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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, v. AMERICAN CIVIL RIGHTS COALITION, INC., WARD CONNERLY, and DOES 1-50, Defendants.	Case No. 03AS04882 FPPC No.: 02/522 PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: September 19, 2003 Time: 9:00 AM Dept: 54 Judge: Hon. Thomas Cecil Date Action Filed: September 3, 2003 No Trial Date Set

INTRODUCTION

A set forth below, granting injunctive relief in this matter is justified by the interest of the People of the State of California in the disclosure of ACRC's contributors. Defendants arguments do not provide a basis for denying that relief.

FACTS RAISED BY DEFENDANTS' RESPONSIVE PLEADINGS

Defendants correctly assert that the Racial Privacy Initiative Committee ("RPI") is a committee formed in California for the purpose of raising contributions and making expenditures in support of the qualification and passage of Proposition 54, commonly referred to as the Racial Privacy Initiative. RPI has filed a statement of organization identifying, within its full name, the American Civil Rights Coalition (ACRC) as its sponsor. RPI has filed the required campaign disclosure statements, since its formation, for each period as required by the Political Reform Act ("the Act").[1] While defendant ACRC may be "[o]ne of its [RPI's] many contributors," it is the contributor that has contributed almost ninety percent of the total funds received by RPI.

ACRC is a separate entity. A nonprofit corporation, ACRC is a political advocacy group "engaging in nationwide activities advocating opposition to racial preferences and discrimination, sometimes in legislative halls and in the media, sometimes in supporting ballot measures." (Defendants' Opposition to Motion for Preliminary Injunction, hereinafter Defendant's Opposition, p. 1:24-26). Defendants state that "[d]uring the period in question, ACRC was engaged in advocacy … in several states and cities." (Defendants' Opposition, p. 1:26-27 and p. 2:1). Defendants admit that the $864,115 in funds it contributed to RPI through March 31, 2002, were funds from "ACRC's own treasury funds comprised of (sic) donations solicited for the multiple activities and purposes of ACRC" (Defendants' Answer to Complaint, paragraphs 7 & 8.) One of those purposes was the qualification and passage of Proposition 54 in California.

Defendants state that with respect to Proposition 54, "ACRC fully reported its expenditures … to RPI," and that its identity as the sponsor of RPI "was fully disclosed on the campaign reports filed by

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[1] The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

RPI." (Defendants' Opposition, p. 2:2-5). While ACRC is identified as the sponsor on RPI's campaign reports, the only reporting of ACRC's monetary and nonmonetary contributions was made by RPI, not ACRC, and RPI's reporting only disclosed the contribution amounts it received from ACRC, without identifying the names of the source contributors to ACRC. Defendants however, raise two legal claims as to why the funds they contributed to RPI are not of such a character as to make the identities of the sources of the funds disclosable. Before addressing defendants' legal claims in this regard, we first must address defendants' argument with respect to the standards for issuance of a preliminary injunction.

ARGUMENT

Standards for Injunctive Relief

As defendants state, the two standards for the court to apply in determining whether to issue a preliminary injunction are: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm the defendant is likely to suffer if the preliminary injunction is issued. With respect to the likelihood that plaintiff will prevail on the merits, that issue is reserved for discussion, later in this memorandum, when addressing defendants' legal contentions in support of their refusal to file campaign disclosure reports identifying the contributors to ACRC.

With respect to the balancing of the relative harm to the parties, plaintiff, on behalf of California voters, is seeking this injunction to enjoin continuing violations of the Act and compel disclosure, before the October 7, 2003, special election, of individual contributors whose funds were used to support Proposition 54. The Act makes clear that disclosure is one of its primary statutory objectives stating:

> The people enact this title to accomplish the following purposes:
> (a) Receipts and expenditures in election campaigns should **be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.**
> (§ 81002, subd. (a), emphasis added.)

As such, the harm that will come to the People of the State of California if injunctive relief is not granted is that the contributor information will not be "fully and truthfully disclosed" to the voters so they can be "fully informed" prior to the election, when the value of such information is at a premium. Indeed, as set forth above, the People of the State of California have expressly given great weight to such harm under the Act. Defendants, on the other hand, suffer only the harm of being required to do

that which the law already requires them to do[2]. (Civil Code § 3367(2) "that which ought to be done") Certainly, that which ought to be done includes complying with the requirements of the law.

Defendants further argue that a preliminary injunction is designed to maintain the status quo. Again, the question of the applicability of this principle must turn on the legal finding as to whether or not the Act's provisions are applicable to defendants in this situation. If they are, as plaintiff contends, it would be patently absurd for the court to hold that the status quo must be maintained when that "status quo" is the continuing violation of the law.

Therefore, the only issue to be determined in this matter is whether, under the facts before the court, defendants are required to comply with the campaign disclosure requirements set forth in the Act. If they are, the injunction should issue. If they are not, the injunction should be denied. Accordingly, we turn now to a discussion of the legal defenses raised by defendants in support of their claim that they do not come within the reach of the Act by its statutory interpretation or, if they do, they are not required to report on constitutional grounds.

ACRC, and the Contributions to it, Come Within the Purview of the Act

Government Code section 82013, subdivision (a) includes within the definition of "committee" "any person or combination of persons who directly or indirectly … Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year. This type of committee is commonly referred to as a recipient committee. Government Code section 84101, subdivision (a) requires a recipient committee to file a statement of organization within 10 days after it has qualified as a committee.

In addition, the Act also requires a recipient committee to file certain campaign disclosure statements, including semiannual statements pursuant to section 84200. Section 84211 identifies the information required to be contained in each campaign statement. Pursuant to subdivision (f) thereof, if the committee receives contributions of one hundred dollars or more from a person, the statement must include, for each person who contributes one hundred dollars or more, the person's full name, street address, occupation, employer's name or business name if self-employed, the date and amount received for each contribution received during the period covered by the campaign statement.

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[2] Assuming plaintiff prevails on the first question, for without that finding, the second question need not be reached.

Defendants acknowledge that the funds ACRC contributed to RPI in 2001 and 2002 were from solicited funds it received into ACRC's treasury. If those funds, solicited by ACRC and contributed by ACRC to RPI, were "contributions" under the Act, defendant ACRC has qualified as a committee and is thereby required to file the appropriate campaign statements and comply with the disclosure requirements of the Act. Thus, as defendants acknowledge, the primary issue is whether the donations made to ACRC were, in fact, "contributions" under the Political Reform Act.

Section 82015 states that a contribution is a payment … without full and adequate consideration, unless it is clear from the surrounding circumstances that it is not made for political purposes. Regulation 18215, subdivision (a) further defines the term "contribution" and when a payment is made for a political purpose.

> (a) A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:
> (1) For the purpose 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; *or*
> (2) Received by or made at the behest of the following or any agent thereof:
> …
> (D) An organization formed or existing primarily for political purposes, including, but not limited to, a political action committee established by any membership organization, labor union or corporation.

Plaintiff contends that under the above definitions, donations solicited by defendant ACRC and contributed to RPI were contributions made for political purposes if the donations were made after ACRC initially contributed to RPI. Before that time that ACRC made these contributions to RPI, arguably, ACRC would not have been a committee because of the application of subdivision (b) of regulation 18215 further defining contributions.[3] This is what is generally referred to as the "one-bite rule."[4]

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[3] At this time, plaintiff is not attempting to rebut the presumption created under regulation 18215, subdivision (b), the "one-bite rule" with respect to the donations made on the "first bite" involving the contributions made by defendant ACRC to RPI in 2001. Plaintiff will seek leave to amend its complaint if further evidence suggests this presumption may be rebutted.

[4] Defendants, in their Opposition to Motion for Preliminary Injunction, refer to this as the "second bite rule." Under the presumption created by the rule, it allows for "one-bite" before certain payments meet the definition of a contribution. On the "second bite" the payments come within the definition. Whichever terminology is applied, the rule is the same.

Regulation 18215, subdivision (b), the "one-bite rule" states:

> (b) The term 'contribution' includes:
>
> (1) Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures. …
>
> There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least one thousand dollars ($1,000) in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years.

Regulation 18215, subdivision (b)(1) addresses the situation where a donor makes a payment to an organization when, at the time of making the payment, that organization has no history of making contributions for political purposes in California, but subsequently uses those payments to make such contributions in California. In that case, under this subdivision, the payment will only be treated as a contribution if "the donor knows or has reason to know that the … funds … will be used to make contributions or expenditures [in California]." It further creates a presumption that the donor does not "have reason to know" unless the organization has made contributions of one thousand dollars or more during the calendar year or any of the four preceding calendar years. If the organization has made such contributions, the presumption no longer applies.

This is referred to as the "one-bite rule" because it allows an organization to make its first political contribution in California without being subject to the campaign disclosure requirements unless it can be shown that the donors to that organization knew or had reason to know that their contributions could be used for political purposes in California. However, once the bite has been taken, any donations received by that organization qualify as contributions for a political purpose in California, and once the $1,000 contribution threshold under section 82013, subdivision (a) is met, the organization has qualified as a committee and is subject to the Act's campaign disclosure laws. This analysis of the rule has been consistently applied by the Commission and disseminated to the political community regulated by the Act. (See Advice Letter No. I-96-280 to Kenneth J. Hoffer, attached to Plaintiff's Request for Judicial Notice.)

Therefore, any payments made by donors after the first bite has been taken meet the definition of a contribution under regulation 18215, subdivision (a), and there is no need to apply the further definition created under subdivision (b). Since subdivision (b) only applies to making a determination as to whether that first free bite may be taken, no inquiry need be made as to the "knows or has reason to know" test with respect to subsequent bites, as that knowledge is presumed in the law by the organization's past activities of "influencing or attempting to influence the action of the voters for the qualification or passage of any measure" by making political contributions in California.

Indeed, Defendants' own recitation of the one-bite rule is consistent with this analysis, except that defendants attempt to limit application of the rule to certain specified groups, which do not include them. (Opposition to Motion for Preliminary Injunction at pp. 7:22-9:4.) Defendants provide a rather succinct and accurate explanation of the "one-bite rule." Defendants state that the genesis of the "one-bite rule" held that an organization which did not specifically solicit contributions for California political purposes, "could nonetheless become a committee if in one year it spent its own money on political contributions and expenditures, and then in a subsequent year spent enough to pass the committee threshold [of $1,000]. Then, by virtue of the rule, the members of the association knew or had reason to know that a portion of their dues was being used for political purposes, and the [organization] would become a recipient committee and disclose the donors." Exactly!

Defendants took their first bite when they made $67,093 in contributions to RPI in 2001. Absent any showing that the donors to ACRC knew or had reason to know that their contributions would be used for such purpose, that bite is free, and defendants are not required to disclose the names of the individuals whose payments were included in that amount. However, all subsequent contributions received after the first bite was taken by ACRC qualify as contributions by the terms of regulation 18215, subsection (a)(1) and defendants are required to file campaign disclosure statements in conformance with the requirements the Act, once its reporting threshold is met.

But defendants claim, without any legal justification for that claim, that the rule only applies to members of trade associations, or other such entities, because only they "would have actual knowledge or reasonable knowledge of the trade association's occasional direct political activities, and that this

knowledge would be presumed." (Defendants' Opposition, p. 8:6-8). Ostensibly, this is because, under defendants' argument, as members they have an ongoing association with the organization.

Defendants, however, claim that they are not that type of organization, because their donors are not members that pay annual dues, and they are not the same individuals from year to year. Because of that factor alone, defendants assert, while knowledge of the organization's activities may be imputed to donors of other organizations, such knowledge should not be imputed to their donors.

In order to accept this argument, one would have to find that trade association members, who have nominal dues deducted from their paychecks each month to fund the activities, both political and nonpolitical, of the trade association, would have greater knowledge of the organization's political activities than donors who, on their own initiative, write and sign checks for $100, $1,000, $10,000, or even $100,000 to give to an organization to support its political activities. Defendants offer no evidence to support such a finding. If anything, it can be argued that an individual who affirmatively contributes personal funds would know at least as much about his or her organization as a member of a trade association would know about the activities of his or her organization.

Secondly, as stated above, the "knows or has reason to know" requirement only comes into play in determining if a payment qualifies as a "contribution" under the Act <u>in determining if the first bite may be taken</u>. Once the first bite has been taken, it cannot be taken again, and the knowledge test under subsection (b) can no longer be applied.

Defendants Claim That Disclosure Violates ACRC Donors' Rights of Associational Privacy

Defendants claim that the disclosure requirements of the Act are unconstitutional, as applied to them, under the First Amendment. Defendants ignore most of the case law regarding campaign financing disclosure requirements and rely primarily on the Supreme Court's ruling in *NAACP v. Alabama* (1958) 357 U.S. 449. In that case, the State of Alabama sought to compel the NAACP to reveal the names and address of all its Alabama members. The NAACP "made an uncontroverted showing that … revelation of the identity of its rank-and-file members has exposed these members to economic reprisals, loss of employment, threat of physical coercion, and other manifestations of public hostility." (s*upra*, p. 462.) The Court found that the issue turned on whether Alabama "has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to

justify the deterrent effect … (*supra*, p. 463.) "Whether there was 'justification' in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists." (*supra*, p. 464.) The exclusive reason offered by the State was that the membership lists were needed to determine if the NAACP was engaging in intrastate business. (*supra*.) The Court stated "we are unable to perceive that disclosure of the names of petitioner's … members has a substantial bearing [on this interest]." (*supra*.) "[B]ut whatever interest the State may have in obtaining [this information it] has not been shown to be sufficient to overcome petitioner's constitutional objection to the production order." (*supra*, p. 456.)

Nearly twenty years later, the Supreme Court first addressed the issue of to what extent the campaign disclosure provisions of the Federal Elections Campaign Act of 1971 ("FECA") may infringe on any First Amendment rights to associational privacy in its holding in *Buckley v. Valeo*, (1976) 424 U.S. 1. In that case, the Court found sufficient justifiable reasons for the FECA's disclosure requirements that contributors of $100 or more, to a committee or candidate, be disclosed by name and address, occupation, and principal place of business in reports filed by the committees and candidates with the Commission. (*Buckley, supra,* p.82.) Courts have consistently upheld disclosure of campaign contributions and expenditures since *Buckley,* with only one exception.

In *Brown Et Al. v. Socialist Workers '74 Campaign Committee (Ohio) Et Al.*, (1982) 459 U.S. 87, following the Court's holding in *Buckley, supra*, that the First Amendment prohibits the government from compelling disclosures by a <u>minor political party</u> that can show a "reasonable probability" that the compelled disclosures will subject those identified to threats, harassment, or reprisals," (*supra*, p. 88), the Court examined an Ohio law that required disclosure of all contributions and expenditures made by the party. The Court found that the Socialist Workers Party provided a long and comprehensive documentation of such "threats, harassment, or reprisals" from both private individuals and governments entities, including substantial interference from the FBI. Additionally, the Court found that the party contained only 60 members in Ohio, spent a mere $15,000 per year, and had "little" success at the polls, receiving only 1.9 percent of the vote in a recent United States Senate campaign. (*supra*.) For these reasons, the Court held that the disclosure provisions were unconstitutional as applied to the party. In effect, the Court stated if the harm is substantial, and the information required is insignificant (small amounts of money going into a lost cause), the requirements

would not pass constitutional muster. In the instant case however, defendants have not shown any evidence of harm, are contributing large amounts of money, have a history of winning, and here support a ballot measure that has a substantial chance of passing.

Neither *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations whose positions are often controversial and are facially unconstitutional. Rather, the statutes in those cases were held inapplicable to the groups in question based on the facts presented, and were not invalid on their face. In the instant case, defendants have made no evidentiary showing whatsoever to support their claims of threats, harassment, or reprisals to contributors to ACRC. As such, defendants have presented this court with no facts that place it in the same category of threatened associations such as the NAACP or the Socialist Workers Party. They have made only bare assertions as to such. Therefore, this court is presented with no basis for invalidating the statute on its face or as applied to defendants based on the present evidence.

In other cases specifically addressing disclosure in the ballot-measure context, the Court found: "regulations compelling the disclosure of expenditures and contributions in the ballot-initiative context passed constitutional muster" (*Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290.); upheld a regulation requiring "sponsors of ballot measure initiatives to disclose who pay petition circulators, and how much," approvingly observing that this requirement informed voters of "the source and amount of money spent by proponents to get a measure on the ballot" (*Buckley v. American Constitutional Law Foundation*, (*Buckley II*) (1999) 525 U. S. 182, at p. 205 and p. 203); "[d]isclosure may well be justified in some situations — for example, by the special state interest in protecting the integrity of a ballot-initiative process." (*Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, (2002) 536 U.S. 105, at p. 167).

In the recent Ninth Circuit case, *California Pro-Life Council*, *Inc. v. Getman* (2003) 328 F3d 1088, the Court provided an explanation of the various reasons why the State has a compelling interest in campaign disclosure in ballot measure cases, including: (1) initiatives decide the fate of complex policy proposals of supreme public significance (*supra,* at p. 1105); (2) interest groups pour millions of dollars into campaign to pass or defeat ballot measures (*supra*); (3) knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that … long-term policy

ramifications of the ballot measure are often unknown (*supra*, at p. 1106); (4) at least by knowing who backs or opposes an initiative, voter will have a pretty good idea who stands to benefit from the legislation[5] (*supra*); (5) since Californians act as lawmakers in the ballot initiative sense, Californians have an interest in who is lobbying for their vote (*supra);* and (6) by requiring disclosure of the source and amount of funds spent for ballot measure advocacy, California – at a minimum – provides its voters with a useful shorthand for evaluating the speaker behind the sound bite.[6] (*supra*). Given these factors, it is clear that California has a compelling state interest in requiring the donors in this case to disclose the required information.

Finally, a recent Supreme Court case held that 'restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edge than to the core of political expression." (*Federal Elections Commission v. Beaumont*, (2003) 123 S.Ct. 2200, at 2210.) For that reason, the lesser standard of being "closely drawn to match a sufficiently important interest" is used. (*supra*)

CONCLUSION

For the reasons stated above, plaintiff's Motion for a Preliminary Injunction should be granted.

Dated: _____

Respectfully submitted,
FAIR POLITICAL PRACTICES COMMISSION

By: _____
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[5] See the Court's footnote number 24 at page 1106 citing an example of how disclosure identified the real interest behind a California ballot measure, which resulted in the measure being soundly defeated.
[6] See the Court's footnote number 25 at page 1106 citing evidence that Californians will vote based on the identity of those supporting or opposing a measure, including whether the measure is being supported by out-of-state interests.