

***The Prohibition on Use of Public Funds for Political Purposes
by Local Governments in the Election Context¹***

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¹ The presenter wishes to gratefully acknowledge that the authorship and source of much of the information in this paper is drawn from the briefs filed by the City of Salinas appellate counsel Joel Franklin in the case of *Vargas v. City Salinas*, currently pending before the California Supreme Court and the excellent Amicus Curiae Brief of League of California Cities, *et al* in support of the City of Salinas by Karen Getman, Esq. of Remcho, Johansen & Purcell.

I. Introduction

Increasingly, significant issues of state and local public policy are being decided by the voters at the ballot box. An important consideration for city attorneys advising local governments is just what kind of information can be provided by a local entity to the voters about the impact of a proposed ballot measure. Although the courts and Legislature have long recognized the important informational role played by government in our democratic process, (e.g., *Keller v. State Bar of Cal.* (1990) 496 U.S. 1, 12-13), in the thirty years since *Stanson v. Mott* (1976) 17 Cal. 3d 206, was decided, cities and counties have struggled with how to inform voters about pending ballot measures without being accused of using public funds for improper campaign purposes.

For example, the City of Salinas and its City Manager were sued for their action in connection with preparing a budget to meet potential substantial cuts from a proposed local tax repeal measure (Measure O) and for informing the public of those actions. That case is now pending before the California Supreme Court. (*Morfin Vargas v. City of Salinas, et al.*, Cal S. Ct. Case No. S140911.)

The purpose of this paper is to provide a general overview of the current state of the law governing the use of public funds in the election context. The paper will consider what type of local agency speech is proper in the context of an election and what is the correct standard for such speech. This subject is treated exhaustively in the numerous briefs filed by the parties and *amici curiae*, including the League of California Cities, in the pending *Vargas* case and may be viewed on-line on the California Supreme Court web site.

II. The “Traditional” *Stanson v. Mott* Test

The expenditure of public funds in connection with a ballot measure election has traditionally been interpreted in light of the California Supreme Court’s decisions in *Stanson v. Mott* (1976) 17 Cal. 3d 206 and *Mines v. Del Valle* (1927) 201 Cal. 273.

In *Mines*, a citizen-taxpayer brought action against the City of Los Angeles requesting the repayment of money expended by the City to advocate an affirmative vote on a city bond measure. The City had used public funds to pay for a number of promotional materials that were sent to voters throughout the City. The Supreme Court determined that the City’s activities were illegal, and held that a public agency may not use public funds to advocate a position on a ballot measure “unless the power to do so is given ... in clear and unmistakable language” by the Legislature. (*Mines*, 201 Cal. At 287.)

Nearly fifty years later in *Stanson v. Mott*, the California Supreme Court considered a legal challenge to the Director of California Department of Parks and Recreation expending public funds to “promote” the approval of a statewide park bond measure. The director conceded that he had used public funds to engage in a variety of activities

supporting the bond measure including “promotional” mailings, speaking engagements, and travel expenses. (*Stanson* at 211.) [This is in marked contrast to the facts concerning the City of Salinas in *Vargas* and many other subsequent examples where the local entity did not expressly advocate a vote.] Procedurally, the case was presented on demurrer, where the factual allegations were limited to those plead in the complaint. The Department had argued that promotion of public support for the measure was a proper use of public funds. (*Id.*, at 211.)

The Supreme Court disagreed, saying “expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.” (*Id.*, at 213.) As to the expenditures before it, the Court found “no legislative provision accorded the Department of Parks and Recreation such authorization.” (*Id.*, at 209-210.) The Court reviewed cases from this and other states regarding the use of public funds for campaign purposes, concluding that

“Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in a election contests or bestow an unfair advantage on one of several factions.” (*Id.* at 217.)

The Court never reached the constitutional issue in *Stanson* however, holding instead that in the absence of “clear and unmistakable” legislative language authorizing such expenditures, “defendant could not properly authorize the department to spend public funds to campaign for the passage of the bond issue.” (*Id.* at 220.)

The Court acknowledged that it would not be easy to separate proper informational activities from improper campaign expenditures. (*Id.* at 221.) In the context before it, the Court said that the Department could pay for informational activities, or provide a “fair presentation of the facts” in response to a citizen request for information, and could authorize an “agency employee to present the department’s view of a ballot proposal at a meeting of” a public or private organization, upon request. (*Id.*)

The *Stanson* Court noted the following as examples of what the Department clearly could not do:

[T]he use of public funds to purchase such items as bumper stickers, posters, advertising “floats,” or television and radio “spots” unquestionably constitutes improper campaign activity [citations omitted], as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. [Citations.]

(17 Cal. 3d at 221.)

In between these two extremes, the Court noted that the determination of the propriety or impropriety of a particular expenditure “depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.” (*Id* at 222 (emphasis added).)

And therein lies the gray area that has led to litigation and confusion ever since the *Stanson v. Mott* opinion was issued.

III. Post-*Stanson* Case Law

Since *Stanson*, the courts of appeal have been called upon repeatedly to clarify what constitutes impermissible campaign activities for which public funds cannot be spent without express legislative authorization.

In *Miller v. Miller* (1978) 87 Cal.App.3d 762, 764-766 [*Miller I*], the issue was the legality of expenditures by the California Commission on the Status of Women to advocate the state Legislature’s ratification of the Equal Rights Amendment to the U.S. Constitution. The Commission had engaged in traditional lobbying, but had also conducted “grass roots lobbying” in which it urged voters to contact the Legislature in support of ratification. The *Miller I* court disallowed such expenditures, construing *Stanson v. Mott* as prohibiting the agency from making a direct appeal to the voters. (*Id.* at 768-769, 771-772.)

The Legislature then enacted a statute specifically authorizing the Commission to disseminate its views on a wide variety of women’s issues. On its second review, the court of appeal held that the new legislation “can only be interpreted as a legislative warrant to advocate and promote the commission’s positions on these subjects.” (*Miller v. California Com. On the Status of Women* (1984) 151 Cal.App.3d 693, 698 [*Miller II*].) The court rejected the plaintiff’s claim that the Commission’s actions, even if legislatively authorized, unlawfully infringed his speech rights as a citizen by expending public funds to promote controversial issues with which he disagreed. (*Id.* at 700.)

This claim fails to make the critical First Amendment distinction between “the government’s addition of its own voice [and the] government’s silencing of others.” [Citation.] “That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically ‘neutral.’” [Citations.] [*Miller II* at 700.]

The Court acknowledged that “[o]rdinarily, government may not compel citizens to express a view any more than it may forbid someone to express a view.” (*Id.*) “But none of this means that government cannot add its own voice to the many it must tolerate, provided it does not drown out private communications.” (*Id.*, internal quotation marks and citations omitted.)

The *Miller* decisions were followed by *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529. Here, plaintiff's challenged public expenditures made to assist in the drafting of a statewide initiative measure that would change existing law. The court of appeal rejected the challenge, holding that "the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority." (*Id.* at 550.) The court held that a "ballot measure" does not become an official measure triggering any prohibition on the use of public funds to advocate a single viewpoint, until the measure begins circulating among the voters for potential qualification. (*Id.* at 555, 556.)

The court in *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* also found that various materials prepared by public employees regarding the proposed initiative were 'relatively balanced and neutral in tone' and provided "a considerable body of useful information," thus providing "'a fair presentation' of relevant information..." (*Id.* at 559, quoting *Stanson* at 221.) Finally, the court held that the board of supervisors did not unlawfully expend public funds by holding a hearing at which it officially recorded its support for the qualification of the proposed initiative. (*Id.* at 560.)

Other decisions similarly have drawn the line at prohibiting active campaigning for or against a ballot measure. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 187-188 [city lawfully expended public funds on a voter registration program encouraging residents to register and vote even though city was on record as opposing a measure that would appear on the ballot]; *Yes on Measure A v. City of Lake Forest* (1997) 60 Cal. App.4th 620, 625-626 [city's expenditure on a pre-election challenge to the legality of a ballot measure are not reportable political expenses under the Political Reform Act]; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 429-431 [school district did not illegally expend public funds by holding and broadcasting school board meeting at which the board took a position opposing a statewide ballot initiative]; *cf. California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 747-749 [upholding attorneys' fees award to plaintiff who successfully stopped a sheriff from ordering his deputies while in uniform and on duty, to distribute literature prepared by a private campaign committee].)

In *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, the court considered the wording of a ballot form drafted by a municipality seeking voter approval of a proposed card room. At issue was the city's inclusion of unnecessary and arguably partisan language in a ballot form used for a local initiative². (*Id.* at 1224-1225.) The court held that the particular language before it violated Business &

² The proposed ballot form provided as follows:

Shall ordinance 94-011, a gaming ordinance, zoning modification and development agreement, as printed in the voter pamphlet, be enacted to allow and regulate card room gaming at Golden Gate Fields, at which controlled games permitted by law, such as draw poker, low ball poker, and Panguingue (PAN) are played, in order to provide revenue for the City of Albany, create jobs, provide an Albany Bay trail, and allow Albany waterfront access?

Professions Code section 19819, which prescribes the ballot form for local initiatives seeking approval of new gaming clubs. Although the court reviewed *Stanson v. Mott*, its holding went no further than finding the language at issue “directly conflicts with the legislative intent [in section 19819] to submit the measure to the voters in a concise and neutral manner.” (*Id.* at 1227-1228.)

IV. Recent Legislation: The State Legislature has Authorized Local Government to Inform Voters About its Views on Pending ballot Initiatives

Under *Stanson v. Mott*, the first question is whether the expenditures at issue have been authorized by statute. As is outlined further below, local governments have been authorized to analyze proposed ballot measures and formulate their own views as to the impacts, merits and detriments of a proposal, but not to expressly advocate the passage or defeat of the measure.

A. General Broad Authority

By operation of the Constitution and statute, local governments have been provided broad authority to make fiscal decisions concerning their constituents. Charter cities thus have “broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law.” (*Schroeder v. Irvine City Council*, 97 Cal.App.4th at 184-185, citing *West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 521-522.) General law cities, unless otherwise prohibited by law, may expend funds “where it appears that the welfare of the community and its inhabitants is involved and ... benefit results to the public.” (*Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866,869, quoting 4 McQuillin, *Municipal Corporations* (3d ed.) p. 66.) What constitutes a public purpose justifying the expenditure is primarily a legislative determination that will be upheld so long as it has a reasonable basis. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746, citations omitted.)

B. Elections Code Section 9212

In addition to the broad authority outlined above, local governments have specific authority to analyze and speak about local initiatives. Under Elections Code section 9212, proposed initiatives that would enact or amend city ordinances may be referred by a city council to any city agency or agencies for a report on any or all of the following:

(1) Its fiscal impact.

(2) Its effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

- (3) Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs.
- (4) Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.
- (5) Its impact on the community's ability to attract and retain business and employment.
- (6) Its impact on the uses of vacant parcels of land.
- (7) Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.
- (8) Any other matters the legislative body requests to be in the report.

(Cal. Elec. Code, § 9212(a).)

Unlike the analysis prepared for measures that qualify for the ballot, there is no statutory requirement that reports prepared under section 9212 be balanced or impartial (*Compare* Elec. Code § 9212 (report on effect of measures) *with id.*, § 9280 (impartial analysis of city measures).) Indeed, the specificity of the items listed in section 9212(a) indicates that the Legislature intended to give local government the means to explain to the voters all the negative or positive consequences that might flow from a particular measure.

The Section 9212 report is prepared very early in the process: either while the initiative petitions are being circulated for signatures, or within 30 days from when the initiative is certified for the ballot. (*Id.* § 9212(a) & (b).) It is a preliminary view only.

Once an initiative qualifies for the ballot, a city council may take a position on the measure and even “file a written argument for or against any city measure” that appears in the voter information pamphlet. (Elec. Code § 9282; *cf. Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 429-431 [local school district may go on record opposing a ballot measure at a public meeting]; *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529, 560 [same for county board of supervisors]; *Stanson v. Mott*, 17 Cal. 3d at 221 [state agency may send an employee to present the department’s view of a ballot proposal” when requested by a public or private organization.].) The local legislative body is not required to do this in a vacuum, but rather can research the merits and faults of the initiative, assess its impact on the constituency, hear arguments from the public for and against the measure, and discuss its own views in public session, prior to voting on an endorsement or the wording of the ballot argument.

Nor is the local government’s authority restricted to analyzing and commenting on initiatives submitted by others. The local legislative body may submit to the voters its own measure for the repeal, amendment or enactment of an ordinance. (Elec. Code, §§ 9140 [county board of supervisors] & 9222 [legislative body of municipality]; *see also*

League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com., 203 Cal.App.3d at 550.) The mere fact of doing so puts local government squarely on one side of the issue. Similarly, local government must submit to the voters proposals to amend or repeal a city or county charter. (Elec. Code, § 9255.) Presumably it submits only those proposals that it believes should be approved by the voters.

By statute, then, local governments are not required to remain impartial about local initiatives. Whether the initiative has been prepared by the government itself, or by other interested citizens, local government is affirmatively authorized to analyze and speak about the impacts of the measure.

C. Government Code section 54964 – Express Advocacy

Recent enactments by the Legislature have also clarified what local governments are not permitted to do. In 2000, the Legislature enacted Government Code section 54964, which expressly prohibits 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.” (Gov. Code § 54964(a).) The statute also defines prohibited expenditures.

§ 54964. Local agency expenses

(a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

(b) As used in this section the following terms have the following meanings:

(1) “**Ballot measure**” means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency.

.....

(3) “**Expenditure**” means a payment of local agency funds that is used for communications that **expressly advocate** the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters.

.....

(c) This section 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:

(1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.

(2) 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.

(Gov. Code § 54964 (emphasis added).)

The definition of the term “expenditure” to only include funds used for communications that “expressly advocate” the approval or rejection of a specified ballot measure is a significant and welcome shift away from the arguably vague and constitutionally infirm rule of *Stanson v. Mott*.

The phrase “expressly advocate” is a term of art that appears frequently in state and federal election law. Courts have looked to the Political Reform Act of 1974 (“PRA”), Government Code sections 81000 *et seq.*, and regulations adopted by the Fair Political Practices Commission (“FPPC”) to determine whether communications expressly advocate a particular result in an election. (*California Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088, 1096-1100; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 461-463, 470-471; *Schroeder v. Irvine City Council*, 97 Cal.App.4th at 185; *League of Women Voters v. Countywide Crim. Justice Coordination Com.*, 203 Cal.App.3d at 550.)

For example, a Fair Political Practices Commission regulation defines “expenditure” as “any monetary or nonmonetary payment made by any person . . . that is used for communications which expressly advocate the . . . qualification, passage or defeat of a clearly identified ballot measure.” (Cal. Code Regs., tit. 2, § 18225(b).) The regulation further states that a communication “expressly advocates” the passage or defeat of a measure if:

[I]t contains express words of advocacy such as “vote for,” “elect,” “support,” “cast your ballot,” “vote against,” “defeat,” “reject,” “sign petitions for,” or otherwise refers to a clearly identified . . . measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.

(*Id.*, § 18225(b)(2)(emphasis added).

“[T]he definition of ‘express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a [ballot measure]. If the language of the communication contains no such call to action, the communication cannot be “express advocacy.”” (*Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal.App.4th at 471, quoting *Chamber of Commerce of U.S. v. Moore* (5th

Cir. 2002) 288 F.3d 187, 197.) The inquiry focuses on the plain meaning of the words of the communication: “the overall impressions of the hypothetical, reasonable listener or viewer” are irrelevant. (*Id.* at 469, quoting *Virginia Society for Human Life v. FEC* (4th Cir. 2001) 263 F.3d 379, 391-392.)

D. Government Code section 8314

Another relevant and similar statutory provision is Government Code section 8314. Added in 1990, this section prohibits the use of public resources as follows:

§ 8314. Use of public resources for unauthorized purposes

(a) It is 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, or personal or other purposes which are not authorized by law.

(b) For purposes of this section:

(1) “Personal purpose” means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. “Personal purpose” does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call.

(2) “Campaign activity” means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. “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.

.....

(d) Nothing in this section shall 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.

.....

(Gov.Code § 8314.)

Once again, the question becomes whether the expenditure was used for “communications which expressly advocate the . . . qualification, passage or defeat of a clearly identified ballot measure.” This is the language of the Fair Political Practices Commission’s regulation clarifying the definition of “expenditure” in Government Code section 82025(b). (Cal. Code Regs., tit. 2, § 18225(b).) As noted earlier, in *Yes on*

Measure A v. City of Lake Forest, 60 Cal.App.4th 620, the Court of Appeal held that a city-funded, preelection challenge to the validity of an initiative did not constitute a reportable expenditure within the meaning of section 82025. The court expressly rejected the argument “that removing a measure from the ballot represents the ultimate political act and attempt to influence the electorate because it prevents them from participating in the political process.” (*Id.* at 626.)

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V. Vargas v. City of Salinas

Many of the issues raised above were considered by the Sixth District Court of Appeal in *Vargas v. City of Salinas* (2005) 135 Cal.App.4th 361, *review granted*, April 26, 2006. In *Vargas*, plaintiffs filed an action against the City of Salinas and its City Manager alleging improper government expenditures for communications concerning a local initiative election (“Measure O”) that would have repealed the City’s long-standing utility users tax (UUT). That tax provides the city with approximately \$8 million in annual revenue, representing about 13% of the city’s general fund budget.

The facts as explained by the Court of Appeal:

“In response to the qualification of Measure O for the November 2002 ballot, city staff prepared a series of reports analyzing the effect of the loss of utility tax revenue and recommending the reduction or elimination of services and programs. Starting in November 2001, over the course of several public hearings, the city manager and the city's department heads presented fiscal impact reports to the city council. The departments' presentations, which were made in August 2002, took the form of slide presentations. The presentations embodied staff recommendations for service cuts, some in dire terms. In July 2002, the city council adopted the departments' recommendations as presented, thereby identifying the service cuts that would be implemented in the event of Measure O's passage.

The staff's reports, analyses, and presentations concerning Measure O were placed on the city's website. As a matter of course, the website also includes minutes of city council meetings; the minutes of the meetings at which these reports were presented and discussed thus were posted on the website. The city also informed the electorate of its analysis of Measure O through articles in the Fall 2002 edition of the city's periodic newsletter to residents, and by means of a one-page summary of the anticipated service cuts, which the parties sometimes refer to as a leaflet or flyer. Like the reports and presentations, the flyer was posted on the city's website.

Plaintiffs disagreed with the city's analysis of the consequences of Measure O. In plaintiffs' view, repeal of the UUT would benefit the city's residents by reducing their taxes and by eliminating local government waste. They made written and oral presentations to the city council in August 2002. The minutes of those

meetings were placed on the city's website.” (*Vargas*, 37 Cal.Rptr.3d 506, 510 – 511.)

The City challenged the pleadings filed by plaintiffs by opposing the application for a temporary restraining order and by filing a motion for judgment on the pleadings, which the court granted as to several causes of action. Plaintiffs petitioned for writ of mandate, which was denied. Thereafter plaintiffs moved for permission to amend their complaint, based on a new tax measure that the city had placed before the voters, Measure P. The superior court granted plaintiffs request to “supplement” the complaint. In April 2004, following the filing of the supplemental complaint, the City responded by filing a special motion to strike plaintiff’s complaint as a strategic lawsuit against public participation (“anti-SLAPP”), pursuant to Code of Civil Procedure section 425.16. In May 2004, the court heard and granted the motion to strike.

On appeal, plaintiffs contended that the City had improperly engaged in partisan campaigning intended to influence city voters in favor of Measure O. Plaintiffs argued that the style tenor and timing of defendants’ communications constituted impermissible advocacy under *Stanson v. Mott*. Amicus Californians Aware agreed, arguing against a bright line standard for judging whether political speech constitutes advocacy and urging that government speech is not desired or protected in the election process.

The City asserted that the trial court properly granted the special motion to strike since plaintiffs’ failed to carry their burden of showing that the City engaged in impermissible express advocacy. The League of California Cities supported the City’s position and argued for a bright line rule to determine what constitutes advocacy, asserting that such a rule is workable and that it furthers the goal of open government.

The Court of Appeal agreed and affirmed the granting of the City’s special motion to strike. The Court first concluded that the City and its manager had carried their initial burden of demonstrating that plaintiffs’ claims arose from constitutionally protected speech within the meaning of section 425.16. On the second prong of the statutory analysis, the Court concluded plaintiffs had not established a probability of prevailing on the merits. (*Vargas* at 520.) The Court concluded “that the proper measure for judging whether defendants’ communications were promotional is the express advocacy standard” as embodied in the Government Code section cited. [Citations omitted.] “A communication meets that standard when it ‘contains express words of advocacy’ or when ‘taken as a whole, [it] unambiguously urges a particular result in an election.’” (*Vargas* at 525, citing *Schroeder* at 186, quoting Cal. Code of Regs., tit.2 § 18225(b)(2).)

The Court noted that the City’s communications did not contain words of express advocacy or exhortation. Rather, in the Court’s opinion, the City’s communications “present a balanced picture of the consequences of the passage of the measure.” (*Vargas* at 525-526.)

The City of Salinas and *amici* League of California Cities, California State Association of Counties and League of Women Voters of the Salinas Valley, have urged the California Supreme Court to affirm the standard set forth by the Sixth District Court of Appeal as a clear, workable standard for local government. The City, in its argument to the Supreme Court, has defined the proper standard as follows:

[A] governmental entity constitutionally and properly speaks to inform citizens of the effects pending ballot measures may have on the municipal government's functioning and services, as long as the government does not use “express words of advocacy” (“magic words”) and does not “unambiguously urge” passage or defeat of the ballot measure. This second class of speech exists if the language of the speech is susceptible of only one reasonable interpretation, and no reasonable person could find it to have any plausible meaning or purpose other than to unmistakably call for clearly-identified action.

(*Vargas*, Respondents’ Answer to Briefs of Amici Curiae, p. 3.)

It is hoped that the *Vargas* case, which has been fully briefed and is ready for oral argument before the Supreme Court, will resolve these issues and clarify the correct standard for government speech in the election context.

VI. *Stanson v. Mott* Does Not Set Forth a Constitutional Test for Government Speech

The City expenditures at issue in *Vargas* were for informational materials authorized by law. The materials contained none of the express advocacy prohibited by statute. That should end the inquiry. Nonetheless, appellants have urged to Supreme Court to go further and hold that even legislatively authorized expenditures are unconstitutional if they contain “partisan” speech.

In the event that the Supreme Court accepts some of this argument and determines that the government stop short of certain conduct with respect to pending initiatives, the League and City have urged the Court to draw the line with greater precision than the murky and subjective “style, tenor and timing” test set forth in *Stanson v. Mott*.

As discussed earlier, the bright-line express advocacy standard set forth in Government Code sections 8314 and 54964 arises from the standard used by California courts and statutes to distinguish speech that can be regulated as a political expenditure. (*See Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal.App.4th at 461-463, 470-471; *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d at 1096-1100.) It was used first by the U.S. Supreme Court to save an otherwise unconstitutionally vague statute in *Buckley v. Valeo* (1976) 424 U.S. 1, 80.

Any standard that applies an inherently subjective analysis of the “style, tenor and timing” of a communications is dangerous and constitutionally infirm as it is judged

solely through the eye of the beholder. What is informational to one person can easily be seen as partisan by another. A subjective and vague standard puts local government at risk of litigation each time it says anything about the possible consequences of a local initiative. Local governments deserve, and Supreme Court jurisprudence requires, a clear, workable standard as set forth in Government Code section 54964 and its accompanying regulations.

VII. Anti-SLAPP Protections Apply to Litigation Challenging the Legality of Government Speech

Like others who engage in public debate about public issues, local governments face the danger of being sued by those seeking to eliminate or minimize their participation in the debate. There can be no question that *Vargas* is such a lawsuit – appellants disagreed with the City of Salinas’ perspective and sued to enjoin the City from communicating that perspective to its citizens.

The Legislature has responded to this risk by enacting anti-SLAPP laws to protect those engaged in public debate. As the Supreme Court recently reaffirmed, anti-SLAPP laws express “the Legislature’s unqualified desire to ‘encourage continued participation in matters of public significance.’” (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61 [quoting Code of Civ. Proc., § 425.16(a)].) The laws do so by establishing a “summary-judgment-like procedure” to end meritless lawsuits “early and without great cost” before they chill debate by “deplet[ing] ‘the defendant’s energy and drain[ing] his or her resources.’” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312, citations omitted; see also *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th at 60-61.)

Although there is no California Supreme Court case that directly addresses the issue to date, California appellate courts that have considered the question agree with the Sixth District below that “[g]overnment agencies and public employees are among those entitled to protection from strategic lawsuits against public participation.” (Slip Opn. at 9.) Simply put, “[g]overnment has a legitimate interest in informing and educating the public. *It must be able to communicate.*” (*Bradbury v. Superior Court* (1997) 49 Cal.App.4th 1108, 1118, emphasis added, citation omitted.) Accordingly, the anti-SLAPP laws must be available to ensure that the government’s role in the public “exchange of ideas” is not “unduly curtailed.” (*Id.*; see also *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1246-47 [“For the purposes of the anti-SLAPP statute, the word ‘person’ includes governmental entities.”]; *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 367 fn. 1 [“The anti-SLAPP statutes treat[] a government entity as a ‘person’ entitled to the statute’s protection.”]; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343, 353 [“We have no doubt that a public official or government body, just like any private litigant, may make an anti-SLAPP motion where appropriate.”]; *Schroeder v. Irvine City Council*, 97 Cal.App.4th at 183, fn. 3 [government should have anti-SLAPP protection when it is “sued based on the content of its speech.”]).

Thus the Court of Appeal properly considered whether appellants' lawsuit could withstand the special motion to strike under the anti-SLAPP statutes. (*See generally* Slip Opn. at 6-9.) That analysis involves a two-step process. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) First, the court decides whether the defendant has made a threshold showing that the lawsuit against it challenges an act in furtherance of the defendant's constitutional "right of petition or free speech." (*City of Cotati v. Cashman*, 29 Cal.4th at 76; Code Civ. Proc., § 425.16(b)(1).) If so, the court considers "whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman*, 29 Cal.4th at 76.)

When used to protect government, the anti-SLAPP laws prevent "disgruntled" individuals aggrieved by government decisions from "frivolously [tying] up the resources of government agencies and the judiciary" through meritless lawsuits. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal.App.4th at 730.) Under current anti-SLAPP laws, those who are genuinely concerned that government speech has crossed the line into unlawful express advocacy may sue, and meritorious lawsuits will survive special motions to strike.

If, on the other hand, most publicly funded speech were exempted from current protections, it will become dramatically more risky and expensive for government to communicate with its citizens, and the effect on public debate will be chilling.

The City of Salinas' position, as articulated in *Vargas*, is that when speaking from their knowledge of government operations, public employees are protected in performing an important function when conveying information to the public concerning the actions of the government. Likewise, in performance of the public entity's governance functions, the public employees act within the scope of their employment and yet retain their First Amendment speech protections. The public entity, likewise, is protected in carrying out its governing, both in determining discretionary policy and decision-making, and in informing the citizenry about such actions.

The city's communications of such information to the public validly exercises its constitutional rights to speak. Such speech is not illegal as a matter of law under the first prong of the anti-SLAPP inquiry. (Code Civ. Proc., § 425.16, subd. (b)(1); *see Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-321.) Salinas has contended that a city has a right and obligation to speak, at least when it is not expressly advocating, and instead is providing information on the impacts of ballot measures on its operations. That speech should be protected.

VIII. Conclusion

The people of this state must have the best information, and all possible information, available to them when making critical decisions at the ballot box. The Legislature has manifested a clear desire to foster the dissemination of such information by local government, while stopping short of allowing government expenditures on express advocacy. This line, urged by the League and City of Salinas, allows the voters freedom to make their own choices, but ensures the choices they make will be informed ones. Nothing in *Stanson v. Mott* requires the contrary. Whether the Supreme Court agrees shall soon be decided and will provide valuable guidance to all local government entities.