

Date of Hearing: April 10, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 1306 (Cristina Garcia) – As Amended March 18, 2019

SUBJECT: Political Reform Act of 1974: misuse of funds.

SUMMARY: Enacts a new prohibition on the use of public resources for a campaign activity that largely duplicates an existing prohibition, and gives the Fair Political Practices Commission (FPPC) the authority to enforce this new prohibition through a civil or administrative action.

Specifically, **this bill:**

- 1) Makes it unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity.
- 2) Defines the following terms, for the purposes of this bill:
 - a) “Campaign activity” to mean an activity constituting a contribution or an expenditure as defined for the purposes of the Political Reform Act (PRA). Provides that the term “campaign activity” does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.
 - b) “Public resources” to mean any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time.
 - c) “Use” to mean a use of public resources that is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated.
- 3) Provides that in lieu of any other penalty under the PRA, any person who intentionally or negligently violates this bill is liable for an administrative or civil penalty of up to \$1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. Provides that if two or more persons are responsible for any violation, they shall be jointly and severally liable for the penalty.
- 4) Requires any moneys recovered under this bill to be paid into the General Fund.
- 5) Prohibits a civil or administrative action alleging a violation of this bill from being commenced more than four years after the date the alleged violation occurred.
- 6) Provides that this bill does not prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, if (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair

and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

EXISTING LAW:

- 1) Creates the FPPC, and makes it responsible for the impartial, effective administration and implementation of the PRA.
- 2) Makes it unlawful for an elected state or local officer, as specified, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.
 - a) Defines “campaign activity,” for these purposes, as an activity constituting a contribution or an expenditure as defined in the PRA. Provides that the term “campaign activity” does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.
 - b) Makes an intentional or negligent violation of this prohibition punishable by a civil penalty of up to \$1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. Permits the penalty to be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000, as specified.
 - c) Specifies that this prohibition does not prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.
- 3) Prohibits an officer, employee, or consultant of a local agency from expending or authorizing the expenditure of local agency funds to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters. Provides that this provision does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:
 - a) The informational activities are not otherwise prohibited by the Constitution or laws of the state.
 - b) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.
- 4) Prohibits school district or community college district funds, services, supplies, or equipment from being used for the purpose of urging the support or defeat of any ballot measure or

candidate, including, but not limited to, any candidate for election to the governing board of the district. Provides that this prohibition does not prohibit the use of public resources to provide information to the public about the possible effects of any bond issue or other ballot measure if both of the following conditions are met:

- a) The informational activities are otherwise authorized by the Constitution or laws of this state.
 - b) The information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.
- 5) Provides that the term “contribution,” for the purposes of the PRA, includes the payment of public moneys by a state or local governmental agency for a communication to the public that satisfies both of the following conditions:
- a) The communication 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; and,
 - b) The communication is made at the behest of the affected candidate or committee.
- 6) Provides that the term “independent expenditure,” for the purposes of the PRA, includes a payment of public moneys by a state or local government agency 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 behest of the affected candidate or committee.
- 7) Defines the term “committee,” for the purposes of the PRA, as a person or combination of persons who directly or indirectly does any of the following:
- a) Receives contributions totaling \$2,000 or more in a calendar year;
 - b) Makes independent expenditures totaling \$1,000 or more in a calendar year; or,
 - c) Makes contributions totaling \$10,000 or more in a calendar year to or at the behest of candidates or committees.
- 8) Requires committees to file periodic campaign reports disclosing contributions received and made, and expenditures made during the reporting period, among other information.
- 9) Permits the FPPC to impose administrative penalties in situations where it determines that a violation of the PRA has occurred. Permits the FPPC, through this administrative enforcement procedure, to require the person who violated the PRA to do any of the following:
- a) Cease and desist violation of the PRA;

- b) File any reports, statements, or other documents or information required by the PRA; and,
- c) Pay a monetary penalty of up to \$5,000 per violation.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

Assembly Bill 1306 would amend the Political Reform Act to authorize the Commission to bring administrative and civil actions against public agencies and public officials for spending public resources on campaigns. There is a gap in the FPPC's enforcement ability to hold accountable those who violate the law. This bill sends a clear message that California won't tolerate public agencies spending taxpayer dollars on campaign activities and is stepping up penalties because of it. We're simply holding folks accountable and empowering our oversight entities to dole out more than a fix-it ticket fine.

- 2) **FPPC Letter to the Legislature:** According to information provided by the author, the genesis for this bill was a letter sent by the FPPC to members of the Legislature in February of this year in which the FPPC requested that legislators "consider legislation amending the [PRA] to authorize the [FPPC] to bring administrative and civil actions against public agencies and public officials for spending public funds on campaign activity." In that letter, the FPPC noted that it had "recently fined the Bay Area Rapid Transit District for failing to disclose its campaign activity in support of a ballot measure." The letter went on to note that while the FPPC has the authority to bring enforcement actions when public agencies fail to file public reports that *disclose* campaign spending, the FPPC does not have the authority to bring enforcement actions against public agencies and officials for improperly *spending* public resources for campaign purposes.
- 3) **Existing Prohibitions on the Use of Public Funds for Campaign Activities:** As detailed above, existing law already contains numerous prohibitions against the use of public resources for campaign purposes. At least three provisions of state law *explicitly* prohibit various public agencies, officers, and employees from using public resources for campaign purposes, including one provision that is substantially similar to the language found in this bill. Several other provisions of state law restrict the use of public resources for campaign purposes in a more indirect manner. In addition to these restrictions, the PRA prohibits mass mailings from being sent at public expense, and prohibits a public officer from expending and a candidate from accepting public moneys for the purpose of seeking elective office, as specified.

Independent of these state laws, the California Supreme Court has found that the use of public funds for campaign purposes is restricted even in the absence of a state law prohibiting such a use of public funds. Specifically, in *Stanson v. Mott* (1976) 17 Cal.3d 206, the California Supreme Court ruled that public funds could not be used for campaign purposes in the absence of clear and explicit legislative authorization. (The court in *Stanson* did not opine on whether the expenditure of public funds for campaign purposes *with* explicit legislative authorization would be permissible, noting that court did not need to "resolve the

serious constitutional question that would be posed” by such an authorization in order to resolve the case before the court.) More recently, the California Supreme Court reaffirmed *Stanson* in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1. In that case, the Supreme Court concluded that the expenditure of public funds for materials or activities that reasonably are characterized as campaign materials or activities is not authorized, even when the message delivered does not constitute express advocacy.

In light of the foregoing information, it is well established under state law that public agencies and officials are not permitted to use public resources for campaign purposes. When public agencies or officials violate these restrictions, various remedies exist, including potential criminal or civil actions, and injunctive or declaratory relief.

Although not *explicitly* stated in the written materials provided to this committee, it appears that many supporters of this bill are concerned that existing restrictions on the use of public resources for campaign purposes suffer from inadequate enforcement. If enforcement of those laws *is* inadequate, however, it is unclear whether the best way to address that problem is through the enactment of a *new* prohibition on the use of public resources. Instead, it may be more effective to reconsider the enforcement mechanisms that exist for the existing laws that restrict the use of public resources for campaign purposes.

In fact, the creation of a *new* law restricting the use of public resources for campaign purposes could make it harder for diligent public agencies and officials to ensure that their activities comply with state law. While the restrictions imposed by this bill are substantially similar to ones that exist in current law, the administration and enforcement of a new law by the FPPC could result in differing interpretations of those laws by the different enforcement authorities. Such a situation could complicate efforts to understand and comply with these laws.

- 4) **Campaign Purposes vs. Informational Purposes:** Although state law prohibits the use of public funds for campaign purposes, public agencies are permitted to use public resources for informational purposes in connection with measures that appear on the ballot. The distinction between campaign purposes and informational purposes, however, is not always clear, as was acknowledged by the California Supreme Court in both *Stanson* and *Vargas*. In *Stanson*, for example, the California Supreme Court noted that while “public agencies may generally publish a ‘fair presentation of facts’ relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to ‘Vote Yes,’ have nevertheless been found to constitute improper campaign literature.”

In fact, the lack of clarity about the distinction between “informational” and “campaign” materials may contribute to situations where public agencies use public funds for impermissible purposes. Similarly, that lack of clarity may also contribute to situations where members of the public believe that public agencies are violating the law when they produce permissible informational materials. If additional mechanisms are going to be provided to enforce rules that prohibit the use of public funds for campaign activities—as is proposed by this bill—public agencies, regulators, and members of the public may benefit from additional clarity in the law about the types of activities that are permissible.

- 5) **Pending Litigation:** As noted above, although the FPPC does not have the authority to enforce state laws prohibiting the *use* of public funds for campaign purposes, it has brought enforcement actions against public agencies for failing to file campaign disclosure reports when public funds are used for campaign purposes. In September of last year, the California State Association of Counties and the California School Boards Association filed a lawsuit against the FPPC challenging its authority to adopt and enforce specified regulations. Those regulations have been used by the FPPC as the basis of enforcement actions against public agencies for failing to file campaign reports disclosing the use of public funds for campaign purposes. The lawsuit is pending in the Los Angeles Superior Court.
- 6) **FPPC and Administrative Enforcement:** Existing laws prohibiting the use of public funds for campaign purposes generally must be enforced through criminal or civil actions. By contrast, this bill would give the FPPC the authority to bring *administrative* enforcement actions for the improper use of public funds for campaign purposes. Although the FPPC has the authority to bring civil enforcement actions for certain violations of the PRA, the vast majority of enforcement cases brought by the FPPC are handled administratively. The FPPC generally has the authority to levy a monetary penalty of up to \$5,000 per violation through its administrative enforcement process.

This bill permits the FPPC to bring a civil *or* administrative enforcement action for a violation of the bill. Whether an enforcement action is brought civilly or administratively, this bill provides for the same penalty of up to \$1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. A provision of law that allows for a penalty to be imposed in an amount of three times the actual damages—as is the case in this bill—is commonly referred to as a “treble damages” provision. Although it is not unprecedented, it is extremely uncommon for the FPPC to have the ability to levy treble damages through its administrative enforcement process. While treble damages are available for criminal violations and for certain civil violations of the PRA, the only instance in which existing law permits the FPPC to levy treble damages through its administrative process is for violations of specified provisions of the PRA governing disclosures that must appear on certain campaign advertisements.

- 7) **Arguments in Support:** In support of this bill, the Howard Jarvis Taxpayers Association writes:

While the FPPC has the ability to fine agencies who don’t follow state law regarding disclosure of campaign expenditures, they do not currently have the authority to pursue actions based on illegal expenditures of public resources for political advocacy.

The insufficiency of the FPPC’s current authority was demonstrated earlier this year when the FPPC handed down a \$7500 fine against the Bay Area Rapid Transit Agency or BART. In 2016, Bay Area voters approved Measure RR, a \$3.5 billion bond to fund BART improvements. During the campaign, a number of taxpayer funded advertisements and videos were produced by BART. In our view, and in the view of the San Jose Mercury News (among other newspapers) the ads crossed the line of ‘express advocacy’ prohibiting public agencies from using taxpayer dollars in campaigns. The legal precedent for this statement comes via the landmark California Supreme Court decision *Stanson v. Mott* (1976). The

court made very clear where they stood on this issue by saying, “A fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in an election contest or bestow an unfair advantage on one of several factions.” The FPPC agreed, calling the BART situation a “serious misuse of public funds.” But without the ability to bring legal actions, their hands were tied....

AB 1306 holds individuals liable for violations and will serve as a valuable deterrent. Taxpayers need to be able to trust that their hard-earned dollars are going towards the public services that improve their lives, and not to run a political campaign.

- 8) **Previous Legislation:** AB 9 (John A. Pérez), Chapter 363, Statutes of 2009, specified that the payment of public moneys by a governmental agency for a communication to the public that 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 is either a contribution or an independent expenditure under the PRA, and thus is subject to the restrictions and reporting requirements of the PRA.
- 9) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders, and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

CalTax
Howard Jarvis Taxpayers Association

Opposition

None on file.

Analysis Prepared by: Ethan Jones / E. & R. / (916) 319-2094