APPROVED
BY THE CITY COUNCIL
JUN - 2 1987
OFFICE OF THE
CITY CLERK
CONTINUED
TO ~~5-26-87~~ 6-2-87

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OFFICE OF THE
CITY ATTORNEY

JAMES P. JACKSON
CITY ATTORNEY

THEODORE H. KOBEY, JR.
ASSISTANT CITY ATTORNEY

CITY OF SACRAMENTO
CALIFORNIA

CITY MANAGER'S OFFICE
RECEIVED
MAY 12 1987

812 TENTH STREET
SACRAMENTO, CA
95814-2694

916-449-5346

DEPUTY CITY
ATTORNEYS:
SAMUEL L. JACKSON
WILLIAM P. CARNAZZO
LAWRENCE M. LUNARDINI
GARLAND E. BURRELL, JR.
DIANE B. BALTER
RICHARD F. ANTOINE
TAMARA MILLIGAN-HARMON
LINDA M. GONZALES

May 11, 1987

Honorable City Council
Council Chambers
Sacramento, CA 95814

Re: An Ordinance Repealing Sacramento City Code §62.204, Relating to Fair Campaign Practices and Declaring This Ordinance To Take Effect Immediately

Honorable Members in Session:

SUMMARY

This report recommends enactment of an emergency ordinance to repeal Sacramento City Code §62.204 which requires a statement on the ballot as to whether a candidate has signed the City's Code of Fair Campaign Practices.

BACKGROUND

The Law and Legislation Committee reviewed the attached report on May 7, 1987 and voted unanimously to recommend emergency repeal of Section 62.204.

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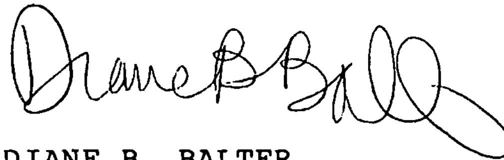
RECOMMENDATION

The Law and Legislation Committee recommends enactment of the attached emergency ordinance repealing Section 62.204 of the City Code.

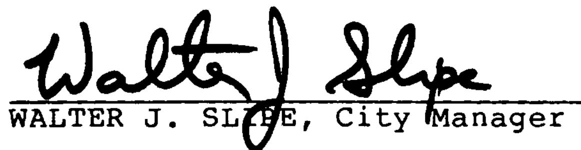
Respectfully submitted,

JAMES P. JACKSON
City Attorney



DIANE B. BALTER
Deputy City Attorney

RECOMMENDATION APPROVED:



WALTER J. SLIPE, City Manager

DISTRICT: All
DATE: May 21, 1987

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ORDINANCE NO. 87-062

ADOPTED BY THE SACRAMENTO CITY COUNCIL ON DATE OF

AN ORDINANCE REPEALING SACRAMENTO CITY CODE §62.204, RELATING TO FAIR CAMPAIGN PRACTICES AND DECLARING THIS ORDINANCE TO TAKE EFFECT IMMEDIATELY

APPROVED BY THE CITY COUNCIL
JUN - 2 1987
OFFICE OF THE CITY CLERK

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1. Repeal.

Sacramento City Code §62.204 is hereby repealed.

SECTION 2. Emergency.

THIS ORDINANCE IS DECLARED TO BE AN EMERGENCY MEASURE, TO BECOME EFFECTIVE IMMEDIATELY. THE FACTS CONSTITUTING THE EMERGENCY ARE that the City Clerk is required to prepare an election brochure and pamphlet for distribution to candidates and others in connection with the City's upcoming election. Included in that pamphlet is information relating to §62.204. That pamphlet must be ready for publication within a short time, necessitating immediate action to remove §62.204 from the City Code so that the corresponding references in the pamphlet are not included.

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK

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OFFICE OF THE CITY ATTORNEY

JAMES P. JACKSON
CITY ATTORNEY

THEODORE H. KOBEY, JR.
ASSISTANT CITY ATTORNEY

CITY OF SACRAMENTO
CALIFORNIA

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TAMARA MILLIGAN-HARMON
LINDA M. GONZALES

April 6, 1987

City Council
Sacramento, California

Honorable Members in Session:

SUBJECT: Fair Campaign Practices Ordinance

SUMMARY

Due to a recent opinion issued by the State Attorney General, the City Council should consider repeal of City Code §62.204 which requires a statement on the ballot as to whether a candidate has complied with the provisions of the City's Fair Campaign Practices Ordinance.

BACKGROUND

City Code §62.204, which is part of the Fair Campaign Practices Ordinance, reads as follows:

> **§62.204 Effect of Signing or Not Signing Code**
>
> The election official responsible for preparation of the ballot shall note on both the sample ballot and the official ballot, near the name of the candidate, that the candidate "has signed code of fair campaign practices" or "has refused to sign code of fair campaign practices."

Attached (Attachment "A") is a copy of a recently-issued Attorney General opinion which concludes that provisions such as §62.204 are unconstitutional. The reasoning used to reach that conclusion is, we believe, sound. The balance of the ordinance is not affected. Therefore, consideration must be given to repeal of §62.204. We have attached a proposed ordinance which does so (Attachment "B").

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RECOMMENDATION

Due to a recent opinion issued by the State Attorney General, the City Council should consider repeal of City Code §62.204 which requires a statement on the ballot as to whether a candidate has complied with the provisions of the City's Fair Campaign Practices Ordinance.

Respectfully submitted,

JAMES P. JACKSON, City Attorney

By ______________________
WILLIAM P. CARNAZZO
Deputy City Attorney

JPJ:je

April 14, 1987
All Districts

Attachments

TO BE PUBLISHED IN THE OFFICIAL REPORTS

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OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION of JOHN K. VAN DE KAMP Attorney General CLAYTON P. ROCHE Deputy Attorney General	No. 86-103 DECEMBER 30, 1986

THE HONORABLE L. B. ELAM, COUNTY COUNSEL, SACRAMENTO COUNTY, has requested an opinion on the following questions:

1. Would a state law or county ordinance which provides for a citizens advisory committee appointed by the board of supervisors which would hold hearings on complaints of unethical campaign practices described in sections 12500 et seq. of the Elections Code and publicize its findings prior to the election violate the constitutional guarantee of freedom of speech?

2. Would a state law or county ordinance which requires ballots to indicate whether the candidates for elective county office have signed or refused to sign the Code of Fair Campaign Practices provided for in sections 12500 et seq. of the Elections Code violate the constitutional guarantee of freedom of speech?

CONCLUSIONS

1. A state law or county ordinance which provides for a citizens advisory committee appointed by the board of supervisors which would hold hearings on complaints of unethical campaign practices described in section 12500 et seq. of the Elections Code and would publicize its findings prior to the election would violate the constitutional guarantee of freedom of speech.

2. A state law or county ordinance which requires ballots to indicate whether the candidates for elective county office have signed or refused to sign the Code of

Fair Campaign Practices provided for in sections 12500 et seq. of the Elections Code would violate the constitutional guarantee of freedom of speech.

ANALYSIS

In 1982 (Stats. 1982, ch. 855) the Legislature enacted sections 12500 through 12526 of the Elections Code relating to "Fair Campaign Practices."1/ This law provides for a "Code of Fair Campaign Practices" as set forth in full in the Appendix. The intent and purposes of the law are set forth in section 12500, and include the goals (1) "to encourage every candidate for public office in this state to subscribe to the Code" and (2) "to give voters guidelines in determining fair play and to encourage candidates to discuss issues instead of untruths or distortions."2/

The Secretary of State or the county clerk, as appropriate, supplies blank forms of the code to campaign committees and candidates. (§§ 12520, 12523.) Subscription to the code is clearly voluntary. (§§ 12520, 12525.) As stated in section 12525, "[i]n no event shall a candidate

---

1. All section references are to the Elections Code unless otherwise indicated.

2. Section 12500 provides in full:

> "The Legislature hereby declares that the purpose of this chapter is to encourage every candidate for public office in this state to subscribe to the Code of Fair Campaign Practices.
>
> "It is the ultimate intent of the Legislature that every candidate for public office in this state who subscribes to the Code of Fair Campaign Practices will follow the basic principles of decency, honesty, and fair play in order that, after vigorously contested, but fairly conducted campaigns, the citizens of this state may exercise their constitutional right to vote, free from dishonest and unethical practices which tend to prevent the full and free expression of the will of the voters.
>
> "The purpose in creating the Code of Fair Campaign Practices is to give voters guidelines in determining fair play and to encourage candidates to discuss issues instead of untruths or distortions."

Fair Campaign Practices provided for in sections 12500 et seq. of the Elections Code would violate the constitutional guarantee of freedom of speech.

ANALYSIS

In 1982 (Stats. 1982, ch. 855) the Legislature enacted sections 12500 through 12526 of the Elections Code relating to "Fair Campaign Practices."1/ This law provides for a "Code of Fair Campaign Practices" as set forth in full in the Appendix. The intent and purposes of the law are set forth in section 12500, and include the goals (1) "to encourage every candidate for public office in this state to subscribe to the Code" and (2) "to give voters guidelines in determining fair play and to encourage candidates to discuss issues instead of untruths or distortions."2/

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for public office be required to subscribe to or endorse the code." All completed forms subscribed to by a candidate are filed with the county clerk who retains them for public inspection until 30 days after the election. (§§ 12523, 12524.)

In accordance with the stated legislative purpose, the Code of Fair Campaign Practices itself, set forth in section 12520, provides that a subscribing candidate shall conduct his or her political campaign "vigorously" but also "fairly" so that the electorate will vote "fully and clearly . . . on the issues."

In furtherance of this goal the candidate subscribes to a series of pledges as to how he or she will actually act. Thus, for example, the candidate pledges to discuss the issues and his or her record and the opponent's record without resorting to such matters as "character defamation, whispering campaigns, libel, slander or scurrilous attacks" on the opponent or his or her family. The candidate also pledges to eschew appeals "to negative prejudice based on race, sex, religion, racial origin, physical health, status or age." Likewise, the candidate pledges not to hamper the free exercise of the franchise by promising not to use "any dishonest or unethical practice which tends to corrupt or undermine our American system of free elections." The candidate also pledges not to coerce "election help or campaign contributions" from his or her employees. He or she further pledges to repudiate any support derived from any person or group which engages in the foregoing enumerated tactics. And finally, the candidate pledges to "defend and uphold the right of every qualified American voter to free and equal participation in the electoral process."

In the context of this relatively new state law relating to Fair Campaign Practices the county wishes to know whether it, by ordinance, or the Legislature, by state law, could additionally legislate to provide certain matters with respect to the Code of Fair Campaign Practices.

We are first asked whether the county or the Legislature could, consistent with candidates' constitutional guarantees of freedom of speech,3/ provide for a

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3. "Congress shall make no law . . . abridging the freedom of speech. . . ." This amendment is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.

(Fn. 3 continued on next page)

citizens' committee with certain specified duties. The possible role of the citizens' committee would be twofold. First, the committee would receive and conduct hearings on complaints that candidates for county office who had signed the Code of Fair Campaign Practices had violated it, and would publish its findings with respect thereto before the election for the information of the electorate. Secondly, the committee would hear complaints solely from candidates that they had been victimized by misrepresentations of fact by their opponents concerning their character, background, public record or other qualifications for office which were violations of the Code of Fair Campaign Practices. As with the first possibility, the citizens' committee would hold public hearings on the complaints, and publicize its findings to essentially "set the record straight" before the elections.

We are additionally asked whether the county or the Legislature could, consistent with candidates' constitutional guarantees of freedom of speech, provide that the ballot should state thereon whether a candidate for elective office has or has not signed the Code of Fair Campaign Practices so that the voters may be so informed.

For the reasons to be discussed herein, we conclude that both proposals would violate candidates' constitutional guarantees of freedom of speech.

GENERAL PRINCIPLES

Case law is scarce with respect to attempts by states to regulate the content of campaign advertising or communications by candidates. This is understandable when one considers the pronouncements over the years by the federal courts in the general area of political speech in the framework of the First Amendment.

The right to engage in political speech and political association is guaranteed by the First and Fourteenth Amendments. (N.A.A.C.P v. Alabama (1958) 357 U.S. 449, 460.)

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3. (Continued)

See also California Constitution, article I, section 2:

"(a) Every person may freely speak, write or publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

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"These protections reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open,' (New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the core of our electoral process. . . .' William v. Rhodes, 393 U.S. at 32. . . ." (Elrod v. Burns (1975) 427 U.S. 347, 357.)

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government . . . and all such matters relating to political processes. . . ." (Mills v. Alabama (1966) 384 U.S. 214, 218-219.) "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaign for political office" (Monitor Patriot Co. v. Roy (1971) 401 U.S. 265, 272 so "that candidates have the unfettered opportunity to make views known" (Buckly v. Valeo (1976) 424 U.S. 1, 52-53, emphasis added.)

Accordingly, in this area "the remedy to be applied is more speech, not enforced silence." (Whitney v. California (1927) 274 U.S. 357, 377. Although "the states have a legitimate interest in upholding the integrity of their electoral process (Brown v. Hartlage (1982) 456 U.S. 45, 52), "[w]hen a state seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstratedly supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." (Id., at pp. 53-54.) "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification of limiting speech." (Id., at p. 60, emphasis added.)

"Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate." (Gertz v. Robert Welch, Inc. (1973) 418 U.S. 323, 341.) "The First Amendment requires that we protect some falsehood in order to protect speech that matters." (Id. at p. 341).

Thus, although "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," (Brown v. Hartlage, supra, 456 U.S. at

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p. 60), "[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. See Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). . . . We depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc., supra, at 339-340. In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponents. The preferred remedy of 'more speech, not enforced silence,' . . . thus has special force. . . ." (Id., at p. 61.)

Accordingly, in the landmark case, New York Times v. Sullivan (1964) 376 U.S. 254, the Court held that a newspaper could not be found to have libeled a "public official" by the publication of a falsehood absent "actual malice." Such test requires that the publication be made with the knowledge that it was false or with a reckless disregard of whether it was true or false.

The New York Times test was thereafter extended to publications regarding candidates for office in Monitor Patriot Co. v. Roy, supra, 401 U.S. 265, and Ocala Star-Banner Co. v. Damron, supra, 401 U.S. 295. In the latter case, the Court noted with respect to a false story published with respect to a candidate that "[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest case for the application of The New York Times rule." (Id., at pp. 300-301.)

Prior thereto to Court had, in Mills v. Alabama, supra, 384 U.S. 214, held that a newspaper editor could not be charged with violating the Alabama Corrupt Practices Act (for "electioneering" on election day) for writing and publishing an editorial on election day urging adoption of a particular ballot measure. The Court found it difficult to conceive of a more flagrant abridgement of freedom of the press. (Id., at p. 219.)

Subsequently, the Court held in Elrod v. Burns, supra, 427 U.S. 347, that the practice of dismissing employees of the opposite political party ("patronage dismissals") severely encroached upon First Amendment freedoms. And in Brown v. Hartlage, supra, 456 U.S. 45, the Court held that Kentucky's Corrupt Practices Act could not, consistent with the First Amendment, be applied to candidate Brown's statement that, if elected, he intended to serve at a salary less than fixed by law. Legally he probably could not have done so, but he erroneously believed he could.

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And finally, with respect to general principles, the Court in Buckley v. Valeo, supra, 424 U.S. 1, struck down the expenditure limitations made by or on behalf of candidates set forth in the Federal Election Campaign Act of 1971, finding such restrictions as placing substantial restrictions on the ability of candidates, citizens, and associations to engage in First Amendment protected political expression. (Id., at p. 59.) In the course of the decision, the Court stated (424 U.S. at p. 50):

> "The Court's decisions in Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. . . ."4/

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4. For a recent discussion and exposition of the differing rules concerning media libel against both public figures and private plaintiffs, affirming the rule of New York Times v. Sullivan, see Philadelphia Newspapers, Inc. v. Hepps (1986) ___ U.S. ___, 106 S.Ct. 1558, holding "[t]hat, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without showing that the statements at issue are false." (106 S.Ct. at p. 1559.)

For several California cases in the general area of campaign speech in the context of First Amendment rights see: Wilson v. Superior Court (1975) 13 Cal.3d 652 (error, to issue preliminary injunction restraining publication of allegedly libelous newsletter re opponent); Calligan v. Superior Court (1986) 185 Cal.App.3d 734 (Election Code section 10013.5, permitting mandate or injunction to correct erroneous material in candidate's campaign statement, constitutional. Prior restraint permitted in publicly financed forum). But compare, Loza v. Panish (1980) 102 Cal.App.3d 821 (holding prior Elections Code section 10012 constitutional re candidate's statements). See additionally Fisher v. Larsen (1982) 138 Cal.App.3d 627 (discussion of rules for deciding motions for summary judgment re alleged libel published by campaign workers and local newspapers); Schuster v. Municipal Court (1980) 109 Cal.App.3d 887 (prior Elections Code section 29410, requiring source disclosure of all political campaign literature, unconstitutional; Baldwin v. Redwood City (9th Cir. 1976) 540 F.2d 1360, cert. den.,

(Fn. 4 continued on next page)

See also Citizens Against Rent Control v. Berkeley (1981) 454 U.S. 290.

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By virtue of the foregoing principles, it is not surprising to note the recent opinion of the Court of Appeals, District of Columbia Circuit with respect to an alleged misleading photomontage purportedly depicting President Reagan and staff members ridiculing racial minorities. In Lebron v. Washington Metro Area Transit Auth. (D.C. Cir. 1984) 749 F.2d 893, the court held that the defendant transit authority improperly refused to permit the plaintiff to rent advertising space to display this photomontage which the court stated was "plainly political" and was "intended to convey Mr. Lebron's belief about the manner in which certain segments of the American population have reacted to the effects of the Reagan administration's policies on them." (Id., at p. 895.) Despite the plaintiff's offer to place a disclaimer on the poster that the montage was a composite and not a true depiction of an actual encounter of the persons thereon (Reagan and his staff langhing on one side, and hostile or sullen men and women on the other side, some of whom were racial minorities), the defendant transit district concluded the poster violated its guidelines as being "deceptive." With respect to this poster and defendant's actions, the court stated (749 F.2d at P. 898):

> "Judge Scalia is of the view that, while it is a sound judicial practice to avoid passing upon constitutional issues, it is also a sound judicial practice, of even more venerable antiquity, to avoid passing upon the truth or falsity of political pamphleteering or advertising, particularly in the context of prior restraint. . . ."

And additionally with respect to prior restraint the court noted:

> ". . . Prior administrative restraint of political messages on a content-related basis other than substantive falsity -- notably, obscenity -- is permissible. Cf. Freedman v. Maryland 380 U.S.

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4. (Continued)

431 U.S. 913 (inspection fee and ban on political signs in residential areas, and limitation as to aggregate area of signs per candidate or issue, unconstitutional, but limitation of area of signs per parcel, constitutional).

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4. (Continued)

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51, 58-59 . . . (outlining elements that would validate film censorship schemes). And in extreme situations, prior judicial restraint on the basis of falsity may be appropriate. See, e.g., Tomei v. Finley, 512 F.Supp. 695 (N.D. Ill. 1981) (granting preliminary injunction prohibiting use in political advertising of the acronym 'Rep' [Representation for Every Person party] on grounds that it falsely implied affiliation with Republican party.) But prior administrative restraint of distinctively political messages on the basis of their deceptiveness is unheard of and deservedly so. [Citing Vancuso v. Schwartz, 401 F.Supp. 87 (S.D.N. 1975), aff'd. 423 104 (1976), to be discussed at length and relied upon herein]. . . ." (Id., at pp. 898-899; fns. ommitted.)

VANCUSO V. SCHWARTZ

Despite the paucity of case law actually attempting to regulate "candidate speech", there is one case which involved a candidate's code of ethics strikingly similar to that set forth in section 12520 in a number of material respects, and an administrative body set up to hear complaints.5/ Thus, in Vancuso v. Schwartz (S.D.N.Y. 1975) 401 F.Supp. 87, which was summarily affirmed by the United States Supreme Court sub nomine, Schwartz v. Postel (1976) 423 U.S. 1041, a three-judge federal court considered the question of a New York law which provided a Fair Campaign Code "for the purpose, inter alia of 'stimulating just debate' in political campaigns." (Id., at p. 88.) Similiar to California's Code of Fair Campaign Practices, the New York Code denounced (and actually prohibited), among other things, "'attacks on a candidate based on race, sex, religion or ethnic background' . . . any 'misrepresentation of any candidate's qualifications including the use of 'personal vilification' and 'scurrilous attacks . . .; [and] any 'misrepresentation of a candidate's position.'" The law also provided detailed provisions relating to filing complaints with the State Board of Elections, for adversary

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5. Although not as factually relevant as Vancuso v. Schwartz, the decision of the Supreme Court of Pennsylvania in Com. v. Wadzinski (Pa. 1980) 422 A.2d 124 also in essence involved an attempt to regulate the content of candidate speech. In that case the court invalidated as a violation of the First Amendment a statute which required, under criminal sanction, that a candidate who intended to publish "election-eve" campaign material about his opponent give his opponent "reasonable notice" of the content thereof so as to permit his opponent an opportunity to reply.

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hearings before the board, and for the institution of judicial proceedings by the board to enforce its orders. The Board was authorized to impose fines and issue reports of its findings and determinations. (Id., at pp. 93-94.)

By applying some of the same basic principles of law outlined by us at length above, the three-judge federal court stated and held:

> ". . . The State argues that the Code and the statute constitute a narrowly drawn regulatory scheme covering an area of unprotected expression. We disagree and hold that the challenged sections of the Code and of the statute are repugnant to the right of freedom of speech guaranteed by the First Amendment and are unconstitutional on their face." (Id., at p. 88.)6/

The court agreed with the Election Board's position that untrue statements made with "actual malice"7/ would be unprotected speech under the rules set forth in New York Times v. Sullivan (1964) 376 U.S. 254, 280, Curtis Publishing Co. v. Butts (1967) 388 U.S. 130 and Garrison v. Louisiana (1964) 379 U.S. 64. The court noted, however, that this case was not a civil or criminal libel case brought by a defamed plaintiff, but one brought in the context of and "during campaigns for political office when the constitutional guarantee of freedom of speech 'has its fullest and most urgent application.'" (410 F.Supp. at p. 93.)

The court went on to hold the New York code unconstitutional as being overly broad in its prohibitions and, accordingly, presenting an "inhibitory 'chilling effect' from the overbreath of the Code . . . to important First Amendment speech." The court noted that "[i]t hardly needs repeating that such speech should be 'uninhibited, robust and wide-open.'" (401 F.Supp. at p. 97.)

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6. For the effect of a summary affirmance by the United States Supreme Court, see Fusari v. Steinberg (1975) 419 U.S. 379, 391, Burger, C.J. concurring: "When we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached. . . ."

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In addition to the "chill" created by the overbreath, the court further concluded that the mere fact that administrative hearings were provided to hear complaints as to alleged violations of the code itself created a substantial chilling effect upon legitimate campaign speech. The court reasoned essentially that it is not difficult to see how a political candidate might be deterred from making protected statements where (1) he must consider the consequences of a board proceeding; (2) where the administrative proceeding did not afford him the same protections he would have in court where "actual malice" would have to be proved with "convincing clarity"; (3) where he did not have the "[j]udicial participation [which] is particularly necessary when important First Amendment expression is involved" [citing cases]; and (4) where a respondent would be faced with a final administrative decision a few days before an election in a nonjudicial proceeding when the proof "may be less than clear and convincing." (401 F.Supp. at pp. 98-100.)

1. The Citizens' Committee

Having discussed the general principles as enunciated by the United States Supreme Court and the decision in Vancuso v. Schwartz, supra, 401 F.Supp 87, aff'd sub. nom., Schwartz v. Postel, 423 U.S. 1041, we reach question one of this request. We are asked whether a state law or county ordinance which provides for a citizens' advisory committee appointed by the board of supervisors which 1) would hold hearings on complaints of unethical campaign practices described in section 12500 et seq. of the Election Code and 2) would publicize its findings prior to the election, would violate candidates' constitutional guarantees of freedom of speech.

Based upon the reasoning and holding of Vancuso v. Schwartz, supra, 401 F.Supp. 87, aff'd sub. nom, Schwartz v. Postel, 423 U.S. 1041, we conclude that the proposed scheme presented in question one would be unconstitutional as suffering from the same overbreath and the same "chilling" effect on speech in the area of protected speech. We see little difference between that in Vancuso v. Schwartz and the proposal in question one to determine if violations have occurred with respect to the Code of Fair Campaign Practices. Each would place candidates "on guard" to insure that they did not violate the Code. The "chilling" effect would appear to be the same in each case. In short, both schemes would foster "self-censorship" on the part of candidates which is incompatible with the free discussion contemplated by the First Amendment in political campaigns. As stated by the court in Vancuso v. Schwartz (401 F.Supp. at p. 98).

". . . Also significant is the realistic assumption that any adverse finding by the Board (and indeed, the filing of a charge by an opponent) will be highly publicized by the respondent's opponent (both Vanasco and Ferris allege in their complaint that they received extensive adverse publicity as a result of the Board's decisions). Upon consideration of these factors it is not difficult to see how a political candidate might be deterred from making protected statements when he must consider the consequences of a Board proceeding." (Fn. omitted.)

We note the suggestion that the conclusion might be otherwise if the citizens' committee were merely to hear complaints made by candidates that they have been victimized by misrepresentations of fact by their opponents concerning their character, background, public record or other qualifications for public office and to publish its findings to "set the record straight."

However, an assertion by a candidate that he is the victim of unfair practice by his opponent also accuses the opponent of the same unfair practices. The two cannot be divorced.

Accordingly, we see no difference between such restrictive hearings and any hearings within the scope of the Code of Fair Campaign Practices. All would invade the area of protected speech. "The First Amendment requires that we protect some of falsehood in order to protect speech that matters." (Gertz v. Robert Welch, Inc., supra.)

2. The Ballot Disclosure Question

Research has disclosed no cases which involved a state law or county ordinance providing that an election ballot state thereon whether a candidate for elective office has or has not signed a voluntary code of ethics with respect to conducting an election campaign.

However, based upon the general principles discussed above and Vancuso v. Schwartz we have little hesitancy in concluding that such a law or ordinance would violate the constitutional guarantees of freedom of speech. A candidate who did not subscribe to the code could be "branded" as not agreeing to conduct a "fair campaign" despite the fact that all campaign speech other than outright falsehoods uttered with actual malice is protected speech under the First Amendment. Accordingly, there would be a coercive effect to require the candidate to "voluntarily" sign the code. Yet in signing the code, the

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candidate would agree to conduct his campaign within the limits of the code and thus restrict his freedom of speech well beyond the area of unprotected speech -- that is, the deliberate falsehood.

For example, if the new procedure were applied to the California statute as it now exists, the candidate in signing the code would agree not to appeal to the "negative prejudice" of voters "based on race, sex, religion, national origin, physical health status, or age." The candidate then could not speak to a group of young college students and urge them not to vote for his opponent based upon his opponent's advanced age or declining health. Nor could a candidate speak to a group of voters in a majority area and indicate to them that he would better represent their interests because of his opponent's racial minority origins.

Yet, these are clearly matters which fall within the area of protected speech. As the court stated in Vancuso v. Schwartz, supra, 401 F.Supp. 87, 94 with respect to such types of matters:

> ". . . It would be a retreat from reality to hold that voters do not consider race, religion, sex or ethnic background when choosing political candidates. Speech is often provocative and indeed offensive, [citations ommitted], but unless it falls into one of those 'well defined and narrowly limited classes' of unprotected speech (e.g., 'fighting words') it enjoys constitutional protection. . . ."

Accordingly, the coercive effect of such a law would clearly tend to restrict campaign speech contrary to the pronouncements of the United States Supreme Court that "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office" (Monitor Patriot Co. v. Roy, supra) where such debate "should be uninhibited, robust and wide open" (New York Times Co. v. Sullivan, supra) so "that candidates have the unfettered opportunity to make views known" (Buckley v. Valeo, supra).

In fact, the "Hobson's choice" this ballot disclosure provision would present is analogous to that presented in Schuster v. Municipal Court, supra, 109 Cal.App.3d 887, in which the Court of Appeal invalidated section 29410 of the Elections Code, which required all campaign literature to disclose on its face the name and address of the individual responsible for it. The court pointed out not only the adverse effects upon those who would exercise their rights of speech, but also upon the electorate itself. The court stated (109 Cal.App.3d at p. 897):

"Further, considering the inevitable deterrent effect upon the exercise of free speech of compulsory disclosure, section 29410 will silence the voices of advocates of not only minority, but novel views, reducing the quantity and diversity of participants and perspectives within an election contest and thus frustrating the compelling state interest of obtaining an informed electorate (Brown v. Superior Court (1971) 5 Cal.3d 509, 524 [96 Cal.Rptr. 583, 487 P.2d 1224]), while seriously infringing upon its right to receive divergent ideas."

We therefore conclude that a state law or county ordinance which requires ballots to indicate whether the candidates for elective county office have signed or refused to sign the Code of Fair Campaign Practices provided for in sections 12500 et seq. would violate the candidates' constitutional guarantees of freedom of speech. "[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. . . ." (Buckley v. Valeo, supra.)

And finally, in our opinion, the coercive effect placed upon candidates by both question one and question two to sign the voluntary code or be designated on the ballot as not having done so (question two) and to "watch their step" lest they be "taken to task" before the citizens' committee (question one) constitutes an impermissible prior restraint upon political speech and debate. (See Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241, 254-258: "Faced with the penalties that would accrue . . . editors might well conclude that the safe course is to avoid controversy . . . [and] political and electoral coverage would be blunted or reduced.")

Thus, contrary to the exhortations of the United States Supreme Court that debate in the political arena should be "uninhibited, robust and wide open" (New York Times v. Sullivan) and "that candidates have the unfettered opportunity to make [their] views known" (Buckly v. Valeo), the two proposals under consideration herein would clearly inhibit debate and fetter candidates in expressing their views in order they not be "branded" as refusing to conduct a fair campaign or be "taken to task" before the citizens' committee.

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Accordingly, we conclude that the proposals outlined in questions one and two are such that they would violate candidates' free speech guarantees.8/

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8. We note that the request restricts our analysis to the issue of freedom of speech.

We accordingly do not address, nor do we need to address, other issues such as (1) whether the citizens' committee could be invested with what are essentially quasi-judicial powers and (2) whether as to a county, the proposals would conflict with state law as in direct conflict with state law and entering an area preempted by state law.

However, we do not foreclose the possibility that a committee could be established pursuant to appropriate legislation to rule upon completed candidate speech where (1) the prohibited speech would clearly fall within the scope of unprotected speech and (2) the committee would be required to follow procedures which provided the alleged miscreant candidate his rights to a fair hearing which accorded with due process rights.

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APPENDIX

Article 3. Code of Fair Campaign Practices

§ 12520. At the time an individual files his or her declaration of candidacy, nomination papers, or any other paper evidencing an intention to be a candidate for public office, the county clerk shall give the individual a blank form of the Code of Fair Campaign Practices and a copy of the provisions of this chapter. The county clerk shall inform each candidate for public office that subscription to the code is voluntary.

In the case of a committee making an independent expenditure within the meaning of Section 12511, the Secretary of State shall provide a blank form and a copy of the provisions of this chapter to the individual filing, in accordance with Title 9 (commencing with Section 81000) of the Government Code, an initial campaign statement on behalf of the committee.

The text of the code shall read, as follows:

CODE OF FAIR CAMPAIGN PRACTICES

There are basic principles of decency, honesty, and fair play which every candidate for public office in the State of California has a moral obligation to observe and uphold, in order that, after vigorously contested, but fairly conducted campaigns, our citizens may exercise their constitutional right to a free and untrammeled choice and the will of the people may be fully and clearly expressed on the issues.

THEREFORE:

(1) I SHALL CONDUCT my campaign openly and publicly, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record and policies of my opponents or political parties which merit such criticism.

(2) I SHALL NOT USE OR PERMIT the use of character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate or his or her personal or family life.

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(3) I SHALL NOT USE OR PERMIT any appeal to negative prejudice based on race, sex, religion, national origin, physical health, status or age.

(4) I SHALL NOT USE OR PERMIT any dishonest or unethical practice which tends to corrupt or undermine our American system of free elections, or which hampers or prevents the full and free expression of the will of the voters including acts intended to hinder or prevent any eligible person from registering to vote, enrolling to vote, or voting.

(5) I SHALL NOT coerce election help or campaign contributions for myself or for any other candidate from my employees.

(6) I SHALL IMMEDIATELY AND PUBLICLY REPUDIATE support deriving from any individual or group which resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics which I condemn. I shall accept responsibility to take firm action against any subordinate who violates any provision of this code or the laws governing elections.

(7) I SHALL DEFEND AND UPHOLD the right of every qualified American voter to full and equal participation in the electoral process.

I, the undersigned, candidate for election to public office in the State of California or treasurer or chairman of a committee making any independent expenditures, hereby voluntarily endorse, subscribe to, and solemnly pledge myself to conduct my campaign in accordance with the above principles and practices.

______________________ DATE

______________________ SIGNATURE