(b) Notwithstanding the definition of "top contributors" in paragraph (1) of subdivision (c) of Section 84501, radio and prerecorded telephonic advertisements shall disclose only the top two contributors of fifty thousand dollars ($50,000) or more unless the advertisement lasts 15 seconds or less or the disclosure statement would last more than eight seconds, in which case only the single top contributor of fifty thousand dollars ($50,000) or more shall be disclosed.

SEC. 13. Section 84504.1 is added to the Government Code, to read:

84504.1. (a) An advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, that is disseminated as a video, including advertisements on television and videos disseminated over the Internet, shall include the disclosures required by Sections 84502 and 84503 at the beginning or end of the advertisement.

(b) The disclosure required by subdivision (a) shall be written and displayed for at least five seconds of a broadcast of 30 seconds or less or for at least 10 seconds of a broadcast that lasts longer than 30 seconds.

(1) The written disclosure required by subdivision (a) shall appear on a solid black background on the entire bottom one-third of the television or video display screen, or bottom one-fourth of the screen if the committee does not have or is otherwise not required to list top contributors, and shall be in a contrasting color in Arial equivalent type, and the type size for the smallest letters in the written disclosure shall be 4 percent of the height of the television or video display screen. The top contributors, if any, shall each be disclosed on a separate horizontal line, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. The name of each of the top contributors shall be centered horizontally. The written disclosures shall be underlined, except for the names of the top contributors, if any.

(2) If using a type size of 4 percent of the height of the television or video display screen causes the name of any of the top contributors to exceed the width of the screen or causes the disclosures to exceed one-third of the television or video display screen, the type size of the name of the top contributor shall be reduced until the top contributor's name fits on the width of the screen or the entire disclosure fits within one-third of the television or video display screen, but in no case shall the type size be smaller than 2.5 percent of the height of the screen.

(c) An advertisement that is an independent expenditure supporting or opposing a candidate shall include the appropriate statement from Section 84506.5 in the solid black background described in paragraph (1) of subdivision (b) below all other text required to appear in that area in a contrasting color and in Arial equivalent type no less than 2.5 percent of the height of the television or video display screen.

SEC. 14. Section 84504.2 is added to the Government Code, to read:

84504.2. (a) A print advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the disclosures required by Sections 84502, 84503, and 84506.5, displayed as follows:

(1) The disclosure area shall have a solid white background and shall be in a printed or drawn box on the bottom of at least one page that is set apart from any other printed matter. All text in the disclosure area shall be in contrasting color.

(2) The text shall be in an Arial equivalent type with a type size of at least 10-point for printed advertisements designed to be individually distributed, including, but not limited to, mailers, flyers, and door hangers.

(3) The top contributors, if any, shall each be disclosed on a separate horizontal line, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. The name of each of the top contributors shall be centered horizontally in the disclosure area.

(4) Immediately below the text described in paragraph (3), committees subject to Section 84223 shall include the text "Funding Details At [insert Commission Internet Web site]." The text shall be in an Arial equivalent type with a type size of at least 10-point for printed advertisements designed to be individually distributed, including, but not limited to, mailers, flyers, and door hangers.

(b) Notwithstanding paragraphs (2) and (4) of subdivision (a), the disclosures required by Sections 84502, 84503, and 84506.5 on a printed advertisement that is larger than those designed to be individually distributed, including, but not limited to, yard signs or billboards, shall be in Arial equivalent type with a total height of at least five percent of the height of the advertisement, and printed on a solid background with sufficient contrast that is easily readable by the average viewer. The text may be adjusted so it does not appear on separate horizontal lines, with the top contributors separated by a comma.

(c) Notwithstanding the definition of "top contributors" in paragraph (1) of subdivision (c) of Section 84501, newspaper, magazine, or other public print advertisements that are 20 square inches or less shall be required to disclose only the single top contributor of fifty thousand dollars ($50,000) or more.

SEC. 15. Section 84504.3 is added to the Government Code, to read:

84504.3. (a) An electronic media advertisement, other than an Internet Web site, paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall comply with both of the following:

(1) Include the text "Who funded this ad?" in a contrasting color and a font size that is easily readable by the average viewer.

(2) Such text shall be a hyperlink to an Internet Web site containing the disclosures required by Sections 84502, 84503, and 84506.5 in a contrasting color and in no less than 8 point font.

(b) Notwithstanding subdivision (a), the text required by paragraph (1) of subdivision (a) is not required if including the language would be impracticable. In such circumstances the advertisement need only include a hyperlink to an Internet Web site containing the disclosures required by Sections 84502, 84503, and 84506.5.

(c) Notwithstanding subdivisions (a) and (b), an Internet Web site paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the disclosures required by Sections 84502, 84503, and 84506.5 in a contrasting color and in no less than 8 point font.

(d) An Internet Web site that is hyperlinked as provided for in paragraph (2) of subdivision (a) shall remain online and available to the public until 30 days after the date of the election in which the candidate or ballot measure supported or opposed by the advertisement was voted upon.

(e) An advertisement made via a form of electronic media that is audio only and therefore cannot include either of the disclaimers in subdivision (a) shall comply with the disclaimer requirements for radio advertisements in Section 84504.

(f) An advertisement made via a form of electronic media that allows users to engage in discourse and post content, or any other type of social media, shall only be required to include the disclosures required by Sections 84502, 84503, and 84506.5 in a contrasting color and in no less than 8 point font on the committee's profile, landing page, or similar location and shall not be required to include the disclaimer required by subdivision (a) on each individual post, comment, or other similar communication.

(g) The disclaimer required by this section does not apply to advertisements made via social media for which the only expense or cost of the communication is compensated staff time unless the social media account where the content is posted was created only for the purpose of advertisements governed by this title.

SEC. 16. Section 84504.4 is added to the Government Code, to read:

84504.4. A radio or television advertisement that is paid for by a political party or a candidate controlled committee established for an elective office of the controlling candidate, and that does not support or oppose a ballot measure and is not paid for by an independent expenditure, shall include the disclosure required by Section 84502 subject to the following requirements:

(a) In a radio advertisement, the words shall be included at the beginning or end of the advertisement and read in a clearly spoken manner and in a pitch and tone substantially similar to the rest of the advertisement.

(b) In a television advertisement, the words shall appear in writing for at least four seconds with letters in a type size that is greater than or equal to 4 percent of the height of the screen.

SEC. 17. Section 84504.5 is added to the Government Code, to read:

84504.5. An advertisement that is an independent expenditure and paid for by a political party or a candidate controlled committee established for an elective office of the controlling candidate shall include the disclosures required by Sections 84502 and 84506.5. An advertisement that supports or opposes a ballot measure and is paid for by a political party or a candidate controlled committee established for an elective office of the controlling candidate shall include the disclosure required by Section 84502. A disclosure that is included in an advertisement pursuant to this section is subject to the following requirements:

(a) A radio or telephone advertisement shall include the required disclosures at the beginning or end of the advertisement and be read in a clearly spoken manner and in a pitch and tone substantially similar to the rest of the advertisement, and shall last no less than three seconds.

(b) A video advertisement, including television and videos disseminated over the Internet, shall include the required disclosures in writing at the beginning or end of the advertisement in a text that is of sufficient size to be readily legible to an average viewer and in a color that has a reasonable degree of contrast with the background of the advertisement for at least four seconds. The required disclosure must also be spoken during the advertisement if the written disclosure appears for less than five seconds of a broadcast of thirty seconds or less or for less than ten seconds of a broadcast of sixty seconds or more.

(c) (1) A print advertisement shall include the required disclosures in no less than 10 point font and in a color that has a reasonable degree of contrast with the background of the advertisement.

(2) Notwithstanding paragraph (1), the required disclosures on a print advertisement that is larger than those designed to be individually distributed, such as a yard sign or billboard, shall in total constitute no less than five percent of the total height of the advertisement and shall appear in a color that has a reasonable degree of contrast with the background of the advertisement.

(d) An electronic media advertisement shall include the disclosures required by Section 84504.3.

SEC. 18. Section 84505 of the Government Code is amended to read:

84505. (a) In addition to the requirements of Sections 84502, 84503, and 84506.5, the committee placing the advertisement or persons acting in concert with that committee shall be prohibited from creating or using a noncandidate-controlled committee or a nonsponsored committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a top contributor.

(b) Written disclosures required by Sections 84503 and 84506.5 shall not appear in all capital letters, except that capital letters shall be permitted for the beginning of a sentence, the beginning of a proper name or location, or as otherwise required by conventions of the English language.

SEC. 19. Section 84506 of the Government Code is repealed.

SEC. 20. Section 84506.5 of the Government Code is amended to read:

84506.5. An advertisement supporting or opposing a candidate that is paid for by an independent expenditure shall include a statement that it was not authorized by a candidate or a committee controlled by a candidate. If the advertisement was authorized or paid for by a candidate for another office, the expenditure shall instead include a statement that "This advertisement was not authorized or paid for by a candidate for this office or a committee controlled by a candidate for this office."

SEC. 21. Section 84507 of the Government Code is repealed.

SEC. 22. Section 84508 of the Government Code is repealed.

SEC. 23. Section 84509 of the Government Code is repealed.

SEC. 24. Section 84509 is added to the Government Code, to read:

84509. If the order of top contributors required to be disclosed pursuant to this article changes or a new contributor qualifies as a top contributor, the disclosure in the advertisement shall be updated as follows:

(a) A television, radio, telephone, electronic billboard, or other electronic media advertisement shall be updated to reflect the new top contributors within five business days. A committee shall be deemed to have complied with this subdivision if the amended advertisement is delivered, containing a request that the advertisement immediately be replaced, to all affected broadcast stations or other locations where the advertisement is placed no later than the fifth business day.

(b) A print media advertisement, including nonelectronic billboards, shall be updated to reflect the new top contributors before placing a new or modified order for additional printing of the advertisement.

SEC. 25. Section 84510 of the Government Code is amended to read:

84510. (a) (1) In addition to the remedies provided for in Chapter 11 (commencing with Section 91000) of this title, any person who violates Section 84503 or 84506.5 is liable in a civil or administrative action brought by the Commission or any person for a fine up to three times the cost of the advertisement, including placement costs.

(2) Notwithstanding paragraph (1), any person who intentionally violates any provision of Sections 84504 to 84504.3, inclusive, or Section 84504.5, for the purpose of avoiding disclosure is liable in a civil or administrative

action brought by the Commission or any person for a fine up to three times the cost of the advertisement, including placement costs.

(b) The remedies provided in subdivision (a) shall also apply to any person who purposely causes any other person to violate any of the sections described in paragraph (1) or (2) of subdivision (a) or who aids and abets any other person in a violation.

(c) If a judgment is entered against the defendant or defendants in an action brought under this section, the plaintiff shall receive 50 percent of the amount recovered. The remaining 50 percent shall be deposited in the General Fund of the state. In an action brought by a local civil prosecutor, 50 percent shall be deposited in the account of the agency bringing the action and 50 percent shall be paid to the General Fund of the state.

SEC. 26. Section 84511 of the Government Code is amended to read:

84511. (a) This section applies to a committee that does either of the following:

(1) Makes an expenditure of five thousand dollars ($5,000) or more to an individual for his or her appearance in an advertisement that supports or opposes the qualification, passage, or defeat of a ballot measure.

(2) Makes an expenditure of any amount to an individual for his or her appearance in an advertisement that supports or opposes the qualification, passage, or defeat of a ballot measure and that states or suggests that the individual is a member of an occupation that requires licensure, certification, or other specialized, documented training as a prerequisite to engage in that occupation.

(b) A committee described in subdivision (a) shall file, within 10 days of the expenditure, a report that includes all of the following:

(1) An identification of the measure that is the subject of the advertisement.

(2) The date of the expenditure.

(3) The amount of the expenditure.

(4) The name of the recipient of the expenditure.

(5) For a committee described in paragraph (2) of subdivision (a), the occupation of the recipient of the expenditure.

(c) An advertisement paid for by a committee described in paragraph (1) of subdivision (a) shall include a disclosure statement stating "(spokesperson's name) is being paid by this campaign or its donors" in highly visible font shown continuously if the advertisement consists of printed or televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephonic message. If the advertisement is a television or video advertisement, the statement shall be shown continuously, except when the disclosure statement required by Section 84504.1 is being shown.

(d) (1) An advertisement paid for by a committee described in paragraph (2) of subdivision (a) shall include a disclosure statement stating "Persons portraying members of an occupation in this advertisement are compensated spokespersons not necessarily employed in those occupations" in highly visible font shown continuously if the advertisement consists of printed or

televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephonic message.

(2) A committee may omit the disclosure statement required by this subdivision if all of the following are satisfied with respect to each individual identified in the report filed pursuant to subdivision (b) for that advertisement:

(A) The occupation identified in the report is substantially similar to the occupation portrayed in the advertisement.

(B) The committee maintains credible documentation of the appropriate license, certification, or other training as evidence that the individual may engage in the occupation identified in the report and portrayed in the advertisement and makes that documentation immediately available to the Commission upon request.

SEC. 27. Section 85704 of the Government Code is amended to read:

85704. (a) A person shall not make any contribution to a committee or candidate that is earmarked for a contribution to any other particular committee, ballot measure, or candidate unless the contribution is fully disclosed pursuant to Section 84302.

(b) For purposes of subdivision (a), a contribution is earmarked if the contribution is made under any of the following circumstances:

(1) The committee or candidate receiving the contribution solicited the contribution for the purpose of making a contribution to another specifically identified committee, ballot measure, or candidate, requested the contributor to expressly consent to such use, and the contributor consents to such use.

(2) The contribution was made subject to a condition or agreement with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.

(3) After the contribution was made, the contributor and the committee or candidate receiving the contribution reached a subsequent agreement that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.

(c) Notwithstanding subdivisions (a) and (b), dues, assessments, fees, and similar payments made to a membership organization or its sponsored committee in an amount less than five hundred dollars ($500) per calendar year from a single source for the purpose of making contributions or expenditures shall not be considered earmarked.

(d) The committee making the earmarked contribution shall provide the committee receiving the earmarked contribution with the name and address of the contributor or contributors who earmarked their funds and the amount of the earmarked contribution from each contributor at the time it makes the contribution. If the committee making the contribution received earmarked contributions that exceed the amount contributed, or received contributions that were not earmarked, the committee making the contribution shall use a reasonable accounting method to determine which contributors to identify pursuant to this subdivision, but in no case shall the

same contribution be disclosed more than one time to avoid disclosure of additional contributors who earmarked their funds.

(e) Earmarked contributions shall be disclosed on reports required by Chapter 4 (commencing with Section 84100) as follows:

(1) A contributor who qualifies as a committee pursuant to Section 82013 and who makes a contribution to a committee but earmarks the funds to another specifically identified committee pursuant to paragraph (1) or (2) of subdivision (b) shall disclose the specifically identified committee as the recipient of the contribution and the other committee as an intermediary at the time the earmarked contribution is made. The specifically identified committee shall disclose the contributor and intermediary at the time the funds are received from the intermediary. The intermediary committee shall disclose receipt of the funds as a miscellaneous increase to cash at the time the funds are received and shall disclose the expenditure as the transfer of an earmarked contribution from the contributor to the specifically identified committee at the time the funds are transferred to the specifically identified committee.

(2) A contributor who qualifies as a committee pursuant to Section 82013 and who makes a contribution to a committee and subsequently earmarks the funds pursuant to paragraph (3) of subdivision (b) shall include a notation on the contributor's next statement that the original contribution was subsequently earmarked, including the name of the specifically identified committee, ballot measure, or candidate supported or opposed. The committee that previously received the funds shall also include a notation on its next statement that the original contribution was subsequently earmarked and shall disclose the original contributor to any new committee to which it transfers the earmarked funds. The new committee shall disclose the true source of the contribution with a notation that the contribution was earmarked to the specific ballot measure or candidate.

(3) A contributor who qualifies as a committee pursuant to Section 82013 and who earmarks a contribution to a specifically identified ballot measure or candidate shall disclose a contribution to the committee that received the contribution with a notation that the contribution was earmarked to the specific ballot measure or candidate. Compliance with this paragraph satisfies the contributor's disclosure obligations under this title. The committee receiving the earmarked contribution shall disclose the contributor with a notation that the contribution was earmarked to the specific ballot measure or candidate when the contribution is received. The committee receiving the funds is solely responsible for disclosing the ultimate use of the earmarked contribution, whether by contribution or expenditure, at the time the funds are used. If the committee receiving the earmarked contribution contributes any portion of the contribution to another committee to support or oppose the specifically identified ballot measure or candidate, that committee shall disclose the true source of the contribution to the new committee receiving the earmarked funds for disclosure on the new committee's campaign report. The new committee shall disclose the true

source of the contribution with a notation that the contribution was earmarked to the specific ballot measure or candidate.

(f) A violation of this section shall not be based solely on the timing of contributions made or received.

SEC. 28. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 29. Notwithstanding Section 31, Sections 3 to 27, inclusive, shall become operative on January 1, 2018.

SEC. 30. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

SEC. 31. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order for the public to prepare for new provisions added by this bill in anticipation of the 2018 elections, it is necessary that this act take effect immediately.

O

Senate Bill No. 1107

CHAPTER 837

An act to amend Section 85300 of, and to add Section 89519.5 to, the Government Code, relating to the Political Reform Act of 1974.

[Approved by Governor September 29, 2016. Filed with Secretary of State September 29, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1107, Allen. Political Reform Act of 1974.

Existing law prohibits a person who has been convicted of a felony involving bribery, embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes, from being considered a candidate for, or elected to, a state or local elective office. Existing law, the Political Reform Act of 1974, provides that campaign funds under the control of a former candidate or elected officer are considered surplus campaign funds at a prescribed time, and it prohibits the use of surplus campaign funds except for specified purposes.

This bill would prohibit an officeholder who is convicted of one of those enumerated felonies from using funds held by that officeholder's candidate controlled committee for purposes other than certain purposes permitted for the use of surplus campaign funds. The bill would also require the officeholder to forfeit any remaining funds held 6 months after the conviction became final, and it would direct those funds to be deposited in the General Fund.

The Political Reform Act of 1974 prohibits a public officer from expending, and a candidate from accepting, public moneys for the purpose of seeking elective office.

This bill would permit a public officer or candidate to expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity established a dedicated fund for this purpose, as specified.

A violation of the act's provisions is punishable as a misdemeanor. By expanding the scope of an existing crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The Political Reform Act of 1974, an initiative measure, provides that the Legislature may amend the act to further the act's purposes upon a ⅔ vote of each house and compliance with specified procedural requirements.

This bill would declare that it furthers the purposes of the act.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) All citizens should be able to make their voices heard in the political process and hold their elected officials accountable.

(b) Elections for local or state elective office should be fair, open, and competitive.

(c) The increasing costs of political campaigns can force candidates to rely on large contributions from wealthy donors and special interests, which can give those wealthy donors and special interests disproportionate influence over governmental decisions.

(d) Such disproportionate influence can undermine the public's trust that public officials are performing their duties in an impartial manner and that government is serving the needs and responding to the wishes of all citizens equally, without regard to their wealth.

(e) Special interests contribute more to incumbents than challengers because they seek access to elected officials, and such contributions account for a large portion of the financial incumbency advantage, as confirmed by recent studies such as those published in the Journal of Politics in 2014 and Political Research Quarterly in 2016.

(f) Citizen-funded election programs, in which qualified candidates can receive public funds for the purpose of communicating with voters rather than relying exclusively on private donors, have been enacted in six charter cities in California, as well as numerous other local and state jurisdictions.

(g) Citizen-funded election programs encourage competition by reducing the financial advantages of incumbency and making it possible for citizens from all walks of life, not only those with connections to wealthy donors or special interests, to run for office, as confirmed by recent studies such as those published in State Politics and Policy Quarterly in 2008, and by the Campaign Finance Institute in 2015 and the National Institute of Money in State Politics in 2016.

(h) By reducing reliance on wealthy donors and special interests, citizen-funded election programs inhibit improper practices, protect against corruption or the appearance of corruption, and protect the political integrity of our governmental institutions.

(i) In Johnson v. Bradley (1992) 4 Cal.4th 389, the California Supreme Court commented that "it seems obvious that public money reduces rather than increases the fund raising pressures on public office seekers and thereby reduces the undue influence of special interest groups."

(j) In Buckley v. Valeo (1976) 424 U.S. 1, the United States Supreme Court recognized that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest."

(k) In Arizona Free Enterprise v. Bennett (2011) 564 U.S. 721, the United States Supreme Court acknowledged that public financing of elections "can further 'significant governmental interest[s]' such as the state interest in preventing corruption," quoting Buckley v. Valeo.

(*l*) In Buckley v. Valeo, the United States Supreme Court further noted that citizen-funded elections programs "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."

(m) The absolute prohibition on public campaign financing allows special interests to gain disproportionate influence and unfairly favors incumbents. An exception should be created to permit citizen-funded election programs so that elections may be conducted more fairly.

SEC. 2. Section 85300 of the Government Code is amended to read:

85300. (a) Except as provided in subdivision (b), a public officer shall not expend, and a candidate shall not accept, any public moneys for the purpose of seeking elective office.

(b) A public officer or candidate may expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity establishes a dedicated fund for this purpose by statute, ordinance, resolution, or charter, and both of the following are true:

(1) Public moneys held in the fund are available to all qualified, voluntarily participating candidates for the same office without regard to incumbency or political party preference.

(2) The state or local governmental entity has established criteria for determining a candidate's qualification by statute, ordinance, resolution, or charter.

SEC. 3. Section 89519.5 is added to the Government Code, to read:

89519.5. (a) An officeholder who is convicted of a felony enumerated in Section 20 of the Elections Code, and whose conviction has become final, shall use funds held by the officeholder's candidate controlled committee only for the following purposes:

(1) The payment of outstanding campaign debts or elected officer's expenses.

(2) The repayment of contributions.

(b) Six months after the conviction becomes final, the officeholder shall forfeit any remaining funds subject to subdivision (a), and these funds shall be deposited in the General Fund.

(c) This section does not apply to funds held by a ballot measure committee or in a legal defense fund formed pursuant to Section 85304.

SEC. 4. The provisions of this bill are severable. If any provision of this bill or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction,

or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 6. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

O

CITY OF WEST HOLLYWOOD

ADMINISTRATIVE REGULATION

No. 414

Effective Date: 03-24-97

SUBJECT: POLITICAL ACTIVITY

Purpose

The City of West Hollywood encourages its employees to participate in the political and government process and be informed on public issues and candidates for public office. However, the City has established guidelines relating to political activities of City employees based upon federal, state, and local laws and prohibits political activity that is illegal.

Application

The City's Administrative Regulation applies to all City employees (including City Manager, Assistant City Manger, Department Directors and Division Managers). Other City representatives such as City officials, Members of City Commissions, Boards, and Task-Forces, contractors, or consultants may also be prohibited from using their official relationship with the City to endorse or oppose political candidates or activities.

Policy

1. It is unlawful for the City of West Hollywood or its employees to expend City funds on partisan and/or political matters and on other issues that are on a ballot for an election. Additionally, this policy prohibits the use of employees' time, City equipment and supplies, and the payment of expenses for City officials who travel for the purpose of promoting a particular view on political matters.
2. The City may also prohibit or limit the solicitation or receipt of political funds or contributions to promote the passage or defeat of a ballot measure concerning working conditions during the working hours of its officers and employees. The City also has the right to limit entry into City offices for such purposes during working hours.
3. California Government Code prohibits officers and employees of the City from directly or indirectly soliciting political funds or contributions from other officers or employees of the City unless the solicitation is done through the mail and is part of a solicitation directed to a large segment of the public which may incidentally include officers and employees of the City of West Hollywood. This is designed to protect employees from feeling pressured into contributing to political causes or for fear that if they fail to do so, their job will be affected.

4. No City employee or official shall participate in political activities of any kind while in a uniform or other clothing that is issued by the City.
5. City employees and officials are prohibited from engaging in political activity or solicitation during working hours and on the City's property.
6. The Hatch Act applies to all employees whose positions are funded by federal funds. According to this Act, the following acts or activities are prohibited:
    a) Use of an employee's official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office.
    b) Direct or indirect coercion, attempts at coercion, commanding or advising a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency or person for political purposes.
    c) Candidacy for a partisan elective office.
    d) Participation in partisan or non-partisan political activities during working hours.

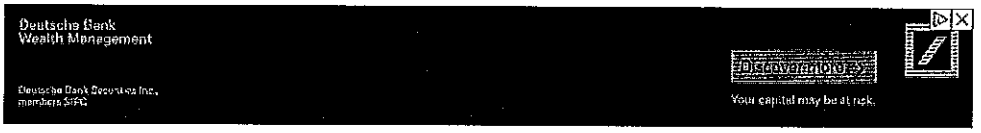
    Employees who are on sick leave, vacation or other leave are governed by the provisions of the Hatch Act while on the leave.

Responsibilities

1. The City expects all employees, City officials, Members of City Commissions, Boards, and Task-Forces to be responsible for adhering to the City's policy regarding political activities. Additionally, contractors, consultants, or others doing business for or with the City will be required to abide by the City's policy regarding political activities while engaged in City business or activities.
2. It is the responsibility of the City Manager, all Department Directors, Division Managers and any other supervisory employee to use their best efforts to take the necessary and proper steps, including disciplinary action, to prevent improper or illegal political activities by City employees.
3. Supervisors should promptly investigate any complaint or report of improper or illegal political activities and notify the Human Resources Division or City Manager of any findings or suspected findings.
4. Any employee who feels that improper political activities are occurring on City property is strongly encouraged to bring the issue up to his/her supervisor, the Human Resources Manager, or the City Manager.
5. The Human Resources Manager is responsible for promptly initiating an investigation after receiving a complaint or report of suspected illegal political activity.

Procedures

1. In determining whether a reported political activity is improper, the totality of circumstances, the nature of the act or behavior, and the context in which the reported incident occurred will be investigated.
2. Individuals found to have engaged in any form of improper or illegal political activity, as defined by this policy, will be subject to disciplinary action, according to the City's disciplinary procedures, which will be based on a number of factors including the severity of the conduct and the past history of the individual's conduct.
3. Statement of findings and disciplinary action taken will be included in the offending party's permanent personnel file and in his/her performance evaluation, unless the investigation discloses no misconduct.
4. An employee or individual working for or representing the City who knowingly makes a false claim against another employee of improper or illegal political activity will be subject to disciplinary action up to and including termination.



AMERICAN CIVIL LIBERTIES UNION OF NEVADA v. HELLER

United States Court of Appeals,Ninth Circuit.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; Gary Peck, Plaintiffs-Appellants, v. Dean HELLER, in his capacity as Secretary of State of the State of Nevada; Brian Sandoval, in his capacity as Attorney General of the State of Nevada; * State of Nevada, Defendants-Appellees.

No. 01-15462.

Decided: August 06, 2004

Before: BROWNING, HUG, JR., and BERZON, Circuit Judges.Allen Lichtenstein and JoNell Thomas, Las Vegas, NV, for the plaintiffs-appellants. Kateri Cavin, Victoria Thimmesch Oldenburg, and Paul G. Taggart, Office of the Attorney General, Carson City, NV, for the defendants-appellees.

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley v. California, 362 U.S. 60, 64-65, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960).

We are asked in this case to rule on the constitutionality of a Nevada statute that requires certain groups or entities publishing "any material or information relating to an election, candidate or any question on a ballot" to reveal on the publication the names and addresses of the publications' financial sponsors. After the district court found no constitutional infirmities, we remanded for a determination of plaintiffs' standing. Now satisfied that standing has been established, we hold that the statutory provision is facially unconstitutional because it violates the Free Speech Clause of the First Amendment, as explicated by McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

BACKGROUND

Nevada Revised Statutes § 294A.320 1 requires persons either paying for or "responsible for paying for" the publication of "any material or information relating to an election, candidate or any question on a ballot" to identify their names and addresses on "any [published] printed or written matter or any photograph." Advertising by candidates and political parties is exempted if the advertising refers only to a candidate and displays his or her name "prominently." In addition, if monies used for a publication have "been reported by the candidate as a campaign contribution," then he or she may approve and pay for that publication without being subject to the Nevada Statute's requirements.

In McIntyre, the Supreme Court addressed the validity of an Ohio statute prohibiting the distribution of written political communications unless the publication contained the name and address "of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." McIntyre, 514 U.S. at 338 n. 3, 115 S.Ct. 1511. Margaret McIntyre had distributed leaflets, attributed to "Concerned Parents and Tax Payers," regarding an "imminent" referendum on the school tax levy, which was scheduled to be discussed at the meeting. Id. at 337-38, 115 S.Ct. 1511. There was "no suggestion that the text of her message was false, misleading, or libelous. Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently." Id. at 337, 115 S.Ct. 1511. The Court struck down Ohio's statutory provision, describing it as "a regulation of pure speech[,] . a direct regulation of the content of speech." Id. at 345, 115 S.Ct. 1511.

In 1997, Nevada amended § 294A.320, originally enacted in 1989, in an effort to respond to McIntyre. The amendment added only an exception for "a natural person who acts independently and not in cooperation with or pursuant to any direction from a business or social organization, nongovernmental legal entity or governmental entity." Nev.Rev.Stat. § 294A.320(2)(c).2

The American Civil Liberties Union of Nevada and its executive director, Gary Peck, (together "ACLUN") brought this First Amendment facial overbreadth challenge to the Nevada Statute. The district court entered summary judgment in favor of the state defendants, reasoning that:

This statute protects the integrity of the election process by promoting truthfulness in campaign advertising. This statute is also important in increasing the wealth of information available to the electorate. The State of Nevada's interest in preserving the integrity of the election process by preventing actual and perceived corruption has been found to be a compelling state interest by the United States Supreme Court.

The ACLUN appealed. In an unpublished order, we remanded the case because the pleadings and record did not demonstrate that the plaintiffs had standing to bring this suit.3 On remand, the district court found that the ACLUN's Second Amended Complaint ("the Complaint") did establish Article III standing because the ACLUN alleged in the Complaint specific instances in which the organization wished to engage in speech but refrained from doing so for fear of being prosecuted under the Nevada Statute.

ANALYSIS

IStanding

On the present record, the ACLU of Nevada, suing for itself and on behalf of its members, and Gary Peck, as one of its members, satisfy Article III standing requirements. Standing requires plaintiffs to demonstrate injuries that are "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks and citation omitted). We recently explained in the First Amendment context that "it is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir.2003) (quotation marks and citation omitted); see also Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1094-95 (9th Cir.2003) (describing "the constitutionally recognized injury of self-censorship").

The present Complaint alleges that the Nevada Statute has "already prohibited and continues to restrict the protected speech of the ACLUN, its members, Gary Peck, and other parties," and provides examples of such restrictions. As found by the district court,

the ACLUN indicated that its members wished to engage in anonymous speech-but did not on account of NRS 294A.320-with regard to an upcoming City of Las Vegas referendum concerning pay raises for the City Council and Mayor and a City of North Las Vegas ballot initiative concerning public comment at City Council meetings. Specifically, ACLUN members wish to engage in coordinated efforts of anonymous political speech, that is, anonymous speech in conjunction with the social organization of which they are a part, which is prohibited by NRS 294A.320. [.]

Similarly, ACLUN members had wanted to engage in the production and distribution of anonymous political flyers on various ballot initiatives in the 2002 election but did not for fear of prosecution under NRS 294A.320. The ACLUN also demonstrated that its members have previously been prosecuted for violations of the statute.

The Complaint states that the ACLUN was prevented from anonymous "involvement with literature concerning ballot initiatives," because, "[u]nder NRS 294A.320, it would have been unlawful for the ACLUN to be involved with[groups opposing a 2002 Las Vegas redistricting plan] in a public information campaign concerning this issue, as it related to the upcoming election, unless the ACLUN had its name on all written material dispensed to the public."

Plaintiffs also introduced affidavits by Peck and another ACLUN member, Tom Skancke, who was "prosecuted for violations of NRS 294A.320." Peck's affidavit describes, with reference to recent Nevada elections and ballot initiatives, his "wish . contrary to the provisions of NRS 294A.320, to involve [himself] with organizations speaking out on [a ballot initiative] issue, including the production and distribution of flyers, without attaching [his] name [so as not to create an appearance that his personal opinion represents the official position of the ACLUN]." Peck added that "ACLUN members who have . expressed a desire to engage in anonymous political speech . wish to do so not only as natural persons acting independently, but also as participants acting in concert and cooperation [with] other persons and groups, as prohibited by [NRS 294A.320]."

The Complaint also alleges an intent to continue to engage in conduct barred by the Nevada Statute in the future. The Complaint states that "[t]he ACLUN and its members have also been involved with various groups who have in the past, and plan in the future, to circulate petitions to place certain referendum measures on statewide or local ballots," and that "NRS 294A.320 has and continues to discourage ACLUN and its members from engaging in anonymous political speech critical of elected officials and of the election process itself." (Emphases added). As a result, alleges the Complaint, "the ACLUN and its members will continue to be forced to choose to self-censor . concerning past and present matters, but also those that will inevitably arise in the future." (Emphases added).

In First Amendment cases, "[i]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." LSO, Ltd. v. Stroh, 205 F.3d 1146, 1154-55 (9th Cir.2000). The Complaint meets that standard.

Both the ACLUN, as an organization and on behalf of its members, and Peck, one of its members, have thus alleged "concrete and particularized" injury stemming from the challenged statute. See Lujan, 504 U.S. at 560, 112 S.Ct. 2130; see also Warth v. Seldin, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."). The Complaint's description of the ACLUN's encounters and those of its members with the challenged Nevada statutory provision therefore amply justify the district court's standing determination.

II

Narrowing Construction

Nevada argues that § 294A.320 should be construed to apply only to "express advocacy." Such a limited interpretation, Nevada contends, would cure any overbreadth concerns. Relying on our decision in FEC v. Furgatch, 807 F.2d 857 (9th Cir.1987), the state regards "express advocacy" as "that speech which is directed to influence a particular outcome of an election, as opposed to issue advocacy that focuses on the merits of a particular issue without regard for an election outcome." Furgatch's definition of "express advocacy" as the term appears in the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq., included speech that "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 864.

Nevada's argument was made before the Supreme Court's decision in McConnell v. FEC, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). McConnell stated that, despite the emphasis on "express advocacy" in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), with regard to the scope of the reporting and disclosure requirements of FECA, "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." McConnell, 124 S.Ct. at 687. After McConnell, the line between "express" and all other election-related speech is not constitutionally material, as the Court was not persuaded that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy." Id. at 688-89; see also id. at 689 (rejecting "the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy").

A limitation of the Nevada Statute to "express advocacy," whether defined in accord with our decision in Furgatch, or more narrowly, see Cal. Pro-Life Council, Inc., 328 F.3d at 1097-98 (discussing the distinction between the "magic words" and the Furgatch approaches to defining "express advocacy"), would therefore likely not have any determinative impact on our evaluation of the statute's constitutional validity. Nevertheless, as stated recently by the Sixth Circuit, McConnell "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." Anderson v. Spear, 356 F.3d 651, 664-65 (6th Cir.2004). By addressing Nevada's proffered limitation of the statute's reach to express advocacy, we can begin to illuminate the narrow tailoring concerns that will recur in this opinion. We therefore start by responding to Nevada's contentions that this court should apply a narrowing construction of § 294A.320, or, alternatively, that it is appropriate for us to certify the question to the Nevada Supreme Court.4

Federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." Stenberg v. Carhart, 530 U.S. 914, 944, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (quoting Boos v. Barry, 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)). According to its text, the Nevada Statute applies to "any material or information relating to an election, candidate or any question on a ballot." An interpretation of this language to apply only to express advocacy concerning a candidate or ballot question is not "readily apparent" from the statute itself. The language of § 294A.320 is not limited to "advocacy," much less "express advocacy."

The Nevada Statute applies to "information," not a term that suggests any kind of exhortation to action. "Information" has been understood in constitutional jurisprudence to refer to matters of fact rather than advocacy. See, e.g., Schneider v. New Jersey, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (repeatedly using the phrase "information or opinion," as in "the freedom to speak, write, print or distribute information or opinion").

The Nevada Statute, moreover, applies to "material or information relating to an election, candidate or any question on a ballot." (Emphasis added). As such, the language reaches objective publications that concern any aspect of an election, candidate, or ballot question-including, for example, discussions of election procedures, analyses of polling results, and nonpartisan get-out-the-vote drives, such as those conducted by the League of Women Voters.

Further, other provisions of Nevada Revised Statutes Title 24, "Elections," make clear that the Legislature explicitly uses language to indicate a limitation to advocacy speech when it intends such a limitation. See, e.g., Nev.Rev.Stat. §§ 294A.004 (referring in part to "expenditures made . to advocate expressly the election or defeat of a clearly identified candidate or group of candidates"); 294A.150 (regulating "[e]very person or group of persons organized formally or informally who advocates the passage or defeat of a question or group of questions on the ballot"); 294A.220 (same). The existence of these provisions provides context for our reading of § 294A.320, which is conspicuous in its failure to contain such limiting language.

We therefore cannot adopt a construction of the statute limiting its reach to express advocacy, however advocacy is defined. For similar reasons, we also decline to certify a question to the Nevada Supreme Court. "Certification of a question . is appropriate only where the statute is 'fairly susceptible' to a narrowing

construction." Stenberg, 530 U.S. at 945, 120 S.Ct. 2597. As already discussed, the Nevada Statute is not so susceptible.5

The Nevada Statute's language indicates clearly what the Legislature sought to accomplish. That language is not fairly susceptible to the narrowing construction proposed by Nevada, and the question of an "express advocacy" limitation, even if it is relevant after McConnell, is not one that is appropriate to certify to the Nevada Supreme Court. See Stenberg, 530 U.S. at 945, 120 S.Ct. 2597. We therefore decline to construe the Nevada Statute to encompass only "express advocacy," or to certify the issue to the Nevada Supreme Court.

III

The First Amendment

Critical to our First Amendment analysis, as will appear, is the central similarity between this case and McIntyre: Both involve campaign statutes that go beyond requiring the reporting of funds used to finance speech to affect the content of the communication itself. This case and McIntyre therefore involve governmental proscription of the speech itself unless it conforms to prescribed criteria. This distinction between direct regulation of the content of political speech and requiring the later reporting of the funding of speech has not always been given weight in some of the post-McIntyre case law.6 Yet while the Supreme Court's recent opinion in McConnell casts new light on some other aspects of the First Amendment principles applicable to regulation of election-related speech, nothing in McConnell undermines McIntyre's understanding that proscribing the content of an election communication is a form of regulation of campaign activity subject to traditional strict scrutiny.7 We therefore begin with McIntyre, which remains fully governing law.

After noting and explicating the "respected tradition of anonymity in the advocacy of political causes," McIntyre, 514 U.S. at 343, 115 S.Ct. 1511, McIntyre underscored that "the speech in which Mrs. McIntyre engaged-handing out leaflets in the advocacy of a politically controversial viewpoint-is the essence of First Amendment expression." Id. at 347, 115 S.Ct. 1511. "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." Id. Requiring a political communication to contain information concerning "the identity of the speaker" is "no different from [requiring the inclusion of] other components of the document's content that the author is free to include or exclude." Id. at 348, 115 S.Ct. 1511.

McIntyre then explained that there are two distinct reasons why forbidding anonymous political speech is a serious, direct intrusion on First Amendment values: First,"[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." Id. at 341-42, 115 S.Ct. 1511. Second,

an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) [footnote omitted], the most effective advocates have sometimes opted for anonymity.

Id. at 342-43, 115 S.Ct. 1511. We, too, following McIntyre, have recognized that "[d]epriving individuals of this anonymity is . 'a broad intrusion, discouraging truthful, accurate speech by those unwilling to [disclose their identities] and applying regardless of the character or strength of an individual's interest in anonymity.' " Wash. Initiatives Now! v. Rippie, 213 F.3d 1132, 1138 (9th Cir.2000) (quoting Am. Const. Law. Found. v. Meyer, 120 F.3d 1092, 1103 (10th Cir.1997)) (second alteration in original).

The Nevada Statute here at issue is, in almost all pertinent respects, similar to the statute invalidated in McIntyre. Indeed, in one important way the Nevada Statute before us is broader in restricting speech than the Ohio statute at issue in McIntyre: The Nevada Statute, like the Ohio statute, covers both candidate and issue elections, but the Ohio statute was limited to publications "designed to promote the nomination or election or defeat of a candidate or to promote the adoption or defeat of any issue, or to influence the voters in any election ." McIntyre, 514 U.S. at 338 n. 3, 115 S.Ct. 1511. The Nevada Statute, in contrast, reaches "any material or information relating to an election, candidate or any question on a ballot." Nev.Rev.Stat. § 294A.320(1) (emphasis added). Nevada nonetheless maintains that there are sufficient differences in coverage and purpose to render the Nevada Statute valid, McIntyre notwithstanding. We disagree.

a. McIntyre and the Individual

Nevada's primary submission is that, because the Statute now contains an exemption for a natural person acting independently and without the cooperation of, inter alia, "any business or social organization," it would not apply to the fact situation in McIntyre and is therefore constitutional.

The Court in McIntyre did stress the particular harshness of Ohio's punishment of McIntyre as the sole advocate for her cause. But nothing in the decision indicates that if she had been allied with other individuals, or with a "business or social organization," the result would have been different. The anonymity protected by McIntyre is not that of a single cloak.

Although we do not think the precise scope of the "natural person" exception in the Nevada Statute is of dispositive import, it is worth noting at the outset that it is exceedingly narrow. First, the exception applies only to "a natural person," acting both "independently" and "not in cooperation with or pursuant to any direction from" several kinds of organizations and entities. So two or more individuals working together,

although not in conjunction with any organization, are required to disclose their identities on any election-related publication, as is a single individual cooperating with an organization.

Second, as defined in the statute, a "business or social organization" is distinct from a "nongovernmental legal entity." Nev.Rev.Stat. §§ 294A.009(2) & (3) (defining "person" to include "(2) [a]ny form of business or social organization" or "(3) [a]ny nongovernmental legal entity"). The latter is defined as "including, without limitation, a corporation, partnership, association, trust, unincorporated organization, labor union, committee for political action, political party and committee sponsored by a political party." Id. at § 294A.009(3). As most formal or permanent groups of individuals could be described as "association[s]" and "unincorporated organization[s]," the separate category, "any form of business or social organization," must cover temporary and informal, loosely affiliated groups.

The reasons given by McIntyre for protecting anonymous speech apply regardless of whether an individual, a group of individuals, or an informal "business or social organization" is speaking. Two or more individuals working together or with informal "social organizations" or more formal associations can harbor "fear of economic or official retaliation, [or] concern about social ostracism," McIntyre, 514 U.S. at 341-42, 115 S.Ct. 1511, just as can lone individuals.

Similarly, just as a lone "advocate may believe her ideas will be more persuasive if her readers are unaware of her identity," because readers may otherwise "prejudge her message simply because they do not like its proponent," id. at 342-43, 115 S.Ct. 1511 (citation omitted), so, too, groups or individuals working in cooperation with groups may be concerned about readers prejudging the substance of a message by associating their names with the message. In fact, groups are more likely to be associated with a certain viewpoint than are individuals (e.g., Greenpeace, the ACLU, the National Rifle Association). So a particular group's concern that its message may be prejudged based on its association with the group could be even more well-founded than an individual's similar concern. Anonymity may allow speakers to communicate their message when preconceived prejudices concerning the message-bearer, if identified, would alter the reader's receptiveness to the substance of the message. Like other choice-of-word and format decisions, the presence or absence of information identifying the speaker is no less a content choice for a group or an individual cooperating with a group than it is for an individual speaking alone.

The Court in McIntyre also recognized that the choice to speak anonymously may be motivated by "a desire to preserve as much of one's privacy as possible." Id. at 341-42, 115 S.Ct. 1511; see also id. at 355, 115 S.Ct. 1511 ("A written election-related document-particularly a leaflet-is often a personally crafted statement of a political viewpoint. [I]dentification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue."). This basis for protecting anonymous speech does not apply as clearly to groups as it does to individuals. A group as a whole lacks the same "personal [ ]" interest in its "thoughts." Id. at 355, 115 S.Ct. 1511. Nonetheless, the fact that individuals in a group, or an individual cooperating with a group, have shared their political thoughts with the members of the group does not mean that they have no privacy interest in concealing from the general public their endorsement of those beliefs. This observation has particular force when the group is small enough that readers will associate individual members with the thoughts conveyed. Exposing the identity of the group publishing its views, or of an individual publishing the views of a group, thus infringes to some degree on the privacy interests of the individuals affiliated with the group.8

Finally, although the Court in McIntyre referred to "individuals acting independently and using only their own modest resources," 514 U.S. at 351, 115 S.Ct. 1511, we think it doubtful that the court used "indopendently" to mean "individually." That would have been redundant. "Independence," in this context of campaign regulation, usually refers to the absence of ties between someone like McIntyre (or ten allied McIntyres) and a political campaign. See, e.g., 2 U.S.C. § 431(17) ("The term 'independent expenditure' means an expenditure by a person-(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."). As to "modest resources," the Nevada Statute has no financial threshold; it requires identification of the person who "paid for or . is responsible for the publication," even if the only cost is for paper, pen, and ink; and it applies even where "a natural person" pays for the publication, if that person cooperates with "a business or social organization" in doing so.

In short, the Nevada Statute, like the Ohio statute in McIntyre, applies to circumstances in which the interests in circulation of anonymous communications are at their strongest. We therefore reject Nevada's proposed limitation of the holding in McIntyre to communications for which an individual working entirely alone is responsible.9

b. Government Interests in Regulating Speech

Quite aside from the suggestion that the "natural person" exception saves the Statute, the state maintains that its interests are different from and stronger than those relied upon by Ohio in McIntyre. We have considered carefully Nevada's submissions, as well as the post-McIntyre case law upon which Nevada relies, McConnell included. Although the post-McIntyre cases, including McConnell, indicate a fairly wide berth for state reporting and disclosure statutes promoting interests similar to those upon which Nevada here relies, those later cases do not support the validity of a McIntyre-clone statute based on the asserted governmental interests Nevada asks us to consider.

The constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements has been noted and relied upon both by the Supreme Court and by this

Circuit. In Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), for example, the Supreme Court was presented with a challenge to Colorado's regulation of initiative-petition circulators. One of the challenged provisions required paid circulators to wear an identification badge, indicating the circulator's name and the name and number of the circulator's employer. Id. at 188 n. 5, 119 S.Ct. 636. The State's interest in requiring the badges was to "enable[ ] the public to identify, and the State to apprehend, petition circulators who engage in misconduct." Id. at 198, 119 S.Ct. 636. A second provision, not challenged in the Supreme Court, required each circulator to complete and attach an affidavit to every petition, stating, among other information, the circulator's name and address. Id. at 189 n. 7, 119 S.Ct. 636. This affidavit was then filed with the secretary of state along with the completed petition. Id. at 188 n. 4, 119 S.Ct. 636.

Although both provisions required the circulator to reveal his or her name, the Court struck down the badge requirement, contrasting it with the affidavit requirement:

While the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speaker's interest as well as the State's. Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks. [T]he name badge requirement forces circulators to reveal their identities at the same time they deliver their political message; it operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned. The affidavit, in contrast, does not expose the circulator to the risk of heat of the moment harassment.

Id. at 198-99, 119 S.Ct. 636 (internal quotations and citations omitted). In other words, it is not just that a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech. See, e.g., Wash. Initiatives Now!, 213 F.3d at 1138 ("Even when it does not have the effect of facilitating harassment, the [requirement of disclosure of the names and addresses of paid circulators] chills speech by inclining individuals toward silence.").

This distinction between requiring a speaker to reveal her identity while speaking and requiring her to reveal it in an after-the-fact reporting submission to a governmental agency was also recognized in McIntyre. There, the Supreme Court noted:

True, in [a] portion of the Buckley [v. Valeo] opinion we expressed approval of a requirement that "independent expenditures" in excess of a threshold level be reported to the Federal Election Commission. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election related writings. A written election-related document-particularly a leaflet-is often a personally crafted statement of a political viewpoint. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill-and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

514 U.S. at 355, 115 S.Ct. 1511. See also Cal. Pro-Life Council, Inc., 328 F.3d at 1104 (citing McIntyre and noting the "distinction between prohibiting the distribution of anonymous literature and the mandatory disclosure of campaign-related expenditures and contributions " (emphasis in original)).

As these precedents indicate, requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money. The former necessarily connects the speaker to a particular message directly, while the latter may simply expose the fact that the speaker spoke. See Majors II, 361 F.3d at 353 (recognizing that the statutory provisions requiring mandatory identification related to "electioneering communications" that McConnell upheld "do[ ] not even require identifying the specific ads financed by the reporting contributor"). Statutes like the one here at issue and the Ohio statute in McIntyre, consequently, must be, and have been, viewed as serious, content-based, direct proscription of political speech: If certain content appears on the communication, it may be circulated; if the content is absent, the communication is illegal and may not be circulated.

As a content-based limitation on core political speech, the Nevada Statute must receive the most "exacting scrutiny" under the First Amendment. McIntyre, 514 U.S. at 346, 115 S.Ct. 1511 (quoting Meyer v. Grant, 486 U.S. 414, 420, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)); see also McConnell, 124 S.Ct. at 658 (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), for the proposition that a regulation that "alters or impairs the political message" is subject to strict scrutiny). Such restriction will survive strict scrutiny only if "it is narrowly tailored to serve an overriding state interest." McIntyre, 514 U.S. at 357, 115 S.Ct. 1511. More specifically, "a content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest." Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir.1998).

Nevada offers three pertinent state interests, contending that they are sufficiently compelling to justify § 294A.320's restrictions, and that the Statute is sufficiently narrowly tailored to further these interests. Nevada argues that: (1) "[w]hether the identity of the author would help evaluate the usefulness of the information makes [this] case different from McIntyre; " (2) McIntyre "left open the possibility that preventing fraud and libel may be a valid compelling interest during the course of an election;" and (3) the state's interest in the enforcement of "disclosure and contribution election laws" is furthered by § 294A.320. We examine

these three governmental interests in turn, with particular attention to the details of Nevada's overall scheme of regulating election campaigns.

i. Information

Nevada argues that § 294A.320 is justified as a measure to aid prospective voters in evaluating information provided to them. In McIntyre, the Court firmly rejected Ohio's proffered justification that its statute served the purpose of more thoroughly informing the electorate than would otherwise be the case:

The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

McIntyre, 514 U.S. at 348-49, 115 S.Ct. 1511.

We perceive no relevant distinction between McIntyre and this case that would support the constitutionality of the Nevada Statute on the ground that the Statute, as the state claims, "foster[s] an informed electorate." In fact, the impact of the Statute may be quite the opposite. The premise of McIntyre is that if anonymous speech is banned, some useful speech will go unsaid. Given the breadth of the Nevada Statute's coverage-in particular, its inclusion of "information related to" an election-this likely result is all the more serious. As the ACLUN correctly points out, under the Statute, "[a]nonymous statements, even if true, that allege voter disenfranchisement or bias in how different voters are treated are banned by the Nevada law." The result could be a worse-informed, not a better-informed, electorate.

That the Nevada Statute contains a "natural person" exception does not affect this McIntyre-based analysis, for two reasons:

First, the Nevada Statute still requires individual private citizens who publish any election-related material in cooperation with an organization or governmental or nongovernmental entity to include their names and addresses. An ACLU member, for example, who discusses an issue before the electorate on a ballot initiative at an ACLU meeting and then volunteers to compose, publish, and circulate a flyer concerning the organization's views on the matter is required to put her name, not the ACLU's, on the document. See Nev.Rev.Stat. § 294A.320(1)(a)-(b). That a certain, unknown individual supplied the paper, computer, and time involved in producing a given communication "add[s] little, if anything, to the reader's ability to evaluate the document." McIntyre, 514 U.S. at 348-49, 115 S.Ct. 1511.

Second, in many instances, requiring publishers to include the names of business or social organizations or legal entities responsible for publishing an election-related communication is unlikely to supply much useful information. As the Court noted in McConnell, individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names. 124 S.Ct. at 651 n. 23 (listing examples of such "mysterious" sponsors of issue ads as "American Family Voices" and "Coalition to Make Our Voices Heard"). While reporting and disclosure requirements can expose the actual contributors to such groups and thereby provide useful information concerning the interests supporting or opposing a ballot proposition or a candidate, simply supplying the name and address of the organization on the communication itself does not provide useful information-and that is all the Nevada Statute requires.

Moreover, and more fundamentally, one premise of McIntyre and the line of First Amendment cases concerning anonymous speech upon which McIntyre relies is that, far from enhancing the reader's evaluation of a message, identifying the publisher can interfere with that evaluation by requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message. As McIntyre stated after reviewing the illustrious role of anonymous (and pseudonymous) communications in our history and that of other nations: "Of course, the identity of the source is helpful in evaluating ideas. But the best test of truth is the power of the thought to get itself accepted in the competition of the market." 514 U.S. at 348 n. 11, 115 S.Ct. 1511 (quotation marks and citations omitted). "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Id. at 348, 115 S.Ct. 1511.

We reiterate that McIntyre's evaluation of the inadequacy of a pure information rationale, and ours, pertain only to requirements that the disclosure be included on the communication itself. Campaign regulation requiring off-communication reporting of expenditures made to finance communications does not involve the direct alteration of the content of a communication. Such reporting requirements also serve considerably more effectively the goal of informing the electorate of the individuals and organizations supporting a particular candidate or ballot proposition. See, e.g., Cal. Pro-Life Council, Inc., 328 F.3d at 1107 (suggesting that "California may well have a compelling interest in informing its voters of the source and amount of funds expended on express ballot-measure advocacy" via contribution and expenditure reporting requirements). Compared to communication-altering requirements such as the one imposed by the Nevada Statute, the imposition on freedom of speech of such reporting requirements is less, while the fit between the regulation and the interest it serves is superior.

That reporting and disclosure requirements have been consistently upheld as comporting with the First Amendment based on the importance of providing information to the electorate therefore supports rather than detracts from our conclusion that McIntyre's rejection of the additional information rationale remains binding on us. See Buckley v. Am. Const. Law Found., 525 U.S. at 198, 119 S.Ct. 636 ("This notarized submission [stating the names of petition circulators], available to law enforcers, renders less needful the State's provision

for personal names on identification badges." (Emphasis added)). The availability of the less speech-restrictive reporting and disclosure requirement confirms that a statute like the one here at issue cannot survive the applicable narrow tailoring standard.

The state's first claimed interest supporting § 294A.320 is therefore not sufficiently compelling to justify the Nevada Statute.

ii. Fraud

Nor does Nevada's interest in combating "sham advocacy" justify § 294A.320, in light of McIntyre. The Nevada Statute, like the Ohio provision struck down in McIntyre, covers both true and false speech, relating to both candidate and ballot elections.

In McIntyre, Ohio's representations regarding its fraud interest were inadequate to render the considerably narrower statute there at issue constitutional:

Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunder-buss approach than the facts of the case before us.

Id. at 357, 115 S.Ct. 1511; see also Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) ("In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further, North Carolina may constitutionally require fundraisers to disclose certain financial information to the State. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." (Citation omitted)).

McIntyre did recognize that during election campaigns, the "state interest in preventing fraud and libel . carries special weight." 514 U.S. at 349, 115 S.Ct. 1511.10 But the Court prohibited Ohio from using on-communication identity disclosure regulations during election campaigns "as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators." Id. at 350-51, 115 S.Ct. 1511.

In any event, the Nevada Statute is not limited to speech "during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." McIntyre, 514 U.S. at 349, 115 S.Ct. 1511. As the state itself noted, § 294A.320 would have prevented an anonymous mailing "many months before a general election" in response to an elected official's vote in favor of a casino. Nevada's representation demonstrates that speech subject to the statute's compelled self-identification requirement can be far removed from the thrust and parry of election campaigns. Instead, the Nevada Statute could prevent speech well before, and long after, a campaign is underway. Cf. McConnell, 124 S.Ct. at 674-75 (finding certain statutory provisions applying to "activity that occurs within 120 days before a federal election" "reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served" (emphasis added)); id. at 686-87 (noting that statutory definition of "electioneering communications," for which disclosure requirements were upheld, includes time limitations of either 30 or 60 days before an election).

Moreover, the Nevada Statute is not only temporally ill-adapted to the special concerns regarding fraud during an election campaign but substantively ill-adapted as well. The Statute applies to communications made with neither the intent nor the effect of influencing any election. An academic paper analyzing opinion polls regarding an upcoming election could be a publication of "information relating to an election," requiring inclusion of the source of any grants supporting the research. Nor is there is any requirement that any member of the pertinent electorate be exposed to, or influenced by, the publication. Cf. McConnell, 124 S.Ct. at 687 ("New FECA § 304(f)(3)(C) further provides that a communication is 'targeted to the relevant electorate' if it 'can be received by 50,000 or more persons' in the district or State the candidate seeks to represent."). For this reason as well, the Nevada Statute is not narrowly tailored to reach only that speech necessary to further its asserted interest in discouraging the impact of fraud on election results.

Nevada also posits that its statute is narrowly tailored to "protect [ ] candidates from unscrupulous attacks by requiring that those who seek to mislead the electorate into thinking that the candidate has taken certain positions disclose their identity." We disagree. Far more speech, such as speech in no way misleading, is affected by § 294A.320 than necessary to protect candidates from others "playing ventriloquist." Majors I, 317 F.3d at 723.

Additionally, the Statute contains exceptions for communications by candidates and political parties. See pp. 997-998, infra. No reason appears why candidates and political parties are less likely to engage in election-related fraud than other groups and entities; if anything, one would expect the opposite to be the case. For this reason as well, the Statute forwards the asserted interest in fraud prevention poorly if at all.

In sum, McIntyre's concern for fraud and libel prevention "during election campaigns" cannot serve to justify the Nevada Statute's intrusion on speech, due to the extremely broad purview of the Statute. Section 294A.320 is not limited to speech "during election campaigns," but covers all publications "relating to an election, candidate or any question on a ballot." It covers ballot proposition elections, in which libel is a

remote concern. It is riddled with exceptions that do not comport with the asserted interest in fraud prevention. The information it requires is unlikely to be of any real assistance to voters.

The state has therefore not established that § 294A.320 is narrowly tailored to further its interest in fraud prevention.

iii. Campaign Finance

Nevada posits a third state interest: the enforcement of "disclosure and contribution election laws." Nevada argues that § 294A.320 "directly advances . the state's ability to investigate and enforce other campaign finance laws that are, in fact, constitutional." To evaluate such an argument, one must pay close attention to the relationship between the challenged regulation and the particular set of laws it purportedly helps to enforce. We therefore begin by looking closely at Nevada's campaign reporting requirements.

Nevada's election laws include the following reporting requirements: (1) "Every person who is not under the direction or control of a candidate for office" must report to the Secretary of State campaign contributions received in excess of $100, and expenditures made on behalf of a candidate for office, Nev.Rev.Stat. § 294A.140; (2) "Every person . who advocates the passage or defeat of a question . on the ballot" must report to the Secretary of State campaign contributions received in excess of $100, Nev.Rev.Stat. § 294A.150; (3) "Every person who is not under the direction or control of a candidate for an office" must report to the Secretary of State expenditures made on behalf of the candidate in excess of $100, Nev.Rev.Stat. § 294A.210; (4) "Every person or group of persons organized formally or informally who advocates the passage or defeat of a question . on the ballot" must report to the Secretary of State expenditures made on behalf of or against the question on the ballot in excess of $100, Nev.Rev.Stat. § 294A.220.

Because of the dichotomy established in the case law between regulation of ballot-initiative elections and regulation of candidate elections, and because the Nevada Statute applies to both varieties of elections, we are confronted by the initial question of whether the reporting requirements pertaining to ballot-initiative advocacy themselves are constitutional. If Nevada's entire regulation of ballot-measure advocacy were unconstitutional, then enforcing such unconstitutional election laws could not possibly constitute a compelling state interest.

California Pro-Life Council v. Getman stated that "[w]hether a state may regulate speech advocating the defeat or passage of a ballot measure is an issue of first impression in the federal courts of appeal," 328 F.3d at 1100, as opposed to the regulation of speech advocating the defeat or election of a candidate.11 In California Pro-Life Council, the court did not decide whether California had the requisite compelling interest in regulating ballot-measure advocacy by imposing a reporting requirement on those engaged in it, but instead held that such speech was not "absolutely protected," and therefore may be regulated if the State's regulation passes strict scrutiny. Id. at 1103-04.

We do not need to go any further than California Pro-Life Council in deciding whether reporting requirements like Nevada's are constitutional. Even if the reporting requirements are constitutional, and even if the state interest in enforcing those reporting requirements is "overriding," we conclude, for a number of reasons, that Nevada's on-publication identity disclosure requirement is not narrowly tailored to achieve the goal of enforcing the reporting requirements.

First, Nevada's reporting requirements themselves largely belie the asserted governmental enforcement interest in requiring on-publication identification. The on-publication identity disclosure requirement does not apply to "any candidate or to the political party of that candidate which pays for or is responsible for paying for any billboard, sign or other form of advertisement which refers only to that candidate and in which the candidate's name is prominently displayed." Nev.Rev.Stat. § 294A.320(2)(a). Also, on-publication disclosure is not required "[i]f the material is expressly approved and paid for by the candidate and the cost of preparation and publishing has been reported by the candidate as a campaign contribution pursuant to NRS 294A.120." Nev.Rev.Stat. § 294A.320(2)(b). So, far from aiding in the enforcement of the disclosure requirement, the Statute excludes many of the most important instances in which reporting is required and makes reporting a substitute for on-publication identification in some instances.

Even in those situations where the identification requirements might assist the state in enforcing the other campaign finance statutes, the Nevada Statute does not match up with those statutes. For one thing, § 294A.320 requires no statement of how much money was contributed to produce a publication and contains no financial threshold. It thus affects a person spending $100, like McIntyre, in the same manner as a person spending $1 million. As stated by the ACLUN, under the Nevada Statute "an anonymous flyer created by a single rich individual for a million dollars is permitted while a small group that can raise a few hundred dollars for an anonymous political flyer is in violation." Cf. McConnell, 124 S.Ct. at 693 (challenged "amendments to FECA § 304 mandate disclosure only if and when a person makes disbursements totaling more than $10,000 in any calendar year to pay for electioneering communications").

Buckley v. Valeo recognized that an anonymous political advertisement may be a surreptitious campaign finance violation. 424 U.S. at 81, 96 S.Ct. 612. Section 294A.320, however, has no disclosure requirements beyond the sacrifice of anonymity. One cannot tell from an accurate on-communication disclosure mandated by the Statute whether the cost of producing the communication later reported by an organization or entity bears any resemblance to reality, or even whether the person identified has a reporting obligation at all (or is instead below the financial threshold for reporting). Moreover, Nevada has not explained why a group willing to violate the reporting and disclosure laws by failing accurately to report its expenditures after-the-fact would not be willing to violate § 294A.320 as well, by including no identifying information or inaccurate identifying information. The assistance provided by the Nevada Statute toward enforcing the campaign finance laws is

therefore minimal. Cf. Wash. Initiatives Now!, 213 F.3d at 1139 ("The State's interest in educating voters through campaign finance disclosure is more adequately served by a panoply of the State's other requirements that have not been challenged.").

Section 294A.320 also covers far more speech than is necessary to publicize the identities of people otherwise subject to financial reporting requirements under the core provisions of Nevada campaign finance law. Section 294A.210(1), for instance, requires for designated annual periods that:

Every person who is not under the direction or control of a candidate for an office at a primary election, primary city election, general election or general city election, of a group of such candidates or of any person involved in the campaign of that candidate or group who makes an expenditure on behalf of the candidate or group which is not solicited or approved by the candidate or group, and every committee for political action, political party or committee sponsored by a political party which makes an expenditure on behalf of such a candidate or group of candidates shall . report each expenditure made during the period on behalf of the candidate, the group of candidates or a candidate in the group of candidates in excess of $100.

(Emphasis added).12 Section 294A.320, however, reaches speech in addition to that covered by the reporting and disclosure requirements. As noted, the Statute has no minimum spending requirement, so it covers communications that need not be reported. And the Statute, as also noted, pertains to expression regardless of whether it is "on behalf of" a candidate or ballot question, although such neutral communications need not be reported under Nevada law. Section 294A.320, for example, would require the publishers of two flyers costing more than $100, one stating "Spoil your ballots; they're all crooks!" and the other "Vote for Jones," to include their names, while the publishers of the former would not have to report their expenditure under § 294A.210(1) because it is not on behalf of any candidate.

Our decision in Arizona Right to Life Political Action Committee v. Bayless provides a helpful analogue for assessing the adequacy in this regard of the "fit" between the Nevada Statute and its asserted purpose as an aid to enforcement of other campaign finance regulation. Bayless addressed the constitutionality of an Arizona statute that required political action committees ("PAC"s) to give advance notice before engaging in certain types of political speech within ten days before an election. The court found the statute not narrowly tailored as a means of addressing Arizona's proffered concerns about informing its electorate and avoiding corruption or the appearance of corruption in the political process. See 320 F.3d at 1010. In its analysis, Bayless aptly demonstrated why a statute such as Nevada's fails to satisfy the required "fit" between core political speech restriction and compelling state interests:

[T]he statute is over-inclusive because it is not limited to negative campaigning but rather reaches all of a PAC's independent expenditures that advocate for or against the election of any candidate. Because the notice requirement applies even if the expenditure merely paid for vanilla advertisements advocating "Vote for Smith," or "Freedom Lovers for Jones-Re-elect Our Senator," § 16-917(A) burdens innocuous speech that does not even implicate the statute's stated purpose.

Id. at 1012 (citing Grossman v. City of Portland, 33 F.3d 1200, 1207-08 (9th Cir.1994)). Similarly, the Nevada Statute does not comply with the narrow tailoring requirement, as it reaches a substantial quantity of speech not subject to the reporting and disclosure requirements it purportedly helps to enforce.

Further contributing to the lack of narrow tailoring with regard to the asserted campaign finance regulation purpose is the Nevada Statute's failure to limit its proscription on anonymous speech to a designated time period. In McIntyre, the Court noted that Ohio's statute "applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance." 514 U.S. at 352, 115 S.Ct. 1511; see also id. at 352 n. 16, 115 S.Ct. 1511 (commenting with disapproval on the "temporal breadth of the Ohio statute"). A properly time-limited statute might cure some of the over-inclusiveness of the Nevada Statute as an aid to enforcement of other campaign finance regulations, by focusing on the campaign-related speech as to which the public's interest in obtaining complete and timely disclosure is greatest. In the absence of any temporal limitation, however, the Nevada Statute's broad ban on anonymous election-related speech is all the more over-inclusive, and does not meet the applicable exacting scrutiny required.

In sum, Nevada's presentation of § 294A.320 as a salutary means of ensuring campaign financial disclosure is entirely unconvincing in light of the particulars of Nevada's overall scheme of campaign finance regulation. The statute "plainly is not its principal weapon against [campaign finance abuses]," McIntyre, 514 U.S. at 350, 115 S.Ct. 1511-or, indeed, any effective weapon at all-and is therefore not narrowly tailored to the state's interest.

Our conclusion that the Nevada statute at issue here is not narrowly tailored to assist the state in enforcing other campaign finance laws should not in any way suggest that an on-publication identification requirement could never be narrowly tailored to achieve this goal. As we have developed, Nevada's statute is particularly ill-designed for this purpose. An on-publication identification requirement carefully tailored to further a state's campaign finance laws, or to prevent the corruption of public officials, could well pass constitutional muster. Nevada's statute, however, is simply not a viable example of such legislation.

The upshot is that none of Nevada's three proffered governmental interests suffices to outweigh the significant First Amendment protection of anonymity accorded by McIntyre.

IV

Decisions since McIntyre

None of the case law subsequent to McIntyre persuades us that we are wrong in our assessment that the Nevada Statute cannot be sustained under that precedent.

Two state supreme court decisions upheld anonymous campaign speech statutes after McIntyre. See Seymour v. Elections Enforcement Comm'n, 255 Conn. 78, 762 A.2d 880 (2000); Doe v. Mortham, 708 So.2d 929 (Fla.1998).13 Seymour, however, pertained only to "elections and party-related solicitations," not to "referenda or other issue-based ballot measures." 762 A.2d at 886-87. The Nevada Statute, like the statute in McIntyre, does apply to ballot questions, and thereby reaches a substantial quantity of speech as to which the corruption rationale for regulating campaign speech, stressed in Buckley v. Valeo and in McConnell, has no application. Additionally, the Connecticut provision, unlike section 294A.320, was limited "to candidates and those associated with candidates, not persons unrelated to that candidacy." Seymour, 762 A.2d at 892. Whether or not the statute challenged in Seymour is constitutional, it precludes considerably less anonymous speech than the statute here at issue.

Although the Florida Supreme Court's decision in Doe is at odds with our holding, we do not find its reasoning convincing. Doe depended on its understanding of McIntyre as limited to a solitary individual's expression. See 708 So.2d at 934. We reject this reading of McIntyre, for the reasons we have already explained.

In Majors II, the Seventh Circuit upheld the constitutionality of an Indiana statute prohibiting anonymous campaign literature. The statute requires advertising that "expressly advocat[es] the election or defeat of a clearly identified candidate" to include "adequate notice of the identity of persons who paid for . the communication." 361 F.3d at 350 (quotation marks and citation omitted). Elements of Majors II may be read to be inconsistent with our opinion.

In particular, the Majors II majority fails to accord sufficient significance, in our view, to the distinction we regard as determinative between a prohibition of the circulation of communication based on its content and a requirement that the financing of election-related communications be separately reported. While Majors II noted "the distinction the Supreme Court has drawn between 'disclosure' (reporting one's identity to a public agency) and 'disclaimer' (placing that identity in the ad itself)," id. at 354, it did not discuss the conceptual distinction for First Amendment purposes between a regulation that alters a communication and one that does not. Nor did Majors II give any weight to the Supreme Court's distinction, concluding instead-incorrectly, we believe-that there is no meaningful difference with regard to the protection of anonymous speech between a requirement that the identity of the publisher be revealed later and in less detail and a requirement that identifying information be included on the communication itself. See id. at 353 ("Like the Indiana statute, the provision of the Bipartisan Campaign Reform Act that the [McConnell] Court upheld requires identifying any person who contributes to the making of the ad, even if the person is not a candidate or part of the candidate's campaign staff. True, what is required is disclosure to an agency rather than disclosure in the political ad itself, but, as is apparent from the Court's reference to 'providing the electorate with information,' the identity of the contributor is available to the public rather than secreted by the FEC." (Citation omitted)). But see id. at 357 (opinion of Easterbrook, J., dubitante) ("The majority in McConnell emphasized that the disclosure to the agency did not include the content of the advertisement. In Indiana the disclosure is affixed to the speech; the association is unavoidable; does this make a difference? My colleagues think not; I am not so sure." (Internal citation omitted)).

We recognize that the distinction we stress may at first glance appear finecut. But, as McIntyre, Buckley v. American Constitutional Law Foundation, and our decision in California Pro-Life Council discuss at some length, there is a difference of constitutional magnitude between mandatory identification with a particular message at the time the message is seen by the intended audience and the more remote, specific disclosure of financial information that, as McIntyre itself recognized, "is a far cry from compelled self-identification on all election-related writings." 514 U.S. at 355, 115 S.Ct. 1511.

This disagreement regarding the significance of McIntyre aside, the result in Majors II (and in the cases upon which it principally relies 14) does not clash with ours. As Majors II recognizes, the statute in McIntyre covered speech concerning ballot questions, while the statute in Majors II does not. 361 F.3d at 351. Majors II posited that after McConnell, McIntyre is limited to statutes precluding anonymous speech regarding ballot questions. See id. at 353-54. While, for the reasons already stated, we are not convinced that McConnell so narrowed McIntyre, if it did, the Nevada Statute falls on the McIntyre side of the line and, even on Majors II's analysis, is invalid.

Conclusion

Nevada has not met its burden under strict scrutiny of distinguishing its statute from that held facially unconstitutional in McIntyre. Section 294A.320 reaches far more core political speech than is necessary to achieve the state's otherwise legitimate interests, and advances those interests poorly if at all. We therefore VACATE the district court's grant of summary judgment and REMAND for further proceedings consistent with this opinion.

VACATED AND REMANDED.

FOOTNOTES

1. We refer to § 294A.320 in this opinion as "the Nevada Statute," or "the Statute."

2. The complete text of Nevada Revised Statutes § 294A.320 is as follows:Published material concerning campaign must identify person paying for publication; exceptions1. Except as otherwise provided in subsection 2, it is unlawful for any person to publish any material or information relating to an election,

candidate or any question on a ballot unless that material or information contains:(a) The name and mailing or street address of each person who has paid for or who is responsible for paying for the publication; and(b) A statement that each such person has paid for or is responsible for paying for the publication.2. The provisions of subsection 1 do not apply:(a) To any candidate or to the political party of that candidate which pays for or is responsible for paying for any billboard, sign or other form of advertisement which refers only to that candidate and in which the candidate's name is prominently displayed.(b) If the material is expressly approved and paid for by the candidate and the cost of preparation and publishing has been reported by the candidate as a campaign contribution pursuant to Nev.Rev.Stat. § 294A.120.(c) To a natural person who acts independently and not in cooperation with or pursuant to any direction from a business or social organization, nongovernmental legal entity or governmental entity.3. Any identification that complies with the requirements of the Communications Act of 1934 and the regulations adopted pursuant to the act shall be deemed to comply with the requirements of this section.4. As used in this section:(a) "Material" means any printed or written matter or any photograph.(b) "Publish" means the act of:(1) Printing, posting, broadcasting, mailing or otherwise disseminating; or(2) Causing to be printed, posted, broadcasted, mailed or otherwise disseminated,any material or information to the public.Nev.Rev.Stat. § 294A.320For an example of how a "candidate for public office" could meet the identification requirements of the Communications Act of 1934, 47 U.S.C. § 151 et seq., see 47 U.S.C. § 315(b)(2)(C):A candidate meets the requirements of this subparagraph if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds-(i) a clearly identifiable photographic or similar image of the candidate; and(ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

3. Our order stated that the allegations in plaintiffs' Complaint were inadequate, as the Complaint posited only that: "Because the existence of NRS 294A.320 creates a chilling effect on the protected speech of the ACLUN, Gary Peck and other parties, a case and controversy exists for which the ACLUN has standing to bring suit." We noted the absence of an "allegation that any of the appellants have engaged in, intend to engage in, or would engage in but for the statute, any speech concerning an election or candidate, much less any speech covered by NRS § 294A.320. Nor is there any allegation that the ACLU is suing on behalf of its members, or that any of the ACLU's members can meet the injury in fact requirement."

4. The state suggests the following wording for a certification request: "Whether the use of the phrase 'relating to an election, candidate or any question on a ballot' in NRS 294A.320 limits the application of that statute to political speech that expressly advocates the election or defeat of a particular candidate, or the passage or defeat of a particular ballot question."

5. Nevada points to two other circuits that have certified "the very same question." The statutory language at issue in those cases, however, was entirely different from that which we confront. Contested before McConnell, the statutes referred to "influencing"-not "relating to"-a candidate or election, and did not expressly encompass "information." These statutes were thus amenable to a narrowing construction. See Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 510 (7th Cir.1998) ("to influence the election of a candidate . or the outcome of a public question"); Va. Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268, 269 (4th Cir.1998) ("for the purpose of influencing the outcome of an election for public office"). Brownsburg Area Patrons is also inapposite because it concerned an after-the-fact reporting statute, not an on-publication identity disclosure requirement such as the one here at issue.The decision in Majors v. Abell (Majors I), 317 F.3d 719 (7th Cir.2003), certifying a question to the Indiana Supreme Court is consistent with our analysis. In Majors I, a case in which the state of Indiana advocated a narrowing construction, the Seventh Circuit agreed to certify a question concerning statutory language. Id. at 724-25. The statute "requires that political advertising that 'expressly advocat[es] the election or defeat of a clearly identified candidate' include 'adequate notice of the identity of persons who paid for . the communication.' " Id. at 721 (alteration in original). Confronted with the issue of whether the term "persons" is "limited to candidates, authorized political committees or subcommittees of candidates, and the agents of such committees or subcommittees," id. at 725, the Indiana Supreme Court declined to adopt such a narrowing construction: "If we construe the statute as the State suggests, we agree it removes most doubt as to the constitutionality of the statute, but we think it also eliminates most of what the statute was seeking to accomplish." See Majors v. Abell, 792 N.E.2d 22, 29 (Ind.2003). As a result, the Seventh Circuit, in the end, did have to decide the constitutionality of the statute at issue in Majors II. See Majors v. Abell (Majors II), 361 F.3d 349, 355 (7th Cir.2004). Certifying a statutory question to the state Supreme Court when the statute was not fairly open to the proffered interpretation thus accomplished nothing but delay.

6. See discussion of Majors II, infra at 1001-1002.

7. McConnell did not decide the validity of Bipartisan Campaign Reform Act ("BCRA") § 305(a)(3), which amended 47 U.S.C. § 315(b) to require identification of broadcast advertisements of candidate sponsorship in very limited circumstances. See McConnell, 124 S.Ct. at 708 ("Because we hold that the McConnell plaintiffs lack standing to challenge § 305, we affirm the District Court's dismissal of the challenge to BCRA § 305.").Nor did McConnell address the constitutionality of Federal Election Campaign Act ("FECA") § 318, which "requires that certain communications 'authorized' by a candidate or his political committee clearly identify the candidate or committee or, if not so authorized, identify the payor and announce the lack of authorization," see 124 S.Ct. at 710, because "challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals, as provided in 2 U.S.C. § 437h, not in the three-judge District Court convened pursuant to BCRA § 403(a)." 124 S.Ct. at 709. In this regard, McConnell stated with respect to BCRA § 311's addition of "electioneering communications" to FECA § 318's disclosure requirement only that: "Assuming as we must that FECA § 318 is valid to begin with, and that FECA § 318 is valid as amended by BCRA § 311's amendments other than the inclusion of electioneering

communications, the challenged inclusion of electioneering communications is not itself unconstitutional." Id. at 710.

8. Our reading of McIntyre to include groups is reinforced in light of freedom of association protections. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

9. We do not decide whether the preclusion of anonymous political communications could be valid if limited to corporations, as suggested in First National Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 13, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), given the greater attenuation in privacy interests involved in the highly-regulated corporate form. The Nevada Statute is not so limited.

10. Like Ohio, Nevada has a separate statute prohibiting the "publication of certain false statements of fact" concerning a candidate. Nev.Rev.Stat. § 294A.345(1). This provision, which is not challenged before us, states:1. A person shall not, with actual malice and the intent to impede the success of the campaign of a candidate, impede the success of the candidate by causing to be published a false statement of fact concerning the candidate, including, without limitation, statements concerning:(a) The education or training of the candidate.(b) The profession or occupation of the candidate.(c) Whether the candidate committed, was indicted for committing or was convicted of committing a felony or other crime involving moral turpitude, dishonesty or corruption.(d) Whether the candidate has received treatment for a mental illness.(e) Whether the candidate was disciplined while serving in the military or was dishonorably discharged from service in the military.(f) Whether another person endorses or opposes the candidate.(g) The record of voting of a candidate if he formerly served or currently serves as a public officer.

11. The Supreme Court in Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 300, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), held that a $250 limitation on how much an individual could contribute in a single election in support of or opposition to a particular ballot measure violated the First Amendment rights of association and expression.

12. Section 294A.220(1) is the comparable provision for ballot questions:Every person or group of persons organized formally or informally who advocates the passage or defeat of a question or group of questions on the ballot at a primary election, primary city election, general election or general city election shall . report each expenditure made during the period on behalf of or against the question, the group of questions or a question in the group of questions on the ballot in excess of $100. (Emphasis added).

13. But see Doe v. State, 112 S.W.3d 532 (Tex.Crim.App.2003) (holding unconstitutional a statute requiring persons who enter into agreements to print, publish, or broadcast political advertising to forfeit their anonymity).

14. See Majors II, 361 F.3d at 354-55 ("A statute quite like the Indiana statute was . upheld in Gable v. Patton, [142 F.3d at 940, 944-45 (6th Cir.1998), and Kentucky Right to Life, Inc. v. Terry, [108 F.3d 637, 646-48 (6th Cir.1997)].").

BERZON, Circuit Judge:

Subject: RE: Agenda Item 42 - AB 249

Chair Jodi Remke and Commissioners
Fair Political Practices Commission
1102 Q Street, Suite 300
Sacramento, CA 95814

Re: Agenda Item #42/September 21, 2017 Meeting

Dear Chair Remke and Commissioners Audero, Hatch & Hayward:

You received in the last day more than a half dozen letters concerning AB 249 from Trent Lange of the Clean Money Campaign, Common Cause, other advocates of the legislation, AB 249's principal legislative author and the Legislature's Elections Committee chairs concerning the Commission's position on AB 249. Your staff legislative director, Phillip Ung, had written a careful analysis of that bill which you have before you. The recent letter writers appear to be concerned to discourage the Commission from advising Governor Brown about the impacts of AB 249, which the Commission as the expert agency on the Political Reform Act has every right to do if you choose.

Here are a few points about the bill which directly and indirectly affect the Commission, which is likely to be one litigation target if the bill becomes law (see, e.g., Agenda Item # 40):

(1) AB 249 contains provisions the FPPC is currently enjoined to enforce due to their unconstitutionality. AB 249 extends chapter 4 disclaimer provisions, and potential treble damage penalties for violations, to general purpose committees, including political party committees. Those provisions flatly conflict with the federal court injunction in California Republican Party, California Democratic Party and Orange County Republican Party v. FPPC, USDC/ED#CIV-S-04-2144 FCD PAN (ED Cal. Oct. 27, 2004) (copy attached), in which the federal district court for the Eastern District of California, following the Ninth Circuit decision in ACLU of Northern Nevada v. Heller (discussed below), enjoined the FPPC from enforcing the "top two donor" provisions of chapter 4 of the Act against general purpose committees other than political party committees. AB 249 doubles down as noted, requiring disclaimer donor disclosure including "top three donor" disclosure for even general purpose committees that engage in ballot measure and independent expenditure activities. The FPPC will be at risk for a renewed lawsuit to enforce the existing injunction from the parties in that case, or for a new lawsuit raising the same issue from others similarly situated.

(2) But that's not all. The enhanced donor disclosure provisions of AB 249's "top three donor" disclosure regime also raise serious constitutional questions about content based regulation of speech, raised by ACLU of Northern Nevada v. Heller, 378 F.3d 979, 2004 WL 1753264 (9th Cir. 2004), which invalidated a Nevada "on publication" disclosure statute. See also, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015); but cf. Citizens United v. FEC, 58 U.S. 310, 367-370,130 S.Ct. 876 (2010)[upheld more limited disclaimer provisions of the Bi-Partisan Campaign Reform Act of 2002.]) AB 249 assumes there is no meaningful public disclosure except by means of "on publication" disclosure on advertisements. That is belied by extensive online, as contrasted with on publication, disclosure. The FPPC's "top ten" and "ten plus two" online disclosure website contains far more detail which is readily available to the public to determine the funding sources of ballot measure and independent expenditure campaigns. This disclosure was even enhanced by the SB 27 legislation of 2015 which requires "multi-purpose organizations" that participate in ballot measure and independent expenditure expenditures to disclose large donors to the multi-purpose organizations and triggers potential

detailed campaign disclosures by those donors. Online disclosure was the solution to Clean Money's purported public confusion about the sources of advertising money "problem."

(3) But wait, there's more. AB 249 adopts the "black screen" background requirement for television advertisements about ballot measure campaign and independent expenditure donor disclosures. 1/3d of the "full screen" for a television advertisement during the requisite disclaimer disclosure period for the ad must contain a "black screen" on which the "top three donors" are disclosed (with lots of additional detail like centered positioning and ranking from largest-to-smallest donors, no "all caps" lettering, and other minutiae). Where no "top three donor" disclosure is required, the "black screen" must still be used for 1/4th of the "full screen." (amended Gov. Code 84504.1). For print advertisements, an entire page of a multi-page print ad must be devoted solely to the disclaimer (amended Gov. Code 84504.2(a).) This requirement runs afoul of the Heller decision, but also may conflict with Riley v. National Federation of the Blind, 487 U.S. 781, 108 S Ct. 2667 (1988), a North Carolina charitable solicitation statute case in which the U.S. Supreme Court invalidated a compelled speech content provision of the law, holding that North Carolina could not require a fundraiser to reveal the average percentage of contributions actually turned over to charities in the previous 12 months. Such "compelled speech" is unconstitutional because it alters a speech's content, requiring a speaker to say something he otherwise would not have said, the Court reasoned. According to the Court, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners....The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it" (Riley at 2675). Just yesterday, the Ninth Circuit Court of Appeals struck down a San Francisco ordinance that compelled speech by soda manufacturers that ran afoul of the same constitutional problems. American Beverage Ass'n v. City and Cty of San Francisco, No. 16-16703 (9th Cir. Sept. 19, 2017). ["We agree with the Associations that the warning requirement in this case unduly burdens and chills protected commercial speech. As the sample advertisements show, the black box warning overwhelms other visual elements in the advertisement. As such, it is analogous to other requirements that courts have struck down as imposing an undue burden on commercial speech, such as laws requiring advertisers to provide a detailed disclosure in every advertisement, Ibanez [v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136], at 146, to use a font size "that is so large that an advertisement can no longer convey its message," Public Citizen Inc. [v. Louisiana Attorney Disciplinary Board], 632 F.3d [212] at 228 [(5th Cir. 2011], or to devote one-sixth of the broadcast time of a television advertisement to the government's message, Tillman [v. Miller], 133 F.3d [1402] at 1404 n.4."] While these were commercial speech cases, the First Amendment analysis is no different, and applies equally to the AB 249 disclosures that "unduly burden" the speaker's message. Finally, the 1/3d, 1/4th and separate page disclaimer requirements, in addition to the enhanced video audio disclaimer length requirements, pose potential Fifth and Fourteenth Amendment "takings" problems.

(4) Earmarking exemption does hinder small donor disclosure. The recent authors also attempt to defend the proposed earmarked contribution exemption of amended Gov. Code section 85704(c) from Mr. Ung's suggestion that this provision undermines the current $100 campaign contribution disclosure threshold. They are just wrong, and no amount of spin from legislative committee staffers has rebutted this with any facts. The proposed amendment exempts from disclosure the names of contributors of less than $500 whose contributions solicited for "specifically identified" candidates or ballot measures have been solicited by a membership organization, such as a labor union, by deeming such payments as not "earmarked" at all. ["(c) Notwithstanding subdivisions (a) and (b), dues, assessments, fees, and similar payments made to a membership organization or its sponsored committee in an amount less than five hundred dollars ($500) per calendar year from a single source for the purpose of making contributions or expenditures shall not be considered earmarked."] The result of this exemption is that contributions actually solicited for those purposes won't be identified to the actual donor. Current section 85704 works together with Gov. Code section 84301 and affects "disclosure" of donors. The "under $500" threshold of proposed section 85704(c) directly undermines the $100 disclosure threshold of Gov. Code section 84211(f) for specified contributions in amended section 85704(c).

Thank you for your consideration. This is my opinion and not that of, or made on behalf of, any client or my firm. I will not be able to attend the meeting in person.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA REPUBLICAN PARTY; CALIFORNIA DEMOCRATIC PARTY; and ORANGE COUNTY REPUBLICAN PARTY;

Plaintiffs,

v.

FAIR POLITICAL PRACTICES COMMISSION; LIANE RANDOLPH, in her official capacity; SHERIDAN DOWNEY II, in his official capacity; THOMAS KNOX, in his official capacity; PHILLIP BLAIR, in his official capacity; PAMELA KARLAN, in her official capacity,

Defendants.

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NO. CIV-S-04-2144 FCD PAN

MEMORANDUM AND ORDER

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On October 12, 2004, plaintiffs, California Republican Party ("CRP"), California Democratic Party ("CDP"), and Orange County

Republican Party ("OCRP")(collectively "plaintiffs") filed a complaint with this court challenging the constitutionality of two provisions of the California Political Reform Act ("PRA"), Govt. Code § 81000, et seq. On October 20, 2004, plaintiffs filed a motion for a preliminary injunction and an application to shorten time. That same day, the court granted plaintiffs' motion to shorten time, scheduled the matter for hearing on October 26, 2004, and set an expedited briefing schedule. (October 20, 2004 Order Granting Plaintiff's Application to Shorten Time on Motion for Preliminary Injunction at 2.)

Having fully considered the arguments raised by counsel at the October 26 hearing and in written memoranda filed with the court, and for the reasons outlined herein, the court grants plaintiffs' motion for preliminary injunction.

FACTUAL AND PROCEDURAL HISTORY

On November 5, 1996, California voters enacted the "California Political Reform Act of 1996," or "Proposition 208" ("Prop. 208"), an initiative statute that made sweeping changes to California's Political Reform Act. Among its various provisions, Prop. 208 required that any committee paying for an advertisement supporting or opposing a ballot measure identify on the face of the advertisement the committee's two largest contributors of $50,000 or more.[1] Cal. Govt. Code § 84503.

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[1] Cal. Govt. Code §84503 provides:
(a) Any advertisement for or against any ballot measure shall include a disclosure statement identifying any person whose cumulative contributions are fifty thousand dollars ($50,000) or more.
(b) If there are more than two donors of fifty thousand dollars ($50,000) or more, the committee is only required to disclose the highest and second highest in

Prop. 208 mandated similar disclosure requirements when committees make independent expenditures for candidates or ballot measures.[2] Cal. Govt. Code § 84506.[3]

Shortly after Prop. 208's passage, it was subject to a legal challenge in this court. California Pro Life Council Political Action Committee v. Scully, 989 F. Supp. 1282 (1998). On January 6, 1998, this court entered a preliminary injunction barring

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that order. In the event that more than two donors meet this disclosure threshold at identical contribution levels, the highest and second highest shall be selected according to chronological sequence.

[2] Cal. Govt. Code § 84506 provides:
(a) A broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following:
(1) The name of the committee making the independent expenditure.
(2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars ($50,000) or more during the 12-month period prior to the expenditure. If the committee can show, on the basis that contributions are spent in the order they are received, that contributions received from the two highest contributors have been used for expenditures unrelated to the candidate or ballot measure featured in the communication, the committee shall disclose the contributors making the next largest cumulative contributions of fifty thousand dollars ($50,000) or more.

(b) If an acronym is used to identify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements.
Cal. Govt. Code § 84506.

[3] All further statutory references are to the California Government Code unless otherwise noted.

enforcement of Proposition 208.[4] While that injunction was in place and before resolution of the permanent injunction, the voters enacted Proposition 34, which superceded most of Prop. 208's provisions, but left intact the above-described disclosure provisions contained in Government Code sections 84503 and 84506.

The passage of Proposition 34 rendered moot most of the plaintiffs' claims in Scully, except those raised by professional slate mail vendors challenging the disclosure requirements in section 84503. In an unpublished order, this court permanently enjoined enforcement of section 84503 against slate mailer organizations, though its provisions remain enforceable against other forms of political committees.

Plaintiffs are subject to the disclosure requirements in sections 84503 and 84506. As organized political party committees, plaintiffs advance the shared political beliefs of their members by engaging in political activities, including, inter alia, recruiting and supporting candidates for elective office, taking public positions on policy issues, engaging in voter registration, conducting state conventions, and organizing get-out-the-vote activities. (Declaration of Kathleen Bowler ("Bowler Decl.") ¶ 4; Declaration of Micahel Vallante ("Vallante Decl.") ¶ 5.)

Under the PRA, plaintiffs are "general purpose committees" in that they are formed to support or oppose more than one

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[4] The court takes judicial notice of the March 1, 2001 order in California Prolife Council v. Scully, No. Civ. S-96-1965 LKK/DAD. Fed. R. Evid. 201.

candidate or ballot measure.[5] This is distinguishable from a "Primarily Formed Committee" which is defined as a committee formed primarily to support or oppose a single candidate or measure or group of candidates and/or ballot measures "voted upon in the same city, county, or multicounty election." § 82047.5. Both general purpose committees and primarily formed committees must comply with the disclosure requirements in sections 84503 and 84506.

Pursuant to implementing regulations promulgated by defendant Fair Political Practices Commission ("FPPC"), in order to comply with the disclosure provisions in sections 84503 and 84506, a committee must "explicitly indicate that the contributor or contributors were major donors to the committee by stating, for example 'major funding by' or 'paid for by.'" Cal. Code Regs. tit. 2 § 18450.4(a).

Both section 84503 and 84506 were amended recently by Senate Bill 604 ("SB 604"), an urgency statute which became effective upon signature of the Governor on September 10, 2004. Primarily,

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[5] Section 82027.5 provides:
(a) "General purpose committee" means all committees pursuant to subdivision (b) or (c) of Section 82013, and any committee pursuant to subdivision (a) of Section 82013 which is formed or exists primarily to support or oppose more than one candidate or ballot measure, except as provided in Section 82047.5.
(b) A "state general purpose committee" is a political party committee, as defined in Section 85205, or a committee to support or oppose candidates or measures voted on in a state election, or in more than one county.
(c) A "county general purpose committee" is a committee to support or oppose candidates or measures voted on in only one county, or in more than one jurisdiction within one county.

the amendments changed the window of time used to determine which contributors qualified as the "two largest contributors of $50,000 or more." Stats. 2004, c. 478 (S.B. 604) § 13. Prior to SB 604's passage, the largest contributors were defined from the date the committee filed its statement of organization and ending seven days prior to the time the advertisement was sent to the printer or broadcast station. As amended, the window begins "the day the committee made its first expenditure to qualify, support or oppose the measure and end[s] seven days before the advertisement is sent to the printer or broadcast station." § 84502. Under the revised definitions, the two largest contributors to the CDP in the preceding 12 months are the California Teachers Association ("CTA") and Senator John Burton ("Burton"). (Bowler Decl. ¶ 11.) For the CRP, the two largest contributors are Chevron Texaco and Alex G. Spanos ("Spanos"). (Vallante Decl. ¶ 6.) Lastly, the largest contributors over the preceding 12 months to OCRP are the New Majority Committee ("New Majority") and the CRP. (Declaration of Scott Baugh ("Baugh Decl. ¶ 6.)

The disclosure requirements mandate that plaintiffs list the above-referenced contributors on all advertisements made in conjunction with the November 2, 2004 election, including some advertisements advocating positions which the contributors actively oppose or on which they have no public position. (See Bowler Decl. ¶ 15; Baugh Decl. ¶ 6; Vallante Decl. ¶ 6.)

According to plaintiffs, these mandated disclosures violate their First and Fourteenth Amendment rights in that they impair the effectiveness of their political advertisements by coopting

valuable print space and, in some cases, linking the political message to contributors against which potential readers might harbor bias.[6] (See e.g., Vallante Decl. ¶ 10.)

STANDARD

The Ninth Circuit recognizes two tests for determining whether to grant a preliminary injunction.

Under the traditional test, the movant must establish four factors to obtain injunctive relief: 1) a likelihood of success on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting an injunction. Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).

Alternatively, the Ninth Circuit has articulated the test as requiring the moving party to demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations are not inconsistent. Rather, they represent two points on a sliding scale in which the required degree of irreparable harm increases as the possibility of success decreases. Roe v. Anderson, 134 F.3d 1400, 1402 & n. 1 (9th Cir. 1998), aff'd, Saenz v. Roe, 526 U.S. 489 (1999).

ANALYSIS

1. Irreparable Injury

To obtain a preliminary injunction plaintiff must first demonstrate that there exists a significant threat of irreparable

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[6] The First Amendment is made applicable to the states by the Fourteenth Amendment.

injury." Oakland Tribune, Inc., 762 F.2d at 1376. In the absence of a significant showing of irreparable injury, the court need not reach the issue of likelihood of success on the merits. See id.

Loss of First Amendment freedoms generally is regarded as an irreparable injury, even if short in duration. Elrod v. Burns, 427 U.S. 347, 272 (1976). Here, the disclosure requirements may deprive plaintiffs of their ability to keep the identity of their contributors separate from their political message.[7] Connecting the political message to specific groups may prejudice voters against the position advocated. As an example, plaintiffs note that the disclosure requirement that Chevron Texaco be listed as a major donor on all CRP advertisements may reduce the advertisements' effectiveness with voters who view dislike that corporation. Similarly, voters who dislike labor unions may be biased against CDP advertisements which identify CTA as a major contributor. The Supreme Court has recognized the "respected tradition of anonymity in the advocacy of political causes," in part based on the understanding that ideas may at times "be more persuasive if . . . readers are unaware of [the speaker's]

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[7] Plaintiffs also provide testimony from party officials that contributors may curtail the amount of contributions in the future to avoid qualifying for on-publication disclosure of the contributors' identity. Defendants argue that this injury is speculative because plaintiffs have not submitted testimony from any donor that has refrained from contributing in order to avoid on-publication disclosure of the donor's identity. However, for purposes of this motion, it is not necessary that the court decide whether this injury is sufficiently concrete or imminent since plaintiffs have established the presence of independent injury.

identity."[8] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1996); see also American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 988 (9th Cir. 2004.) Thus, plaintiffs have identified an irreparable injury likely to occur unless the injunction is granted.

2. Likelihood of Success on the Merits

Plaintiffs also must demonstrate either likely success on the merits or that serious questions are raised and the balance of hardships tips in its favor.

All parties agree that the challenged statutes must satisfy strict scrutiny. Heller, 378 F.3d at 992-993 ("As a content-based limitation on core political speech, the Nevada Statute must receive the most 'exacting scrutiny' under the First Amendment.")(quoting McIntyre, 514 U.S. at 346. Such requirements survive strict scrutiny only if they are "narrowly tailored to serve an overriding state interest." Id. (quoting McIntyre, 514 U.S. at 357). More specifically, "a content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest." Id. (quoting Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir.1998)).

Defendants' asserted purpose for requiring on publication disclosure of the two major contributors is to provide relevant

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[8] Defendants argue that the contributors are not in fact anonymous, since they must disclose their identities under contribution reporting requirements in existing law. However, "it is not just that a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech." Heller, 378 F.3d at 991.

information to voters. Specifically, defendants note that voters' "capability of evaluating who is doing the talking is of great importance, and expecting voters to accomplish such evaluation solely by reference to the after-the-fact disclosure reports on file with the Secretary of State is unrealistic." (Opp'n at 12.) The Supreme Court has recognized that informing voters regarding campaign contributors is a compelling purpose and plaintiffs do not contend otherwise.

However, the governmental objective of informing voters will not justify *all* disclosure requirements; what is sufficiently compelling to justify one disclosure requirement may not suffice to justify another. In Heller, supra, the Ninth Circuit confronted a Nevada statute requiring on-publication disclosure of parties responsible for any materials relating to an election of a candidate or ballot measure. In support of the disclosure requirements, the defendant in Heller proffered several governmental interests, including the need to provide information to voters regarding the identity of campaign donors. The Ninth Circuit specifically rejected as "not sufficiently compelling," the government's stated interest of informing voters, finding that "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Heller, 378 F.3d at 993 (quoting Mcintyre, 514 U.S. at 348-349).

Admittedly, the statute in Heller was broader than that challenged here. However, the factual distinctions between the statutes do not undermine the applicability of Heller's

reasoning. Relying heavily on the Supreme Court decision in McIntyre, the Heller court noted that "both [cases] involve campaign statutes that go beyond requiring the reporting of funds used to *finance* speech to affect the *content of the communication itself*. This case and McIntyre therefore involve governmental proscription of the speech itself unless it conforms to prescribed criteria." Id. at 987 (emphasis in original). Like both Heller and McIntyre, the major donor disclosure requirements at issue here go beyond the reporting of funds that finance speech to affect the content of the advertisements.[9] Because these types of on-publication disclosure requirements are "considerably more intrusive than simply requiring [speakers] to report to a government agency," they are a "content-based restriction on core political speech" which must receive "the most 'exacting scrutiny' under the First Amendment. Heller, 378 F.3d at 992 (quoting McIntyre, 514 U.S. at 346).

Defendants cannot satisfy that test here because existing off-publication requirements are less restrictive on speech and more effective in meeting the purpose of informing voters. Contrary to defendants' suggestion during oral argument that contributor information is available only in "dusty" old files at the Secretary of State's office, in fact voters can easily obtain access to the identities of a political party's contributors through recourse to reported contributor information filed with the Secretary of State. In the last 16 days before an election, committees must disclose contributions within 24 hours. This

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[9] Conceivably, some form of on-publication disclosure requirements could survive after Heller and McIntyre.

information is available over the internet in a user-friendly database. Indeed, defendants' counsel made use of this very system to calculate for the court the amount of money expended thus far on political advertising in California for the November 2004 election. (See Opp'n at 12 n. 7.) Consequently, voters can obtain daily updated information regarding a speaker's contributors by accessing the Secretary of State's on line records.

Further, the Secretary of State's contributor report information provides a far more complete and accurate picture to voters than the limited major donor disclosures mandated by sections 84503 and 84506. The latter disclosures require political party committees to single out on the face of the document two out of tens of thousands of contributors, many of whom also make sizeable contributions. This "visual byte" provides a limited and potentially distorted picture of a political party's contributors.

In the context of primarily formed committees, this bit of information might prove useful at identifying the true "speaker." As the Heller court noted, "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Heller, 378 F.3d at 994. In such cases, the government may indeed have a compelling interest in unveiling for the voters the true "speakers" behind such an advertisement. However, this is not such a case. In the context of political parties, the true "speaker" is the political party, whose name is disclosed on the face of the advertisement.

In fact, identifying a political party's two largest contributors as the "speakers" could mislead voters because these contributors may not endorse the message in the advertisement. Contributions are made to political parties for many reasons, including agreement with a party's general philosophy, support of certain platform positions, or simply opposition to the competing party. The political parties in turn use this funding to support a wide variety of activities, including dissemination of advertisements in support of, or opposition to, myriad candidates and ballot measures. It is not difficult to imagine a situation in which the contributor will be identified as a major donor on an advertisement containing a political message with which the contributor does not agree.[10] To the contrary, it seems nearly inevitable in light of the plethora of positions advocated by the political parties in a given year. However, the court need not speculate as plaintiffs have identified concrete examples from this election cycle. Plaintiffs note that one of the CDP's major donors, CTA, is officially neutral on the 15th District State Senate election, as well as Propositions 63 and 72. Yet CTA will be identified as a major funding source on mail endorsing Democrat Peg Boland in the 15th Senate race and taking positions on most statewide ballot measures (Id.)(citing Nunez Decl. ¶ 8-9,

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[10] One of the principal arguments raised by defendants' counsel during argument was the need for full discovery before a hearing on the merits, at which plaintiff would be able to provide the court with the actual number of times a major contributor identified on an advertisement disagreed with the advertisement's message. While there may be circumstantial evidence on this issue, absent an extraordinary degree of candor, the court wonders how the state could constitutionally elicit disclosure of one's political beliefs or preferences.

Bowler Decl. ¶ 15.) In addition, plaintiffs note that the New Majority Committee, one of the two largest contributors to the OCRP, supports Proposition 62 and has contributed $25,000 to Californians for an Open Primary Committee, a Primarily Formed Committee advocating passage of Proposition 62. However, the OCRP opposes Proposition 62 and the New Majority Committee will be identified as providing major funding for the OCRP's walk piece which advocates defeat of Proposition 62. (Baugh Decl. ¶ 6.) In these situations, voters may infer inaccurately that contributors, such as CTA and the New Majority Committee endorse the political messages espoused in the advertisement.[11] By potentially misleading voters, the disclosure of major donors to political parties may actually undermine the stated governmental interest of providing information to voters regarding the "identity of the speaker."

Consequently, the court finds that plaintiffs have demonstrated serious questions going to the merits of their claim that the disclosure requirements in sections 84503 and 84506 unconstitutionally infringe their First Amendment right to free speech and association.

3. Balance of Hardships

The court is concerned that plaintiffs waited until less than two weeks before the general election to seek injunctive relief. As of the issuance of this order, there are just five

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[11] By contrast, in the context of a Primarily Formed Committee, such inference may be reasonable. For example, one might reasonably infer that the New Majority Committee supports Proposition 62 in light of its contribution to the Californians for an Open Primary Committee, which is organized for the primary purpose of advocating Proposition 62's passage.

mail days before the election. Presumably, at this point, the campaigns have been in full swing for months and most of the advertisements have been printed and sent. Consequently, much of the asserted injury already has occurred. However, the fact remains that plaintiffs have demonstrated an ongoing harm over the next few days which has First Amendment implications. Further, the Heller decision's rejection of on-publication disclosure requirements substantially bolsters plaintiffs' position.

In light of these considerations, and because the state has offered no authority for denying relief on the basis of laches, in a First Amendment case where the plaintiffs delay appears to be less than two months, the court feels constrained to grant plaintiffs' request for a preliminary injunction.

The court stresses that this is a provisional remedy. During oral argument, defendants' counsel expressed some degree of frustration regarding the limited time provided to prepare for hearing in this case. This is understandable, particularly in light of the fact that plaintiffs created the exigency through their delay in filing the complaint. However, defendants will have every opportunity to fully develop the factual record and legal issues in this case and make their case on the merits. The court holds only that, in light of the constitutional dimensions of the injury, plaintiffs have met their burden to obtain injunctive relief. The court intends to hear the case on the merits on an expedited schedule, well prior to any future election cycle.

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CONCLUSION

For the foregoing reasons, it is hereby ordered that defendants and all of their respective officers, agents, servants, employees, representatives, and attorney and those persons in active concert or participating with any of the above with actual notice of this Preliminary Injunction, are hereby restrained and enjoined from enforcing Cal. Govt. Code §§ 84503 and 84506 against plaintiffs or similarly situated political party committees registered with the Secretary of State as general purpose committees pending entry of a final judgment in this case.

Pursuant to Fed. R. Civ. P. 65(c) and Local Rule 65-231(d)(1), the aforementioned Preliminary Injunction shall be effective upon plaintiffs' filing of a bond in the amount of $1,000.00.

IT IS SO ORDERED.

Dated: October 27, 2004

FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE