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11 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**

12 **STATE OF CALIFORNIA**

13 In the Matter of

14 CHARLES R. "CHUCK" REED, SAN
15 JOSE FISCAL REFORMS, MAYOR
16 REED, CHAMBER PAC AND ISSUES
17 MOBILIZATION PAC PROPONENTS,
18 and BENJAMIN J. ROTH,

19 Respondents.

FPPC No.: 12/761

**RESPONDENTS' REPLY TO
COMPLAINANT'S
ADMINISTRATIVE HEARING
BRIEF**

**Hearing Date: September 19, 2013
Hearing Time: 10:00am
Hearing Place: 428 J Street, 8th Fl.
Sacramento, CA**

1 The Enforcement Division's arguments in its Administrative Brief ("Compl.
2 Brief") call for a short response.

3 **I. Mayor Reed read and followed the law.**

4 The Enforcement Division makes much of the fact that Mayor Reed attempted to
5 discern his legal obligations by actually reading the law: "Despite being the Mayor of
6 one of the largest cities in the country, and being a longtime officeholder and candidate,
7 he chose not to seek experienced counsel on this issue." (Compl. Brief at pg. 12.) This
8 statement reveals a fundamentally flawed assumption: if Mayor Reed wanted to engage
9 in political activity, he should have paid for a lawyer to comb through the regulations and
10 FPPC advice letters on his behalf.

11 The Supreme Court has expressly rejected the Enforcement Division's position.
12 "The First Amendment does not permit laws that force speakers to retain a campaign
13 finance attorney . . . before discussing the most salient political issues of our day."
14 (Citizens United v. Federal Election Commission (2010) 558 U.S. 310, 324.) Put
15 another way, a licensed attorney who is the Mayor of California's third-largest city
16 should not have to hire a lawyer to understand his obligations under the Political Reform
17 Act; instead, the First Amendment requires that he should be able to understand those
18 obligations by simply reading the law and the applicable regulations himself.

19 In this regard, Mayor Reed was not obligated to review FPPC advice letters. (See
20 Smith v. Superior Court (1994) 31 Cal.App.4th 205, 212 [FPPC advice letters are "not
21 legal authority"]; Downey Cares v. Downey Community Development Com. (1987) 196
22 Cal.App.3d 983, 992 [FPPC advice letters "provide no legal authority"].) He also was
23 not obligated to research the statutory or regulatory history. He was not obligated to
24 understand the statutory or regulatory context of a 1987 FPPC opinion. (See Compl.
25 Brief, at p. 5 n. 2 [explaining regulatory language from 1987 referenced in the Lui
26 Opinion].) Mayor Reed was obligated to read and follow the law, which he did.

1 Yet the Enforcement Division claims that Mayor Reed ignored Regulation 18404,
2 contending that the regulation “clearly states that an officeholder’s status as a candidate,
3 whether he has a controlled committee or not, does not terminate until he has left office.”
4 (Compl. Brief, at p. 8. [emphasis added].) In fact, the regulation never explicitly states
5 when a person’s status as a candidate terminates. Rather, the regulation states that a
6 person’s filing obligations, whether that person is a candidate or officeholder, do not
7 terminate until he or she has left office.

8 The Enforcement Division’s misstatement regarding Regulation 18404 proves the
9 vagueness of the purported rule. When the Enforcement Division interprets the rule one
10 way and a Mayor/attorney interprets it the opposite way, it shows that “people ‘of
11 common intelligence must necessarily guess at [the law’s] meaning and differ as to its
12 application.’” (Citizens United, *supra*, 558 U.S. at 324 [describing problems with vague
13 statutes impacting First Amendment rights; citation omitted].) In such instances, the
14 Commission is obligated to construe the relevant law or regulation in favor of the a
15 person’s First Amendment rights. (Federal Election Commission v. Wisconsin Right To
16 Life, Inc. (2007) 551 U.S. 449, 474 [“Where the First Amendment is implicated, the tie
17 goes to the speaker, not the censor.”].) Thus, the Commission should conclude, as
18 Mayor Reed has, that he was an officeholder, not a candidate, for purposes of Section
19 85501. (See also Cal. Govt. Code section 82020 [“‘Elected officer’ means any person
20 who holds an elective office or has been elected to an elective office but has not yet
21 taken office.”].)

22 To be clear, Mayor Reed is only requesting that the Commission rule that he is not
23 a “candidate” for purposes of Section 85501, given the wording of the statutes and
24 regulation and the specifics of his situation; namely, that section 85501 does not apply to
25 someone who: (1) may not run for re-election; (2) is not running for another office; (4) is
26 not raising or spending funds to run for office; (5) is not a write-in candidate; (5) is not
27

1 the subject of a recall; and (6) has terminated his campaign committee by filing final
2 Forms 410 and 460.

3 **II. Section 85501 is unconstitutional.**

4 The Enforcement Division's Administrative Brief does not address Respondents'
5 claims that Section 85501 is unconstitutional, although presumably its Reply Brief will.
6 Respondents would only add at this point that, to our knowledge, no other law in
7 California at the state or local level bans independent expenditures, as such laws are
8 patently unconstitutional under Citizens United. In fact, the Los Angeles City Ethics
9 Commission passed a resolution on February 9, 2010 indicating that it would not enforce
10 the City's ban on corporate independent expenditures – which, to our knowledge, was
11 the only other law in California which completely banned independent expenditures –
12 based on the Citizens United opinion. (See L.A. City Ethics Commission resolution and
13 minutes; copies attached.)¹

14 Moreover, before and after Citizens United, courts struck down numerous other
15 local laws in California limiting or prohibiting contributions to independent expenditure
16 committees. (See, e.g., San Jose Valley Chamber of Commerce Political Action
17 Committee v. City of San Jose (N.D. Cal. Sept. 20, 2006) 2006 WL 3832794, *9
18 [enjoining enforcement of San Jose Muni. Code section 12.06.310; vacated on other
19 grounds]; OakPAC v. City of Oakland (N.D. Cal. Oct. 19, 2006) No. C06-6366 MJJ
20 [temporary restraining order prohibiting enforcement of Oakland Muni. Code section
21 3.12.050(c)]; Committee on Jobs Candidate Advocacy Fund v. Herrera (2007) WL
22 2790351, *5 [preliminary injunction against enforcement of San Francisco Camp. &
23 Govt. Cond. Code section 1.114(c)(1)-(2)]; Long Beach Area Chamber of Commerce v.
24 City of Long Beach (9th Cir. 2010) 603 F.3d 684, 696-99 [Long Beach Muni. Code
25 sections 2.01.310 & 2.01.610 unconstitutional]; Thalheimer v. City of San Diego (9th
26

27 ¹The City subsequently repealed this law.
28

1 Cir. 2011) 645 F.3d 1109, 1121[upholding injunction of San Diego Muni. Code section
2 27.2936].)

3 Given the weight of these authorities, the Commission should again (as it did in
4 2005) choose not to enforce an unconstitutional statute, particularly given the possibility
5 of having to defend Section 85501 in litigation and the related potential liability for
6 attorneys' fees.

7 **III. Conclusion.**

8 For the reasons above, and the reasons set forth in their initial Administrative
9 Brief, Respondents respectfully request that the Commission dismiss this matter without
10 finding a violation or imposing a penalty because:

11 1. Mayor Reed and the Fiscal Reform Committee were not subject to the
12 prohibitions of Section 85501 given that Mayor Reed: (1) may not run for re-election; (2)
13 is not running for another office; (3) is not raising or spending funds to run for office; (4)
14 is not a write-in candidate; (5) is not the subject of a recall; and (6) has terminated his
15 campaign committee by filing final Forms 410 and 460.

16 2. Section 85501 is unconstitutional under Citizens United and Ninth Circuit
17 precedent.

18
19 Dated: September 13, 2013

20
21 By: 

22 Jesse Mainardi
23 The Sutton Law Firm, PC
24 Attorneys for Respondents
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26
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Memorandum

February 2, 2010

To: Members of the City Ethics Commission
From: LeeAnn Pelham, Executive Director
Re: **AGENDA ITEM NO. 10**
***Citizens United v. FEC* and LAMC Sec. 49.7.26.2**

On January 21, 2010, the U.S. Supreme Court issued its decision in *Citizens United v. Federal Election Comm'n*, 558 U.S. ___ (2010) (copy attached). In its ruling, the Court struck down a longstanding federal statutory ban on the use of corporate treasury funds to make expenditures in connection with federal elections. Because the Court's 5-4 decision directly affects a similar provision of Los Angeles City law, Los Angeles Municipal Code (LAMC) section 49.7.26.2, clear information about the impact of the Court's decision is vital. To that end, we have placed this item on the February 9th agenda to inform the Commission about the Court's ruling and present our recommendations at this point with regard to the enforceability of LAMC § 49.7.26.2.

Background on Citizens United v. FEC

For over 60 years, federal statutory law has prohibited corporations and unions from using their general treasuries to make expenditures in connection with federal elections. See 2 U.S.C. § 441(b); see also 558 U.S. at *26. In 2002, pursuant to the Bipartisan Campaign Finance Act (BCRA), Federal law was extended to ban corporate and union spending from their treasuries on "electioneering communications." Under federal law, an "electioneering communication" is defined to be "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election or 60 days of a general election, is publicly distributed, and be can be received by a threshold number of persons depending on the office sought. 2 U.S.C. § 434(f); 11 C.F.R. §§ 100.29(a)(2), 100.29(b)(3)(ii). Spending that is done in coordination or consultation with a candidate is treated under federal, state, and local laws as a contribution and is limited. Contribution limits were not at issue in this case.

The main issue before the Court in this case was whether the government could prohibit a corporation from using its treasury funds for political expenditures without violating the First Amendment. During the 2008 presidential campaign, Citizens United, a non-profit corporation, wanted to promote and air a documentary entitled *Hilary: the Movie*

as a cable-based video-on-demand but believed those actions would be prohibited by the federal ban on corporate electioneering communications. 558 U.S. at *4. Citizens United filed suit in federal district court claiming that the federal spending ban and disclosure and disclaimer requirements for electioneering communications contained in the Bipartisan Campaign Reform Act of 2002 (at §§ 201, 311) were unconstitutional as they applied to *Hillary: the Movie*. *Id.* The district court upheld the federal laws, and Citizens United appealed the decision to the Supreme Court.

The Supreme Court concluded that the federal spending ban could not be applied to *Hillary: the Movie* and also found the BCRA provision and the pre-existing ban on corporate expenditures unconstitutional. In reaching that conclusion, the Court found that the government may not suppress political speech on the basis of a speaker's identity and that the federal government's political spending ban was an impermissible restriction on that speech. Similarly, the Supreme Court found that a political action committee (PAC) is not a sufficient alternative because, it concluded, PACs are separate entities, are expensive to administer, and are subject to extensive regulation and therefore still impose impermissible burdens on independent political spending. *Id.* at *21-22.

The Court further noted that speech is vitally important to democracy and to the electorate's ability to hold public officials accountable to the people. The Court said that the government may not "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at *24. Additionally, "voters must be free to obtain information from diverse sources in order to determine how to cast their votes." *Id.* at *25. The Court also specifically addressed the First Amendment rights of corporations in the political context. *Id.* Like individuals, the Court said, corporations contribute to political discourse and help disseminate information and ideas. *Id.* at *25. Therefore, the Court concluded, a corporation should not be treated differently from individuals simply because it is a corporation. *Id.* at *25, *50.

The Court did uphold federal laws regarding disclosure of and disclaimers on electioneering communications as they apply to the movie *Hillary* and advertisements for the movie. *Id.* at *52. For example, persons who make expenditures of \$10,000 or more in a calendar year for electioneering must report their activity within 24 hours of each disclosure date. 2 U.S.C. § 434(f). In addition, radio and television communications related to federal elections must identify who paid for the communication and who was responsible for its content. 2 U.S.C. § 441(d).

In upholding the federal disclosure and disclaimer laws as applied to *Hillary*, the Court noted that these requirements may burden speech, but they do not prevent anyone from speaking. 558 U.S. at *51, citing *Buckley*, 424 U.S. at 64, and *McConnell*, 540 U.S. at 201. The Court noted that disclosure helps to fully inform the voters about who is speaking about a candidate shortly before an election and that "disclosure is a less-restrictive alternative to more comprehensive regulations of speech." *Id.* at *52, *53. With regard to corporate speech and disclosure, the court stated, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at *55.

Los Angeles Municipal Code Section 49.7.26.2 and Its Purpose

Following the City's 2001 elections, the City Ethics Commission recommended amending City law to establish a ban on the use of treasury funds by unions and for-profit corporations to expressly advocate the election or defeat of City candidates. These changes were adopted by the City Council and took effect on August 16, 2003. Specifically, LAMC § 49.7.26.2 provides the following:

Limitations on Certain Expenditures by Corporate or Union Treasuries

- A. No labor organization or for-profit business corporation may make a payment to expressly advocate the election or defeat of one or more clearly identified candidates for elective City office from the treasury of that organization or corporation.
- B. This section does not prohibit a labor organization or for-profit business corporation from establishing a separate, segregated fund to be used for political purposes, or from making payments to that fund for the administration of the fund. A labor organization or for-profit corporation which has established such a fund may solicit contributions to that fund from its individual stockholders, officers, directors, employees, or members, and their spouses; and it may use money in the fund to make contributions or independent expenditures in connection with elections, including the election of Mayor, City Attorney, Controller, and Member of the City Council.
- C. This section does not prohibit the publication or broadcasting of news items or editorial comments by any news or broadcast media.
- D. For purposes of the prohibition of this section, payments from the treasury of a union for communications to its members and employees or a for-profit corporation for communications to its shareholders and employees that are not behested by a candidate shall not be prohibited.

City law, therefore, does permit for-profit corporations and labor organizations to create separate political funds that can pay for express advocacy related to City elections, and it does not ban use of treasury funds to communicate solely to its membership, shareholders, or employees, so long as those expenditures are not done in coordination or consultation with—that is, “behested” by—a City candidate.

In recommending this provision, the Commission noted that the level of independent spending had grown significantly in recent elections and that independent expenditures were playing an increasingly significant role in City campaigns. The \$3.2 million in non-candidate spending in 2001 alone represented more than four times the amount of independent expenditures made in the entire decade leading up to the 2001 elections. For-profit corporations and unions had made some of the largest independent expenditures in the 2001 municipal elections. The Commission recommended a ban on the use of treasury funds for independent spending based on concerns that access to large

amounts of treasury funds to spend on communications to influence City elections had the potential to drown out the messages of candidates.

While LAMC § 49.7.26.2 has been the focus of several completed Ethics Commission's investigations in recent years, the Commission's board has not had occasion to date to take action in any enforcement case involving that section.

Going Forward

Based on our preliminary review of the recent Supreme Court ruling in *Citizens United* and on our informal discussions to date with the Office of the City Attorney, we believe that LAMC § 49.7.26.2(A) is now unenforceable. Therefore, similar to the recommendation we made in the wake of the Court's ruling in *Davis v. Federal Election Comm'n*, 554 U.S. ___, 128 S. Ct. 2759 (2008) (regarding a wealthy candidate's ability to spend personal funds on a campaign), we recommend that the Commission take immediate action at its meeting on February 9 to clarify that it will not enforce LAMC § 49.7.26.2(A) going forward. Specifically, we recommend that the Commission adopt the attached resolution to provide clear guidance to those who may wish to be involved in upcoming City elections. The resolution would clarify the following:

- The City Ethics Commission will not enforce LAMC § 49.7.26.2(A); and,
- In the wake of the *Citizens United* ruling, therefore, City law will no longer ban for-profit business corporations and labor organizations from making payments to expressly advocate the election or defeat of one or more clearly identified candidates for elective City office with treasury funds of that corporation or organization.

A draft resolution is attached for your consideration.

We also recommend that our office seek written advice from the Office of the City Attorney regarding whether any additional procedural steps are necessary at this time with regard to Sec. 49.7.26.2 in wake of the *Citizens United* decision.

Last week, the City Council introduced a motion calling on our office and the City Attorney's Office to report back within 30 days on the effects of the *Citizens United* case and any steps needed to comply with the Court's ruling. As those discussions unfold, and depending on other ongoing policy priorities, the Commission may also wish to add to its legislative review agenda what new policy approaches might be warranted in this area to ensure that City campaign laws remain as effective as possible.

The staff and I look forward to discussing these issues with you at your meeting next week.

RESOLUTION

WHEREAS the Los Angeles City Ethics Commission strives to ensure that participants in City elections are informed of their obligations under the City's campaign finance laws; and

WHEREAS the United States Supreme Court decided *Citizens United v. Federal Election Comm'n*, 558 U.S. ___ (2010), in a 5-4 vote on January 21, 2010, finding that the government may not suppress political speech on the basis of a speaker's corporate identity and that such restrictions in section 441b of United States Code title 2 are invalid; and

WHEREAS, section 441b of United States Code title 2 has prohibited corporations and unions from using their general treasuries in connection with federal elections; and

WHEREAS, Los Angeles Municipal Code section 49.7.26.2(A), similarly prohibits the use of corporate and union treasury funds to expressly advocate the election or defeat of City candidates; and

WHEREAS the *Citizens United* case constitutes compelling legal authority to conclude that a challenge to Los Angeles Municipal Code section 49.7.26.2(A) on constitutional grounds could not be successfully defended; and

WHEREAS the City Ethics Commission believes that, in light of the legal precedent in *Citizens United*, Los Angeles Municipal Code section 49.7.26.2(A) should not be enforced at this time;

THEREFORE, BE IT RESOLVED by the City Ethics Commission that

- The City Ethics Commission will not enforce LAMC § 49.7.26.2(A); and
- In the wake of the *Citizens United* ruling, City law will no longer ban for-profit business corporations and labor organizations from making payments to expressly advocate the election or defeat of one or more clearly identified candidates for elective City office with treasury funds of that corporation or organization.

I certify that this resolution was adopted by the Los Angeles City Ethics Commission on February 9, 2010, in accordance with Los Angeles City Charter section 702.

Helen Zukin, President
City Ethics Commission

CITY ETHICS COMMISSION

Helen Zukin
President

Paul Turner
Vice President

Marlene Canter
Nedra Jenkins
Valerie Vanaman

CITY OF LOS ANGELES
CALIFORNIA



APPROVED

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REGULAR MEETING OF THE
LOS ANGELES CITY ETHICS COMMISSION

Tuesday, February 9, 2010
9:30 a.m.

City Hall, Room 1050 – 10th Floor
200 North Spring Street
Los Angeles, CA 90012

1. **Call to Order.**

Commission President Helen Zukin called the meeting to order at 9:33 a.m.

Present: Canter, Jenkins, Turner, and Zukin.

2. **Public Comment**

There was no public comment.

3. **Approval of draft minutes for the meeting of January 12, 2010.**

Nedra Jenkins moved to approve the draft minutes for January 12, 2010, and Paul Turner seconded. The minutes were approved 4-0.

4. **Consideration of and action on statements of economic interests for commission and department head SEI reviews [Shannon Prior].**

Program Analyst Shannon Prior recommended that the Commission approve cautionary letters for nominees Dr. Jemiss Nazar and Mr. Ron Galperin, and the standard letters for nominees Mr. Robert R. Ostrom and Mr. Murtaza Sanwari. Marlene Canter moved to accept the recommendation, and Jenkins seconded. The letters were approved 4-0.

5. Executive Director's report [LeeAnn Pelham].

Executive Director LeeAnn Pelham presented her report and highlighted that the most recently completed public audit reports were attached to her report.

Pelham also noted that there will be a discussion by the City Council regarding the potential layoff of 1,000 City employees. Pelham stated that the Commission has one person on the proposed list of layoffs; however, staff is working towards transferring that position to another City department. She also noted that staff has one other position that will be taking advantage of the early retirement program and will be leaving the City on March 13, 2010.

Zukin requested that staff give consideration to using volunteers to assist in the Commission's work. Pelham noted that staff has considered this option in the past and will report back to the Commission next month.

Canter requested that the Commission be involved in determining how projects are prioritized, given the anticipated loss in staff. Pelham asked if Canter would like to discuss this issue as an agenda item at the next month's meeting or during the divisions' quarterly reports. Canter said she would like to have it discussed separately, and Zukin stated that she would like to put it on the agenda for the next meeting.

Jenkins asked Pelham to explain the City Administrative Officer's (CAO) recommendation to restructure \$160,000 from the Commission's contractual services account. Pelham stated that all departments have salary accounts that are funded in certain amounts through the annual budget process. In calculating a department's salary account funding levels, Pelham explained, the city's adopted budget has typically factored in a "salary savings rate." This rate is a percentage designed historically to account for general attrition. When applied to a department during the budget process, actual salary dollars are reduced by that percentage. When a department does not have attrition, salary accounts are underfunded. This has been the case historically with the Ethics Commission. Pelham said that this year, applying this formula will require the Commission to use some \$160,000 from its contractual services account to help meet this structural salary account shortfall. Jenkins asked if the money is rolled over from year to year, and Pelham explained that it is not—it is swept at the end of the fiscal year if it is not used. Jenkins asked if this calculation takes into consideration the fact that we are losing two positions. Pelham and Director of Operations and Planning Eric Tan explained that one of the positions we are losing is a position that was expected to be cur in the FY09-10 budget. Because it is a Coalition position, however, it was maintained because of the city's agreement with the union; but funding for the position was not included the Commission's budget for this year. Tan explained that the other position we are losing this year is held by an employee who is participating in the Early Retirement Incentive Program (ERIP).

6. **Monthly policy and legislation report [Heather Holt].**

Director of Policy and Legislation Heather Holt presented this item and highlighted that the City Council will not be considering the Commission's recommended changes to the Municipal Lobbying Ordinance (MLO) at this time, because of the intensity of the budget discussions. Holt also noted that the Education and Neighborhoods Committee will be exploring the neighborhood council financial disclosure issue again and that she will be attending the upcoming meeting to relay the Commission's position on the issue once again. Zukin noted that the Commission has spoken on this issue repeatedly and expressed her desire that the staff not spend any more time on it.

Canter asked if Charter School Board members are required to file the state's Form 700. Pelham stated that that issue is not within the Commission's jurisdiction. Jenkins asked if the Commission would receive a copy of the report on instant runoff voting report that will be distributed to the City Council. Holt stated that she is looking forward to seeing it and will provide the commissioners with a copy when it is available.

Zukin asked the commissioners if they would like to talk about staff priorities at this meeting, or if they would like to wait until next month's meeting to have a larger discussion regarding this issue. Canter stated that she would like to wait until next month. Holt noted that the horizon snapshot represents everything that the Policy and Legislation division is working on.

Zukin asked if the Governmental Ethics Ordinance (GEO) review is taking up a lot of the staff's time, and Pelham stated that staff has been meeting weekly to work on the review of the GEO. Zukin stated her preference that the GEO review not take priority over the draft language for the infractions and disgorgement policies. Pelham stated that staff is currently working on that project and expects to have the proposed language to the Commission at next month's meeting. Turner suggested that the review of the GEO could be expedited, since it will not generate as much input as the MLO review did. Holt agreed that the GEO review would be different from the MLO review, because far fewer people outside City Hall are affected by the GEO than are affected by the MLO, and said that staff would still like to gather information from the community that is affected by the GEO.

Turner asked if full public financing would be fast-tracked given the recent Supreme Court decision on campaign finance regulations in *Citizens United v. FEC*. Holt noted that she is aware of one councilmember who would like to move public financing forward, but it is a tough issue given the current budgetary crisis. Turner said he believes the concern over unfettered access by corporations and others should outweigh concerns over the budget.

7. **Quarterly activity report by program operations division [David Tristan]**

Project Manager Mark Low presented this item in Director of Program Operations and Deputy Director David Tristan's absence. Low highlighted that the report included a summary of the Program Operations division's activities during the fourth quarter of 2009.

Low stated that the report highlights the projects the division undertook in the past quarter, as well as a projection of the projects the division will be focusing on in the future.

Canter left the room at 9:55 a.m.

Jenkins asked what kinds of expenditures were included in the total lobbying expenditures of \$512,000. Low stated that the expenditures could be anything related to attempts to influence a City official; however, he noted that the majority of the expenditures were related to hiring contractors. Turner asked if those expenditures are spent to lobby just the elected officials or if it includes efforts to lobby the community. Low stated that it depends on the way that the expenditure is disclosed; some disclosures say "community outreach" and others just say "consulting services".

Canter returned to the room at 9:58 a.m.

Pelham added that it might be helpful to get some feedback from the commissioners regarding the timeline that is attached to the report. Zukin noted that the timeline is driven by external deadlines; therefore, there is very little room for flexibility. Pelham stated that, given staff reductions, there may be projects that have to be reprioritized.

8. Quarterly activity report by enforcement division [Deena Ghaly]

Director of Enforcement and Deputy Executive Director Deena Ghaly presented the item and highlighted the status of the whistleblower program. She noted that, in the past quarter, staff closed a few more cases than they opened. Ghaly stated that the division has seen an increase in cold cases, due to human resource issues. She also noted that the loss of a paralegal position and the loss in investigator time due to furloughs has contributed to this increase and that staff is working to remedy the situation. Zukin asked what the next step is in attempting to triage the situation. Ghaly answered that reviewing the cases early on in the process, to weed out cases that fall outside the Commission's jurisdiction, will help expedite the process. Zukin restated her position that the Commission should use volunteers to help offset some of the decrease in workforce. Deputy City Attorney Renee Stadel stated that the Commission can explore that concept and work through some of the issues associated with using volunteers for the Commission's work. Jenkins agreed with Zukin that, barring any legal concerns, using volunteers is a viable solution to the Commission's lack of human resources.

Ghaly noted that the report includes a breakdown of the ongoing investigations and that over half of the investigations are in litigation. Ghaly stated that the report includes a brief overview of *Working Californians v. City of Los Angeles*. Since this case challenges some of the Commission's laws, it will have an impact on how litigation is handled in the future. Zukin asked how the court's opinion will delay or affect what the staff does in a particular case, and Ghaly replied that the court case has a direct bearing on cases involving independent expenditures. Jenkins asked how it would affect those cases, since the City received a favorable opinion. Ghaly said that staff is awaiting the outcome of a separate 9th

Circuit case and has agreed to stay the Commission's cases involving independent expenditures for three months or until the 9th Circuit case is decided.

Ghaly also noted that she spoke at the Conference on Governmental Ethics Laws in the fourth quarter of 2009.

9. Discussion and possible action on report regarding options for establishing hearing officer panels for enforcement matters [Renee Stadel and Deena Ghaly].

Stadel presented the item and noted the Commission's options regarding hearing officers and how the Commission has used them in the past. She also described the options for establishing hearing officer panels, including hiring the state's Office of Administrative Hearings (OAH), selecting a panel of hearing officers who would be used on a rotational or random basis, hiring an outside hearing officer for a period of time, or contracting with a private arbitration office.

Jenkins asked if Zukin ever received a response to her letter to OAH; and Zukin noted that, as a commissioner, she could not be directly involved in the negotiations with OAH. Therefore, she was advised to let the staff handle the situation. Pelham noted that the staff had reached out to OAH, and a follow-up phone call would be made this week.

Stadel said that several other City departments hold administrative hearings and usually issue a proposal for hearing officers. The responses that are received are narrowed through interviews with objective scoring criteria, and the staff makes a recommendation to the commission. Stadel noted that an employee option or a contracting option might not be available, given the City's budgetary problems. Jenkins asked for more information on the request for quotation (RFQ) option, as well as information on whether OAH would have to respond to an RFQ if it was a rotational member of an administrative hearing panel.

Zukin said she would like to hear back from OAH regarding their billing, because they may be the best option. She also noted her due process concerns about contracting with just one person. Turner asked if there would be a cost savings associated with using a hearing officer as opposed to the OAH, and Stadel replied that there would not necessarily be one. Turner stated that cost savings should be a goal in this process. Canter stated her desire to not only look at the cost of each of these options but also the potential impact on the Commission's staff resources. Stadel confirmed that the commissioners wanted to discuss a draft RFQ at the next meeting.

10. Discussion and possible action on report regarding *Citizens United v. FEC* and Los Angeles Municipal Code section 49.7.26.2 [LeeAnn Pelham].

Pelham presented the item and highlighted the impact of the United States Supreme Court decision in *Citizens United v. FEC* on Los Angeles Municipal Code (LAMC) § 49.7.26.2. Pelham said that the Supreme Court held a ban on the use corporate treasuries to make independent expenditures to be unconstitutional. Because City law contains a provision

similar to the federal law at issue in *Citizens United*, Pelham said the staff recommends that the Commission adopt a resolution clarifying that it can no longer enforce that provision.

Turner stated his disapproval of the Supreme Court's decision in this case. He noted that he helped to pass the Bipartisan Campaign Reform Act in 2002 and is disappointed to see the Court take a step backwards by allowing soft money to enter the system. He also stated his concern that the Commission's resolution should be very clear about what provision was affected by the decision. Pelham noted that the proposed resolution clearly states that the only provision the Commission is addressing is 49.7.26.2. She noted that other campaign contribution provisions are still good law and are not impacted by the decision. Turner said he would like for the resolution to state that the decision does not affect other laws. The commissioners agreed.

Jenkins asked if the Commission has the authority to say that City law will no longer ban the use of treasury funds for express advocacy. Stadel explained that the statement is technically not accurate, because the law still exists. She said that while her office may also advise that the provision be repealed, it is entirely appropriate for the Commission to adopt a resolution stating that they will not enforce the provision in the wake of this Supreme Court ruling. Pelham suggested that the second bullet in the resolution be amended to say, "In the wake of the *Citizens United* ruling, the City Ethics Commission will no longer enforce the ban in City law on..." Jenkins suggested further amending the resolution to say, "All other contribution limits and disclosure requirements remain in effect and unchanged by this resolution."

Jenkins moved to adopt the resolution as amended, Turner seconded. The motion was approved, 4-0.

Per the adopted resolution, the Commission asked the City Attorney's office for written advice regarding any additional procedural steps necessary at this time, including whether LAMC 49.5.26.2 should be repealed.

11. Presentation and discussion of overview of Governmental Ethics Ordinance (LAMC Sec. 59.5.1 et seq) [LeeAnn Pelham].

Commissioners noted that they had received the overview materials in connection with this item and decided that no additional discussion was necessary at this time.

12. Announcements and requests to schedule items on future agendas.

There were no announcements or requests.

13. Adjournment.

Jenkins moved to adjourn the meeting, and Turner seconded. The meeting was adjourned at 10:55 am by a vote of 4-0.

1 **PROOF OF SERVICE**

2 1. I am employed in the City and County of San Francisco, State of California.
3 I am over the age of eighteen years and not a party to the within action. My business address is
4 150 Post St., Suite 405, San Francisco, CA 94108.

5 2. On September 13, 2013, I served the foregoing document described as
6 "Respondents' Reply to Complainant's Administrative Hearing Brief" on the following parties to
7 this action as follows:

8 Angela Brereton 9 Fair Political Practices Commission 10 428 J Street, Suite 620 11 Sacramento, CA 95814 12 abrereton@fppc.ca.gov	Attorney for Complainant FAIR POLITICAL PRACTICES COMMISSION
13 Kelli Breton 14 Fair Political Practices Commission 15 428 J Street, Suite 620 16 Sacramento, CA 95814 17 kbreton@fppc.ca.gov	Commission Assistant, FAIR POLITICAL PRACTICES COMMISSION

18 X (VIA E-MAIL) I served such document via e-mail to the persons listed above at the e-
19 mail addresses listed above, which they provided to me and which I have used to successfully
20 communicate with them in the past.

21 _____ (VIA OVERNIGHT MAIL) By enclosing the document(s) in an envelope or package
22 provided by an overnight delivery carrier and addressed to the persons at the addresses listed
23 above. I placed the envelope or package for collection and overnight delivery at an office or a
24 regularly utilized drop box of the overnight delivery carrier.

25 _____ (VIA U.S. MAIL) I mailed a copy of the document(s) as follows: I am a resident of or
26 employed in the county where the mailing occurred. I enclosed a copy in an envelope and
27 deposited the sealed envelope with the United States Postal Service, with the postage fully
28 prepaid.

Executed on September 13, 2013 at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.


Jesse Mainardi