

CHRISTOPHER B. BURTON
Acting Chief of Enforcement
THERESA GILBERTSON
Senior Commission Counsel
Fair Political Practices Commission
1102 Q Street, Suite 3050
Sacramento, CA 95811

Telephone: (916) 323-6421
Email: tgilbertson@fppc.ca.gov

Attorneys for Complainant

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of:

ACLU OF NORTHERN CALIFORNIA

Respondents.

FPPC Case No. 2018-01511

STIPULATION, DECISION AND ORDER

Date Submitted to Commission: August 2023

INTRODUCTION

This matter arose as a Commission-initiated investigation. During the June 5, 2018 Primary Election, the Respondent, the ACLU of Northern California (“ACLU”), paid for a communication that unambiguously urged a vote against clearly identified candidates. As such, ACLU was obligated to file a campaign statement and report and was required to include proper disclosure statements in the advertisement. By failing to do so, ACLU violated the Political Reform Act (the “Act”).¹

SUMMARY OF THE LAW

The Act and its regulations are amended from time to time. All legal references and discussions of law are intended to be citations to statutes and regulations as they existed at the time of the violations in this case.

///

Need for Liberal Construction and Vigorous Enforcement of the Political Reform Act

¹ The Political Reform Act is contained in Government Code §§ 81000 through 91014, and all statutory references are to this code. The regulations of the Fair Political Practice Commission are contained in §§ 18110 through 18997 of Title 2 of the California Code of Regulations, and all regulatory references are to this source.

1 When enacting the Political Reform Act, the people of California found and declared that
2 previous laws regulating political practices suffered from inadequate enforcement by state and local
3 authorities.² Thus, it was decreed that the Act “should be liberally construed to accomplish its
4 purposes.”³

5 One purpose of the Act is to promote transparency by ensuring that expenditures made in election
6 campaigns are fully and truthfully disclosed so that voters are fully informed and improper practices are
7 inhibited.⁴ In furtherance of this purpose, the Act establishes a comprehensive campaign reporting
8 system.⁵ Another purpose of the Act is to provide adequate enforcement mechanisms so the Act will be
9 “vigorously enforced.”⁶

10 **Definition of Expenditure**

11 “Expenditure” means a payment, a forgiveness of a loan, a payment of a loan by a third party, or
12 an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it
13 is not made for political purposes. An expenditure is made on the date the payment is made or on the
14 date consideration, if any, is received, whichever is earlier.⁷

15 A payment is made for political purposes if it is for purposes of influencing or attempting to
16 influence the action of the voters for or against the nomination or election of a candidate or candidates,
17 or the qualification or passage of any measure.⁸

18 “Expenditure” includes any monetary or nonmonetary payment made by any person—except
19 candidates, controlled committees, an official committee of a political party, or organizations formed or
20 existing primarily for political purposes—that is used for communications that expressly advocate the
21 nomination, election, or defeat of a clearly identified candidate or candidates, or the qualification,
22 passage, or defeat of a clearly identified ballot measure.⁹

25 ² Section 81001, subdivision (h).

26 ³ Section 81003.

27 ⁴ Section 81002, subdivision (a).

28 ⁵ Sections 84200, *et seq.*

⁶ Section 81002, subdivision (f).

⁷ Section 82025, subdivision (a).

⁸ Section 82025, subdivision (b)(1).

⁹ Section 82025, subdivision (c).

1 “Clearly identified” is further defined as including when a communication states his or her name,
2 makes unambiguous reference to his or her office or status as a candidate, or unambiguously describes
3 him or her in any manner. A group of candidates is clearly identified if the communication makes
4 unambiguous reference to some well-defined characteristic of the group, even if the communication
5 does not name each candidate.¹⁰

6 A communication “expressly advocates” the nomination, election, or defeat of a candidate if it
7 contains express words of advocacy such as, “vote for,” “elect,” “support,” “cast your ballot,” “vote
8 against,” “defeat,” “reject,” “sign petitions for,” or, within 60 days before an election in which the
9 candidate appears on the ballot, the communication otherwise refers to a clearly identified candidate or
10 measure so that the communication, taken as a whole, unambiguously urges a particular result in an
11 election.¹¹

12 A communication, taken as a whole, unambiguously urges a particular result in an election if it is
13 not susceptible of any reasonable interpretation other than as an appeal to vote for or against a specific
14 candidate or measure. A communication is not susceptible of any reasonable interpretation other than as
15 an appeal to vote for or against a specific candidate or measure when, taken as a whole, it could only be
16 interpreted by a reasonable person as containing an appeal to vote for or against a specific candidate or
17 measure because of both of the following: First, the electoral portion of the communication is
18 unmistakable, unambiguous, and suggestive of only one meaning. Second, reasonable minds could not
19 differ as to whether it encourages a vote for or against a clearly identified candidate or measure, or
20 encourages some other kind of action on a legislative, executive, or judicial matter or issue.¹² The
21 statute offers examples of statements that in most contexts would not be susceptible of any reasonable
22 interpretation other than as an appeal to vote for or against a specific candidate or measure: “Smith’s the
23 One”; “No Measure A”; “Rally ‘round O’Malley”; “Create jobs with Measure X”; “Only Nancy Brown
24 can clean out City Hall”; “Proposition 123 - your last chance to save California”; “Joe Green will earn
25 your trust”; “Bob Boone is unqualified for office and a special-interest puppet”; “Shirley Hall - bad for
26
27

28 ¹⁰ Section 82025, subdivision (c)(1)(A)-(B).

¹¹ Section 82025, subdivision (c)(2).

¹² Section 82025, subdivision (c)(2)(A).

California, bad for you.”¹³ The statute also offers examples of 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.”¹⁴

The definition of “expenditure” also includes a safe harbor provision.¹⁵ A communication would not be considered an expenditure within the meaning of this section when both of the following apply: First, 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. Second, 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.

If a communication does not qualify for the safe harbor provision, 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.¹⁶

Definition of Independent Expenditure

“Independent expenditure” means an expenditure made by a person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the best of the affected candidate or committee.¹⁷

///

¹³ Section 82025, subdivision (c)(2)(B).

¹⁴ Section 82025, subdivision (c)(2)(C).

¹⁵ Section 82025, subdivision (c)(2)(D).

¹⁶ Section 82025, subdivision (c)(2)(E).

¹⁷ Section 82031.

1 **Definition of Committee**

2 “Committee” means any person or combination of persons who directly or indirectly does any of
3 the following: (a) receives contributions totaling two thousand dollars (\$2,000) or more in a calendar
4 year (commonly referred to as a recipient committee); (b) makes independent expenditures totaling one
5 thousand dollars (\$1,000) or more in a calendar year (commonly referred to as an independent
6 expenditure committee); or (c) makes contributions totaling ten thousand dollars (\$10,000) or more in a
7 calendar year to or at the behest of candidates or committees (commonly referred to as a major donor
8 committee).¹⁸

9 **SUMMARY OF THE FACTS**

10 During the June 5, 2018 Primary Election in Sacramento County, the ballot included the election
11 of the County District Attorney and the County Sheriff. The District Attorney race included incumbent
12 Anne Marie Schubert and a challenger, Noah Phillips. The Sheriff race included incumbent Scott Jones
13 and challengers Milo E. Fitch, Donna L. Cox, and Bret Daniels. Incumbents Anne Marie Schubert and
14 Scott Jones were ultimately successful, garnering 62% and 51% of the votes respectively.

15 On May 14, 2018, the ACLU made a payment to a vendor in exchange for several mailings to be
16 distributed to members of the organization or to Sacramento County Voters. The mailer at issue was
17 distributed on or around May 18, 2018 and was sent to approximately 144,523 voters in Sacramento
18 County. ACLU paid approximately \$92,950 for this mailer.

19 The mailer was sent within 60 days of the election and unambiguously urged the reader to vote
20 against the incumbent in the race for District Attorney and Sheriff. In particular, the mailer urged the
21 reader to “Vote using the ballot mailed to you to make sure we elect a District Attorney and Sheriff who
22 reflect our priorities.” The first page contains information on how to vote by mail, vote in person, or
23 how to register to vote. The text in the mailer prominently features these two races in the upcoming
24 election. The second page informs the reader that, “Our District Attorney and Sheriff are two of the
25 most powerful elected officials in our community” and goes on to describe what these officials should
26 do, such as working with groups like Black Lives Matter and the ACLU to end racial bias in law
27
28

¹⁸ Section 82013.

1 enforcement. This page reads, “We have the power to make *change* on June 5, Vote to elect the right
2 people for District Attorney and Sheriff” (emphasis added).

3 On the third page, the mailer reads, “In tragedies like this, our District Attorney and Sheriff
4 should be standing with us. No one is above the law, not even police officers. Our DA can take officer
5 involved shootings seriously by investigating them and holding police accountable, or they can turn a
6 blind eye to officers who shoot and kill members of our community.” The language encourages voters to
7 challenge the inaction of the incumbent District Attorney and Sheriff.

8 The final page includes an image of a protest or a vigil, with fists upraised and a prominent sign
9 that reads, “End Police Brutality.” The text on this page reads, “Don’t be a bystander on June 5. Elect a
10 District Attorney and Sheriff who will stand up for our community.” When viewed as a whole, the
11 message of these four pages is that the current District Attorney and Sheriff are not aligned with the
12 values of the ACLU or the voter, and that the voter should vote for a challenger who will, “stand with
13 us,” and will “take officer shootings seriously.”

14 The mailer unambiguously urges the reader to vote in this local election and to vote against the
15 incumbent. The language suggests that the status quo is not acceptable and encourages the reader to vote
16 for the candidate who will, “stand up for our community” instead of “turn[ing] a blind eye to officers
17 who shoot and kill members of our community.”

18 ACLU contends that this mailing is an issues-based piece that was not intended to endorse a
19 candidate. However, the mailer has no other reasonable reading other than to suggest that the reader vote
20 against the incumbents. In contrast to advertisements that focus on legislative or executive issues, this
21 mailing does not request that voters contact the candidates or the elected officials and asks that they
22 align with the ACLU’s values. Instead, this mailing directs voters to vote against the candidates whose
23 values do not align with the ACLU’s values and make a change at the ballot box. In this way, this
24 mailing qualifies as an expenditure under the Act.

25 The mailing was not made in coordination or at the behest of any of the candidates. Therefore,
26 the mailing was an independent expenditure. The ACLU was obligated to file a campaign statement to
27 disclose the activity, file a 24-hour independent expenditure report, and to conform to the advertisement
28 disclosure requirements.

1 On at least three of the pages of the mailer, “ACLU Northern California” is featured
2 prominently, indicating that a reasonable reader would understand that ACLU Northern California was
3 responsible for the advertisement. However, the mailing failed to include the required disclosure
4 language for political advertisements. Specifically, the advertisement failed to include the required
5 language, “Paid for by.” In addition, the mailer did not include the required disclosure for an
6 independent expenditure as it lacked the statement, “This advertisement was not authorized by a
7 candidate or a committee controlled by a candidate.” Further, the mailer’s disclosure was not in the
8 correct format. The correct disclosure format was to include the required disclosure language in a drawn
9 white box, with the disclosure in contrasting Arial 10-point font, featured at the bottom of at least one
10 page of the advertisement.

11 ACLU filed a semiannual campaign statement for the reporting period of January 1, 2018
12 through June 30, 2018. However, this statement reported activity in support of a ballot measure in the
13 City and County of San Francisco. The activity related to the mailer at issue here, including how the
14 mailer was paid for, the total dollars spent for the mailer by ACLU, and when the mailer was paid for,
15 was not disclosed.

16 VIOLATIONS

17 **Count 1: Failure to Timely Disclose Reportable Activity on Campaign Statements and** 18 **Failure to Timely File a 24-hour Independent Expenditure Report**

19 Respondent ACLU failed to timely disclose reportable activity on a campaign statement filed for
20 the reporting period of January 1, 2018 through June 30, 2018, in violation of Sections 84211.
21 Respondent ACLU failed to timely file a 24-hour Independent Expenditure Report, in violation of
22 Section 84204.

23 **Count 2: Failure to Include Proper Disclosure on an Advertisement**

24 Respondent ACLU failed to include proper disclosure on an advertisement, including failing to
25 state, “Paid for by,” followed by the name of the Respondent, failure to include the disclosure in a drawn
26 box in 10-point font, and failure to include required language for independent expenditures, in violation
27 of Sections 84502, 84504.2, and 84506.5.

28 ///

1 **PROPOSED PENALTY**

2 This matter consists of two proposed counts. The maximum penalty that may be imposed is
3 \$5,000 per count.¹⁹ Thus, the maximum penalty that may be imposed for the counts charged is \$10,000.

4 These types of violations are included in the Streamline Program. However, the Enforcement
5 Division has determined that, here, the extent and gravity of the public harm in the aggregate is more
6 than minimal. Additionally, this case involves a fact specific analysis of when a communication qualifies
7 as an expenditure under the Act. As will be discussed in detail below, this stipulation is the appropriate
8 resolution.

9 In determining the appropriate penalty for a particular violation of the Act, the Enforcement
10 Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an
11 emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division
12 considers the facts and circumstances of the violation in the context of the following factors set forth in
13 Regulation 18361.5 subdivision (e)(1) through (8): (1) The extent and gravity of the public harm caused
14 by the specific violation; (2) The level of experience of the violator with the requirements of the Political
15 Reform Act; (3) Penalties previously imposed by the Commission in comparable cases; (4) The presence
16 or absence of any intention to conceal, deceive or mislead; (5) Whether the violation was deliberate,
17 negligent or inadvertent; (6) Whether the violator demonstrated good faith by consulting the Commission
18 staff or any other governmental agency in a manner not constituting complete defense under Government
19 Code Section 83114(b); (7) Whether the violation was isolated or part of a pattern and whether the
20 violator has a prior record of violations of the Political Reform Act or similar laws; and (8) Whether the
21 violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

22 With respect to the first factor, the Act seeks to protect the integrity of our electoral process by
23 ensuring that voters know who is responsible for the political advertisements that seek to influence how
24 they cast their ballot, and the voting public is harmed when that information is not included on campaign
25 advertisements. The public harm inherent in campaign reporting violations is that the public is deprived
26 of important, time-sensitive information regarding campaign activity, which is heightened when related
27 to preelection activity. In this case, the public harm was caused by the advertisement failing to clearly
28

¹⁹ See Section 83116, subdivision (c).

1 identify that the mailing was a political mailing by including the required advertisement disclaimers,
2 including that the mailer was not authorized by any candidate and had a large reach. Additional public
3 harm in this case resulted from the failure to disclose information related to a political expenditure in
4 campaign statements and reports, including the cost of the advertisement. In mitigation, the language of
5 the advertisement clearly identified the ACLU as being responsible for the content and therefore avoided
6 the harm that would result from an anonymous advertisement.

7 The ACLU has prior experience as an independent expenditure committee and knew or should
8 have known the rules and regulations of the Act.

9 The Commission has not recently considered a case with similar facts where the respondent
10 purported to disseminate an issues-related advertisement that veered into reportable campaign activity.

11 The evidence in this case supports a finding that the violations were likely negligent. There was
12 no evidence to support a finding that the violations were made with the intent to conceal or deceive the
13 voters. As discussed, the mailer prominently included the logo of the ACLU. The ACLU has asserted
14 that the mailing was not intended to be an endorsement of any candidate. The Enforcement Division has
15 no information as to whether the ACLU sought the advice of the FPPC regarding whether the mailing
16 would qualify as an expenditure. The violation was isolated and not indicative of an overall pattern of
17 violations.

18 The Enforcement Division recommends a moderate penalty. As indicated earlier, the violations
19 in this matter (failure to disclose on a campaign statement, failure to file a 24-hour independent
20 expenditure report, failure to comply with certain advertisement disclosure provisions) are ordinarily
21 considered of low harm and therefore qualify for a lower fine. Here, there was more public harm than
22 would be appropriate for a streamline penalty.

23 After considering the factors listed in Regulation 18361.5 and penalties in prior similar cases, a
24 penalty of \$3,500 is recommended for Count 1 and a penalty of \$3,000 is recommended for Count 2 for a
25 total penalty of \$6,500.

26 CONCLUSION

27 Complainant, the Enforcement Division of the Fair Political Practices Commission, and
28 Respondent ACLU, hereby agree as follows:

1 1. Respondent has violated the Act as described in the foregoing pages, which are a true and
2 accurate summary of the facts in this matter.

3 2. This stipulation will be submitted for consideration by the Fair Political Practices
4 Commission at its next regularly scheduled meeting—or as soon thereafter as the matter may be heard.

5 3. This stipulation resolves all factual and legal issues raised in this matter—for the purpose
6 of reaching a final disposition without the necessity of holding an administrative hearing to determine the
7 liability of Respondent pursuant to Section 83116.

8 4. Respondent has consulted with their attorney, James Harrison of Olson Remcho, and
9 understand, and hereby knowingly and voluntarily waive, any and all procedural rights set forth in
10 Sections 83115.5, 11503, 11523, and Regulations 18361.1 through 18361.9. This includes, but is not
11 limited to the right to appear personally at any administrative hearing held in this matter, to be
12 represented by an attorney at Respondent's own expense, to confront and cross-examine all witnesses
13 testifying at the hearing, to subpoena witnesses to testify at the hearing, to have an impartial
14 administrative law judge preside over the hearing as a hearing officer, and to have the matter judicially
15 reviewed.

16 5. Respondent agrees to the issuance of the decision and order set forth below. Also,
17 Respondent agree to the Commission imposing against them an administrative penalty in the amount of
18 \$6,500. One or more payments totaling said amount—to be paid to the General Fund of the State of
19 California—is/are submitted with this stipulation as full payment of the administrative penalty described
20 above, and same shall be held by the State of California until the Commission issues its decision and
21 order regarding this matter.

22 6. If the Commission declines to approve this stipulation—then this stipulation shall become
23 null and void, and within fifteen business days after the Commission meeting at which the stipulation is
24 rejected, all payments tendered by Respondent in connection with this stipulation shall be reimbursed to
25 Respondent. If this stipulation is not approved by the Commission, and if a full evidentiary hearing
26 before the Commission becomes necessary, neither any member of the Commission, nor the Executive
27 Director, shall be disqualified because of prior consideration of this Stipulation.

28 ///

1 7. The parties to this agreement may execute their respective signature pages separately. A
2 copy of any party's executed signature page, including a hardcopy of a signature page transmitted via fax
3 or as a PDF email attachment, is as effective and binding as the original.
4

5 Dated: _____

Christopher B. Burton, Acting Chief of Enforcement
Fair Political Practices Commission

8 Dated: _____

Abdi Soltani
On behalf of ACLU of Northern California

1 The foregoing stipulation of the parties, ACLU OF NORTHERN CALIFORNIA, FPPC Case No.
2 2018-01511 is hereby accepted as the final decision and order of the Fair Political Practices Commission,
3 effective upon execution below by the Chair.

4
5 IT IS SO ORDERED.

6
7 Dated: _____

8 Richard C. Miadich, Chair
9 Fair Political Practices Commission
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28