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MEMORANDUM

VIA EMAIL

To: Members, Governing Board
California Institute for Regenerative Medicine

From: James C. Harrison

Date: October 25, 2019

Re: Use Of Public Funds In Connection With A Ballot Measure

INTRODUCTION

You have asked us to describe the rules applicable to a public agency's participation in the drafting and consideration of a ballot measure. Below, we provide a brief, updated overview regarding the permissible uses of public agency resources with respect to ballot measures.

In addition, we have provided examples of permissible and impermissible activities. However, because these issues are complex and the inquiry is fact-intensive, we recommend that legal counsel review any proposed activities relating to ballot measures, and especially any public communications, before they are undertaken.

A. Overview

Public agencies often play a critical role in formulating and informing the public about ballot measures. However, the use of public funds in connection with these activities is subject to important restrictions. As discussed in more detail below, CIRM may expend public resources to research and draft a ballot measure and to prepare an objective analysis of a ballot measure, often referred to as "informational material." It may not use public funds to build a coalition in support of a ballot measure or to disseminate "campaign materials," such as communications that expressly advocate for or against the ballot measure. When a communication or activity falls into the gray area between informational materials and express campaign advocacy, courts will consider the "style, tenor, and timing" of the

communication or activity, including whether the activity or communication is one in which the agency routinely engages, in order to determine if it is permissible or impermissible.

1. Activity Before A Measure Qualifies For The Ballot

Public agencies are not permitted to advocate for or against ballot measures because they are barred from using public funds in an effort to convince the voters with respect to a particular electoral position. However, a public agency may conduct research and draft a ballot measure because these activities are not aimed at persuading voters.¹

There are two caveats to the general rule that pre-ballot activity is permissible. First, the Attorney General has concluded that while public agencies may engage in outreach to obtain input and assess the feasibility of a measure, they may not use public funds to pay a consultant to develop and implement a strategy for building a coalition in support of a ballot measure by, for example, assisting in scheduling meetings with civic leaders or contributors, if the purpose or effect of such actions serves to develop a campaign to promote voter approval.²

Second, CIRM may not use public funds to urge the voters to qualify the measure for the ballot. While public agencies may expend public funds to influence another legislative body (e.g., advocate that the Legislature pass a law supported by the agency), they may not use public funds to engage in grassroots lobbying, at least without statutory authorization. Under *Miller v. Miller*, 87 Cal. App. 3d 762, 768-69 (1978), superseded by statute as stated in *Miller v California Comm'n on the Status of Women*, 151 Cal. App. 3d 693 (1985), public agencies generally are prohibited from spending public funds on grassroots lobbying. In *Miller*, the court held that the Commission on the Status of Women violated the law by financing an appeal to voters to lobby for the ratification of the Equal Rights Amendment. *Id.* at 767-72. The court stated that the commission's lobbying efforts must be limited to presentations directed to legislative bodies, not the electorate itself. *Id.* at 768-69. "It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public

¹ *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Assn. of Gov'ts*, 167 Cal. App. 4th 1229, 1241 (2008) (citations omitted); *League of Women Voters v. Countywide Crim. Justice Coordination Com.*, 203 Cal. App. 3d 529, 550-554 (1988).

² 88 Ops. Cal. Atty. Gen. 46 (2005), cited approvingly in *DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236, 268 (2010).

treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view." *Id.*; see also 42 Ops. Cal. Atty. Gen. 25 (1963) (the mailing of information and recommendations regarding pending welfare legislation to voters at County expense was not permitted by statute).

2. Activity Concerning A Measure On The Ballot

Public entities are permitted to disseminate informational material to provide the public a "fair presentation" of the issues surrounding ballot measures. They are not, however, permitted to engage in campaign activity to promote or oppose a measure.

Ballot measure activities undertaken by public agencies fall into one of three categories: (1) activities that are clearly impermissible (*i.e.*, campaign activities), (2) activities that are clearly permissible (*i.e.*, informational activities), or (3) activities that require further analysis as to the "style, tenor, and timing" of the communication.³ To determine whether a public entity has acted appropriately, courts analyze each activity on its own. For example, if CIRM were to prepare staff reports analyzing the effect of the ballot measure on its programs and post the report to its website, and separately send a mailer informing the public of its position, a court would assess the propriety of each action independently.⁴

Activities that have been deemed appropriate include preparing objective analyses of the effects of the measure and providing such information in response to requests from the public, including accepting invitations to provide objective information at public meetings. Likewise, it would be permissible for CIRM to disseminate an email about a measure to CIRM's interested persons list so long as the information contained in the email relates to past or present facts and avoids inflammatory or argumentative rhetoric, because the manner of the communication is consistent with CIRM's established practices. In contrast, activities that are presumptively impermissible include disseminating bumper stickers, mass media advertisement spots, billboards, and door-to-door canvassing.

In practice, it is sometimes difficult to predict whether an activity will be deemed to fall into the "clearly permissible" category. Courts have declined to hold that certain types of communications

³ See *Vargas v. City of Salinas*, 46 Cal. 4th 1, 24-25 (2009); see also Cal. Code Regs., tit. 2, § 18420.1.

⁴ See *Vargas*, 46 Cal. 4th at 38-40.

or activities are conclusively permissible, opting instead to exercise discretion when it comes to determining whether a public entity has crossed the line: “no hard and fast rule governs every case.”⁵ Out of an abundance of caution, CIRM should prepare its communications in such a way as to satisfy both the “clearly permissible” test, and the “style, tenor, and timing” test.

A recent enforcement action illustrates the limits on public agencies’ use of funds in connection with ballot measures. In late 2018, the California Fair Political Practices Commission (“FPPC”) concluded that San Francisco Bay Area Rapid Transit (“BART”) had engaged in campaign activity by expending public funds in support of Measure RR, which authorized BART to issue \$3.5 billion in general obligation bonds.⁶ In reaching that conclusion, the FPPC considered the medium and nature of BART’s advertisements, specifically two YouTube videos that included shots of BART riders describing current conditions and their reliance on the system, as well as a tagline, “It’s time to rebuild.” The FPPC determined that the videos “borrow[ed] the voices and sympathy of [BART’s] customers” to campaign for Measure RR. It also assessed BART’s social media activity, identifying as campaign activity Twitter and Facebook posts, as well as text messages, that promoted the same message. For example, it found that the following text message qualified as campaign activity:

“Measure RR on the Nov. 18 ballot would help to rebuild and update BART, after 44 years of service and billions of trips taken. Learn more at bart.gov/betterbart.”

Although the message arguably conveyed informational material, such as the effect the measure would have on the transit system and objective facts about the length of BART’s service and rider statistics, the FPPC concluded it conveyed that information in a manner that appeared to advocate for the passage of Measure RR.

⁵ *Id.* at 26.

⁶ The FPPC analyzed BART’s violation of campaign reporting and disclosure requirements after determining that the agency had participated in campaign activity by making independent expenditures under the Political Reform Act, Cal. Gov. Code section 81000, et seq. To make that determination, the FPPC construed Regulation 18420.1, which adopts the parameters described in *Vargas v. Salinas*, 46 Cal. 4th 1 (2009) and defines when a government agency engages in campaign activity with public funds for purposes of the Political Reform Act. The FPPC stipulation in the BART matter, FPPC No. 16/19959, is available at <http://www.fppc.ca.gov/content/dam/fppc/documents/Stipulations/2018/December/3.%20BART%20-%20Stip.pdf>.

As CIRM considers specific activities or communications, it should follow a few key principles: Communications about a ballot measure should be delivered through CIRM's ordinary communication methods, like its website, blog, newsletter, emails to interested persons, and public meetings, in the style CIRM normally uses to communicate other information. CIRM should avoid passionate or inflammatory language and modes of communication that it does not regularly employ, and should not encourage voters to vote in a particular manner. For example, CIRM should not "borrow the voices and the sympathy" of individuals who could benefit from the passage of the stem cell funding measure when discussing the measure, as BART did for Measure RR. CIRM should also take care to state past or present facts in a fair and dispassionate manner, and avoid using graphics, text, or video aesthetics that are similar to campaign advocacy (and different from CIRM's normal practices). Taking steps like these will help ensure that the FPPC or a court will conclude that CIRM is engaging in information-sharing, rather than overt campaigning.

B. List of Impermissible And Permissible Activities

Below are some examples of what may constitute permissible and impermissible activity. Of course, these are merely illustrative examples. Each activity must be assessed in context, and legal counsel should review each activity and communication or activity before it is distributed or conducted.

1. Public Funds *May Not Be Used To:*

- Gather signatures on an initiative or referendum or urge voters to sign a petition;
- Build a coalition to support the qualification and enactment of a measure;
- Promote an initiative or referendum measure or urge a particular vote on the measure;
- Produce "typical campaign" materials, such as bumper stickers, posters, advertising "floats," television and radio "spots," billboards, or engage in "typical campaign activities," such as door-to-door canvassing;
- Urge voters to contact legislators about a bill, including a bill to place a measure on the ballot;
- Provide a link on the agency's website to a campaign website or to campaign materials or otherwise provide contact information for a campaign committee to members of the public;
- Prepare materials for members of the public or advocacy groups to use in support of its position on the initiative;

- Provide the public with one-sided promotional material about the initiative;
- Design, produce, or send a mailing to the public that expressly advocates the qualification, passage, or defeat of the initiative, or when taken as a whole and in context, unambiguously urges a particular result with respect to the initiative;
- Coordinate with a ballot measure committee to make expenditures in support of, or in opposition to, a ballot measure;
- Disseminate electronically or through social media an advertisement aimed at passage or defeat of a measure, particularly if the material includes a slogan or tagline;
- Contribute funds or resources to a ballot measure campaign; and
- Recruit individuals or organizations to campaign for the ballot initiative.

2. Public Funds *May* Be Used To:

- Draft or review an initiative;
- Seek a sponsor for an initiative;
- Take a position on ballot measure in an open and public meeting and disseminate the agency's position in the same manner that the agency informs the public about other agency decisions;
- Prepare staff reports and other analyses to assist decision-makers in determining the impact of the measure and what position to take;
- Provide the public with impartial educational information about the initiative;
 - The materials must be a fair presentation of the facts, and not one-sided;
 - Fact sheets, reports, newsletters, responses to requests for information and similar publications that are routinely published by the agency are allowed;
 - The issues may be discussed and debated at a public hearing.
- Respond to inquiries about ballot measures in ways that provide a fair presentation of the facts about the measure and the agency's view of the merits of a ballot measure;
- Accept invitations to present the its views before organizations interested in the ballot measure's effects;
- Make its position on the initiative available to the public upon request;
- Send a report providing its evaluation of the initiative to a member of the public upon request;

- Make impartial information regarding the initiative available on its website;
- Announce its position on a measure at a public meeting, state that position in the hearing minutes of the meeting, and post those minutes on the website; and
- Publish its position on its website or in a regularly published electronic newsletter.

C. Rules For Public Officials and Employees

Public agency employees and officials may not solicit support from staff using agency email, supplies, or equipment, but they may endorse, oppose, or fundraise for or against a ballot measure on their own time. During work hours or while on public property, employees and Board members cannot distribute or post campaign literature, attend campaign meetings, make campaign telephone calls or perform any other campaign-related tasks.

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