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May 7, 2018

Via E-Mail and Overnight Delivery

Galena West
Chief, Enforcement Division
California Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
E-Mail: complaint@fppc.ca.gov

Re: Political Reform Act Violations Regarding Napa County Measure C

Dear Ms. West:

I write with an urgent request for enforcement of the Political Reform Act. The Napa County Board of Supervisors ("Board"), as well as at least two individual Supervisors, are actively engaged in an unregistered and unreported campaign against the Napa County Watershed and Oak Woodland Protection Initiative of 2018, which has been placed on the June 5, 2018, ballot as Napa County Measure C.

To date, the Board, as well as Supervisors Ramos and Pedroza, have not only violated state law with respect to the unlawful use of public funds for campaign purposes, but there is every indication that they have violated numerous provisions of the Political Reform Act by: (1) failing to file the required independent expenditure verification; (2) failing to include any legally required disclaimers on certain campaign materials; and (3) failing to acknowledge their ongoing campaign finance reporting obligations.

INTRODUCTION

As detailed below and in the attached exhibits, on January 30, 2018, the Board directed its staff to prepare an objective report on the fiscal, land use, and other effects of Measure C pursuant to Elections Code section 9111. This statute authorizes preparation of reports to examine seven specified effects of County initiatives as well as any other matters the Board requests. Elec. Code § 9111. These reports are intended "to better *inform* the county electorate and the board of supervisors about proposed initiatives."

DeVita v. County of Napa, 9 Cal.4th 763, 777-78 (1995). They allow for an abbreviated environmental review "of a measure's effect[s]," in much the same way that an environmental impact report does under the California Environmental Quality Act ("CEQA"). *Id.* at 794; *see Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1041 (such reports "balance the right of initiative with the goal of informing voters and local officials *about the potential consequences of an initiative's enactment*").

As with all materials prepared at public expense, *such reports must be limited to "fair presentation" of "all relevant facts"* and cannot be used "to promote a partisan position in an election campaign." *Stanson v. Mott*, 17 Cal.3d 206, 209-10, 220 (1976). The Board Agenda Letter for the January 30th meeting at which the 9111 Report was ordered, as well as the public comment and direction from the Board, all indicated that the 9111 Report would address the eight enumerated factors set forth in Elections Code section 9111 and the potential effects of Measure C, both good and bad.[1]

However, sometime after that meeting, it appears that a Board member or other Napa County official directed preparation of a very different type of report by the law firm Miller Starr Regalia, which the County had retained to keep a prior version of Measure C off the ballot. The resultant report does not even purport to provide an objective assessment of the Initiative's environmental or other effects, let alone a "fair presentation" of "all relevant facts."

Instead, the 69-page report prepared by Miller Starr ("Miller Starr Report" or "Report") reads as if it were a legal hit piece prepared *for an opponent* of Measure C, with the sole purpose of cataloguing every conceivable ground—no matter how flimsy—for potentially challenging Measure C in court. (A copy of the Miller Starr Report is attached hereto as Exhibit 2.)

Indeed, it is a stretch to call the Miller Starr Report a "9111 report" at all. The document does not, for instance, ever identify the seven specific impacts and effects that the Legislature itemized as appropriate for consideration in a 9111 Report. Nor does it even purport to set forth an unbiased analysis of the impact of implementing Measure C. And, in contrast to *past* 9111 Reports prepared by the County, it contains no discussion

[1] The Board Agenda Letter for the January 30 meeting is attached hereto as Exhibit 1. A videotape of that meeting is available on the County's website at http://napa.granicus.com/MediaPlayer.php?view_id=2&clip_id=3975.

whatsoever of how and to what degree Measure C will further its stated goals of ensuring long-term protections for Napa County's oak woodlands, streams, and wetlands that are so essential to the County's future. Instead, the Miller Starr Report is replete with fundamentally misleading, biased, and inflammatory statements.

Since receiving the Report, and over the protest of Measure C's official proponents, the County and at least two Supervisors have used this catalogue of Measure C's alleged "legal infirmities" as campaign fodder to expressly advocate against the measure. For instance, shortly after the Report was "received" by the Board,[2] Supervisor Ramos published a link to the Report on her website. *See* Exhibit 3.

Not surprisingly, the Miller Starr Report also ended up featuring prominently in both the direct Ballot Argument Against Measure C, which Supervisor Ramos signed as the lead signatory, and the Rebuttal to the Argument in Favor of Measure C, which Supervisor Pedroza signed. *See* Exhibits 4-5 hereto. These official Ballot Arguments against Measure C quoted some of the most inflammatory and demonstrably untrue conclusions set forth in the Report. This includes the Report's statement that Measure C could "subject property owners to enforcement actions and criminal penalties who, through no fault of their own, lose trees due to wildfire." As detailed below, this unfounded and inflammatory statement is directly contradicted by the plain text of Measure C, the County Counsel's impartial analysis of the measure, and other statements buried deep within the Miller Starr Report itself.

The Supreme Court has long recognized that spending public funds on informational materials that fail to provide fair and accurate information about a proposed ballot measure can constitute impermissible advocacy even where they do not use words of express advocacy. *Stanson,* 17 Cal.3d 209-10, 220; *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 40 ("argumentative or inflammatory rhetoric" in informational materials prepared by a public agency is an indicator of improper and unconstitutional advocacy).

FPPC regulations and advice letters acknowledge as much, imposing reporting and disclosure requirements for any "payment of public moneys" by local agencies that are "made in connection with a communication to the public that … unambiguously urges a particular result in an election." Regulation § 18420.1(a). "A communication unambiguously urges a particular result in an election if … [w]hen *considering the style,*

[2] Napa County – Board of Supervisors Meeting (Feb. 27, 2018), *available at* http://napa.granicus.com/MediaPlayer.php?view_id=2&clip_id=4004.

tenor, and timing of the communication, it can be reasonably characterized as campaign material *and is not a fair presentation of facts serving only an informational purpose*." Regulation 18420.1(b) (emphasis added).

As detailed below, taking into account "the style, tenor, and timing" of the Miller Starr Report, the County's use of public funds for this report constitutes an "independent expenditure" under Gov. Code § 82031, triggering the reporting and disclosure requirements set forth in Gov. Code § 85500. The County's failure to comply with these reporting and disclosure requirements violates the Political Reform Act.

SUMMARY OF MEASURE C

The stated purpose of Measure C is to "protect the water quality, biological productivity, and economic and environmental value of Napa County's streams, watersheds, wetlands and forests, and to safeguard the public health, safety and welfare of the County's residents." Measure C at page 1, § 2A (attached hereto as Exhibit 6). Measure C achieves this goal by adopting policies for the Agricultural Watershed zoning district to protect forests and tree canopy near streams and wetlands and to ensure the long-term preservation of Napa's oak woodlands. *Id.,* § 2B. A central component of Measure C is the establishment of a limit on the number of additional acres of oak woodlands that can be removed ("Oak Removal Limit" or "Limit"). If that Limit is reached, further removal of oak trees in Napa's Agricultural Watershed zoning district would require a permit. *Id.* at 9; *see also* Exhibit 7 (Napa County Counsel's Impartial Analysis of Measure C).

DISCUSSION

I. The style, tenor and timing of the Miller Starr Report, taken as a whole and in context, show that it "unambiguously urges a particular result" in the election on Measure C.

A communication "unambiguously urges a particular result in an election" pursuant to Regulation 18420.1(b), if the communication meets either of the following criteria:

> "(1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television or radio spots.

(2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose."

Here, the style, tenor, and content of the Miller Starr Report leave little doubt that its authors were directed by the Board or its agents to prepare a legal "hit piece" against Measure C and that it does not "serv[e] *only* an informational purpose." As noted above, the Report does not identify any of the seven specific factors that Elections Code section 9111 designates as appropriate information for consideration. *See* Elec. Code § 9111(a)(1)-(7). Instead, it commences with an Executive Summary that purports to summarize Measure C's dozens of alleged legal infirmities before concluding "[t]here is a significant likelihood the Initiative could be challenged on some or all of these grounds." Miller Starr Report at 3 (emphasis in original).

The balance of the Report consists of page after page of dense and inaccessible legalese. Buried deep within the Report—but nowhere mentioned in the Executive Summary—are a series of difficult to access concessions that despite the allegedly "significant likelihood" of litigation, any challenges to Measure C based on the claims outlined in the Report are in fact highly unlikely to succeed.

A. The Report's Executive Summary uses inflammatory rhetoric that is belied by Measure C's plain text and Napa County Counsel's official Impartial Analysis.

The Report's lack of objectivity is seen in multiple ways. Perhaps the most egregious is its treatment of Napa's recent horrific wildfires, which it uses to incite baseless fears about the Initiative's effects. For instance, the Report's Executive Summary asserts that Measure C "could, on its face, subject property owners to enforcement actions and criminal penalties who, *through no fault of their own, lose trees due to wildfire*." Miller Starr Report at 3 (emphasis added).

This statement is not only inflammatory, but also demonstrably incorrect. It is directly contradicted by the plain text of Measure C, which requires a permit only for the removal of oak trees caused by "*intentional* burning."[3] Under the measure's plain

[3] Measure C at 10, § 18.20.060(F)(3) (emphasis added). This section reads in full as follows: "'Remove' or 'removal' means *causing a tree to die or be removed* as a result of human activity by cutting, dislodging, poisoning, *intentional burning*, topping or

definition of tree "removal," only a human being that "intentional[ly]" sets a wildfire could even potentially be subject to penalties or enforcement action by the County. Indeed, despite the inflammatory rhetoric featured in the Report's Executive Summary, the body of the Report effectively acknowledges that this inflammatory statement is unsupported by the text of Measure C. But that acknowledgement is buried in paragraphs of dense legalese that are unlikely to be read by the average voter. *See, e.g.,* Miller Starr Report at 17-18.

In stark contrast to the Miller Starr Report, County Counsel's Impartial Analysis forthrightly acknowledges that "[o]ak tree removal is defined [in Measure C] to include 'intentional burning' [and thus] Oaks destroyed by fires caused by natural phenomena, by backfires set by state or federal agencies, or removed at the direction of CalFire would not count towards this limit" and would *not* be subject to Measure C's permit or enforcement provisions. *See* Exhibit 7 (Impartial Analysis).

B. The Report's inflammatory statements feature prominently in the official ballot arguments signed by the Supervisors who oppose Measure C.

This inflammatory statement in the Miller Starr Report was one of several objectively false and misleading statements reproduced in the ballot arguments against Measure C signed by Supervisors Ramos and Pedroza. *See* Exhibits 4 & 5. However, because the ballot argument authors accurately quote the Miller Starr Report, they were effectively able to insulate those unfounded statements from any legal challenge. Thus, although a Measure C supporter was able to secure a court order deleting five other false statements in the two ballot arguments signed by Supervisors Ramos and Pedroza, the statements from the Miller Starr Report—which was prepared entirely with public funds—could not be challenged under the Elections Code so long as they were accurately quoted.[4] Those statements from the Report will now appear in the official ballot arguments that expressly urge a "No" vote on Measure C.

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damaging of roots, but does not include removal or harvest of incidental vegetation such as berries, ferns, greenery, mistletoe, herbs, shrubs, or poison oak."

[4] The undersigned represented the Measure C supporter who successfully challenged the ballot arguments. *See Apallas v. Tuteur*, Napa County Superior Court Case No. 18CV000425, Notice of Entry of Judgment at page 8-5 to 8-6 (quoting

The official ballot arguments against Measure C similarly quote—and thus insulate from judicial review—the Miller Starr Report's one-sided advocacy statement that certain terms in Measure C are "unlawfully vague and misleading" and thus "create a significant likelihood of litigation" against the County. *See* Exhibits 4 & 5 (Direct and Rebuttal Arguments Against Measure C) (quoting Miller Starr Report).

As with the alleged risk of criminal penalties to innocent property owners that suffer the misfortune of wildfires, the Executive Summary of the Miller Starr Report highlights Measure C's alleged unconstitutional vagueness. *Id.* at 2-3. The body of the report then spends nearly 20 pages reviewing the allegedly vague terms, before ultimately conceding—again buried deep within paragraphs of dense and inaccessible legalese—that ***the likelihood of any such challenge succeeding is actually "most unlikely" or "very low."***[5]

Of course, as the Report says about the terms of Measure C, any term in any law *"might* be deemed impermissibly vague." *See* Report at 9; *id.* at 2-3, 6, 8 (same). However, what makes the Miller Starr Report particularly troubling in terms of the requirement to provide "a fair presentation of facts serving only an informational purpose," is that ***each of the Measure C terms it highlights as potentially so vague as to be unconstitutional appears in the County's own existing land use regulations***, some of them hundreds of times and several of them in the very existing policy that is amended by Measure C.[6]

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challenged ballot argument statements); *id.* at page 8-17 (ordering five of the six challenged statements replaced) (attached hereto as Exhibit 8).

[5] *See, e.g.,* Miller Starr Report at 11 ("most unlikely" that the term "feasible" would be held unconstitutionally vague); *id.* at 13 ("low risk" that "oak woodland" is unconstitutionally vague); *id.* ("very low" risk regarding "canopy"); *id.* 14 ("canons of construction" would uphold County interpretation of "wetland").

[6] *See, e.g.,* February 26, 2018 Ltr from Robert "Perl" Perlmutter to Napa County Board of Supervisors at 8-9 (attached hereto as Exhibit 9; listing some examples of these terms used in the County's laws); *see also* Exhibit 10 (listing other County Code and General Plan provisions using the same allegedly unconstitutional terms as Measure C). For example, Measure C amends the County's existing General Plan Policy CON-24 to require additional mitigation except "when retention of existing vegetation is found to be *infeasible*." Measure C at 4, amending subdivision (c) Policy CON-24. As shown on the

But the Miller Starr Report largely ignores these facts. Nor does the Report mention that, despite the allegedly "significant likelihood" of litigation challenging these terms (Report at 3, emphasis in original), none of these identical terms in the County's existing legislation have *ever* been challenged as unconstitutionally vague.

C. The Report is one-sided and does not provide a "fair presentation" of relevant facts.

At the very least, a "fair presentation" of the facts would point out that each of Measure C's allegedly unconstitutional terms repeatedly appear in the County's existing Code (as well as in the Codes of virtually every other jurisdiction in California). A fair presentation of the facts would also point out that none of these terms in the County's existing laws have ever been challenged in any court, and in fact are applied by Napa County on a routine basis to virtually every land use decision it makes.

More fundamentally, if the Miller Starr Report were truly meant to "serv[e] only an informational purpose"—as required by Regulation 18420.1(b)(2)—then there would be no reason to repeatedly state that these terms "**might** be deemed impermissibly vague," only to bury in the depths of the Report that such an outcome is "most unlikely." *See supra* note 5.

The Miller Starr Report occasionally seeks to justify this differential treatment of the County's own existing ordinances and General Plan by asserting, for instance, that these terms as "presently used" by the County are "not vague because the County, as the adopter of this legislation, has a unique competence to interpret it." Miller Starr Report at 11. However, an unbroken line of cases has expressly held that the County *has the same exact discretion to interpret* its legislation regardless of whether its provisions have

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same pages of Measure C*, the existing subdivision (c) of that existing County Policy uses the identical term "infeasible*," and subdivisions (a), (b), and (e) each use the phrase "to the extent infeasible." "Feasible" and "infeasible" are also well-established terms of art used in many land use and environmental statutes, including CEQA, the state's pre-eminent environmental statute. *See, e.g.,* Pub. Res. Code § 21061.1; *City of Marina v. Board of Trustees of Cal. State Univ.,* 39 Cal.4th 341, 367 (2006). However, from the hundreds of published decisions involving CEQA claims interpreting the terms "feasible" and "infeasible," the authors of the Miller Starr Report are not able to point to a single instance in which a court even suggested, let alone held, that this term is impermissibly vague.

been adopted by initiative. *See, e.g., San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 514-16. And, of course, it is also black letter law that the Courts have a heightened duty to uphold initiatives wherever possible, which includes the duty to "construe enactments to give specific content to terms that might otherwise be unconstitutionally vague." *See Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 598.

The truth of the matter, of course, is that the Miller Starr Report was never intended to serve "only an informational purpose," as required by law, but instead to serve as fodder for the campaign against Measure C.

Numerous other examples of the Miller Starr Reports biased and one-sided treatment of Measure C are detailed in the attached February 26, 2018, letter to the Board (Exhibit 9), which urged the Board not to accept or publish the Miller Starr Report but to instead correct the Report's many inaccuracies and to provide the public with the fair presentation of Measure C's impacts that the law requires.

In short, the pervasive tenor and approach of the Miller Starr Report seems specifically intended to give the public the inaccurate, one-sided, and erroneous impression that the Initiative is legally flawed when in reality Measure C uses the same terms in the same manner as the County's existing laws. Moreover, in stark contrast to prior 9111 reports and similar documents prepared by the County, the Report provides virtually no information about Measure C's effects and serves no legitimate informational purpose for County voters.

Ultimately, the Report's conclusion that there "is a <u>significant likelihood</u> the Initiative could be challenged" (Report at 3) says nothing about the Initiative's likely effects—or even about its validity. Even if this statement is correct, it simply describes the litigation strategy of those opposed to efforts to protect Napa's watershed and oak woodlands. After all, any County land use policy *could be challenged.* But that does mean the challenge will succeed. In the case of an adopted initiative, it merely means the litigants have the resources to try to stop the initiative's policies from being implemented, despite the fact that a majority of County voters support them. And the legal standard for succeeding in such a challenge is very high. Under California law, it is the duty of the courts to "jealously guard" the initiative power, and initiatives "'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.'" *Rossi v. Brown* (1995) 9 Cal.4th 688, 711.

II. All four factors identified in Regulation 18420.1(d) support a finding that the Miller Starr Report constitutes "campaign material and is not a fair presentation of facts serving only an informational purpose."

Regulation 18420.1(d) identifies four factors to help determine whether the style, tenor, and timing of the communication supports a finding that it is "campaign material and not a fair presentation of facts serving only an informational purpose." These factors include whether the communication (1) is funded from a special (as opposed to general) appropriation; (2) is "consistent with the normal communication pattern for the agency;" (3) is "consistent with the style of other communications issued by the agency;" and (4) "uses inflammatory or argumentative language." FPPC Regulation 18420.1(d). Each of these factors support a finding that the 9111 report prepared by Miller Starr are an independent expenditure under Section 82031.

A. The Miller Starr Report was paid for from a special appropriation.

As the Board's January 30, 2018 Agenda Letter states, the 9111 Report was not funded from the County's existing budget but instead required a special appropriation of $20,000 to $30,000. *See* Ex. 1 at 2 (Fiscal Impact: "Is [the Report] currently budgeted? No."). This factor weighs in favor of a finding that the Miller Starr Report is campaign material.

B. The style of the Miller Starr Report is not consistent with the normal communication pattern and style of other communications issued by the County.

This firm drafted Measure C. We have also drafted many dozens of other land use initiatives, including Napa County's Measure J and Measure P, and reviewed or consulted regarding hundreds of others. And we have prepared, helped prepare, or reviewed many dozens of Section 9111 reports, including past 9111 reports prepared by Napa County such as the one the County prepared in 2008 for the Save Measure J Initiative ("Measure P") (A copy of this Report is attached as Exhibit 11). But we have never seen or reviewed a Section 9111 Report as one-sided, biased, and wholly unrelated to the statutory purposes of section 9111 as the one prepared by Miller Starr.

Likewise, we have reviewed dozens of Napa County land use applications and proposed changes to the County's zoning and General Plan and the associated environmental review under CEQA that the Supreme Court has explained serves the same function as an Elections Code 9111 Report. *See DeVita,* 9 Cal.4th at 793-94. But

we have never seen or reviewed a County analysis of such applications or changes that was as one-sided, biased, or wholly unrelated to the purposes of CEQA.

Even a cursory comparison with the 9111 report the County prepared for Measure P—which the entire Board supported in 2008—shows how fundamentally inconsistent the Miller Starr Report is with the County's normal communication pattern and style in analogous circumstances.

The Measure P Report, for instance, commences with a summary of the four specific items under section 9111 that the measure implicates. It then systematically examines the impacts and effects of Measure P, including both the potentially positive or beneficial impacts, and the potential negative consequences. And while it briefly mentions some potential legal concerns, it does not engage in dozens of pages of conjecture about how terms that appear in Measure P (as well as throughout the County Code and in the present Initiative), "might" be subject to litigation. *See e.g.,* Measure P 9111 Report (Exhibit 11) at 1, 7; *see also Vargas,* 46 Cal.4th at 9-10 (noting that the report prepared in that case under Elections Code section 9212—the municipal analogue to section 9111—contained a "study of the measure's potential impact on each of the respective [city] departments")

By contrast, as noted above, the Miller Starr Report never provides any meaningful information about Measure C's impacts that the Legislature "designed" section 9111 to provide. *See DeVita,* 9 Cal.4th at 777. Instead, it contains page after page of analysis claiming that Measure C *might* be unconstitutionally vague—often stretching to come up with potential legal claims that find no support in existing case law.

Many of the terms that the Miller Starr firm found to raise a "significant likelihood" of litigation against Measure C appeared in a nearly identical context in Measure P and in the County's existing General Plan and zoning code.[7] Yet the Measure

[7] For instance, Measure P repeatedly uses the terms "where necessary to comply" with various statutes or "applicable State law." Measure P at 5 (paragraph (c)); *id.* at 6 (paragraph (f)). Measure P is attached as Appendix A to the 9111 Report for Measure P attached to this letter as Exhibit 11. Measure P also repeatedly uses the term "feasible" in just the same manner as Measure C. *See* Measure P at 7 (subparagraphs (iii) and (vi)). Aware that such terms routinely appear in local statutes and regulations, the authors of the Measure P Report properly refrained from speculating about potential legal challenges to them. By contrast, the Miller Starr Report repeatedly claims both terms

P 9111 Report did not engage in any of the spurious conjecture about potential litigation that these terms allegedly would raise. And despite the allegedly significant likelihood of litigation these terms create, no such litigation as ever filed over Measure P.

Another striking example is the Miller Starr Report's claim that one sentence in Measure C allegedly violates a prohibition against "indirect" legislation. Miller Starr Report at 3. In fact, identical language was considered and *expressly upheld* by an appellate court in a challenge to a different initiative. *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565. Even though no other appellate decision has *ever* questioned *Pala Band's* holding, the Miller Report nevertheless opines that the holding is "highly questionable" and that the language is vulnerable to legal attack. Report at 45. No fair and unbiased analysis could come to this conclusion and it serves no legitimate informational purpose.

Again, a comparison to the 9111 Report the County prepared for Measure P is particularly telling. Measure P contained the identical language that the Miller Starr Report contends is unconstitutional. *See* Measure P at 9 (Section 3(D)). However, the 9111 Report for Measure P never suggests that this provision is unconstitutional. Nor, despite the allegedly significant risk of litigation that Miller Starr claims this language creates, did any party challenge this provision after County voters enacted Measure P—with the express support of this Board.

The Miller Starr Report also differs in a more foundational way from how the County has analyzed proposed initiative measures (and other proposed legislative changes) in the past. Typically, the impacts of such changes are analyzed by economic and planning consultant teams with expertise in analyzing the fiscal, land use, and other impacts of such proposals. For instance, the 9111 Report for Measure P was prepared by Seifel Consulting, Inc., an economic and planning consultant firm of the type used by most public agencies in California to prepare these types of reports and that has the expertise necessary to analyze the factors set forth in Elections Code section 9111.

"might be deemed unlawfully vague," before ultimately conceding that such claims are highly unlikely to succeed. Miller Starr Report at 8-11. Such statements do not serve a meaningful "informational purpose," as required by FPPC regulations, and the contrast between the 9111 Reports for Measure C and Measure P dramatically underscore this point.

Similarly, the County's General Plan—which both Measure C and Measure P amend—was analyzed by a host of planning and economic consultants.[8]

By contrast, the Miller Starr Report was prepared by the law firm the County had previously hired to keep a prior version of Measure C off the ballot and it focusses exclusively on the alleged legal grounds for challenging Measure P.[9] As several parties commented at the Board's February 27, 2018, hearing to receive the 9111 Report, these factors not only create a stark appearance of bias and impropriety, but also stand in stark contrast to how the County typically analyzes its own legislative proposals or those proposed by other parties through the standard legislative process. *See* Napa County – Board of Supervisors Meeting (Feb. 27, 2018), *available at* http://napa.granicus.com/MediaPlayer.php?view_id=2&clip_id=4004.

C. The 9111 Report uses inflammatory and argumentative language that has since featured prominently in the ballot arguments and campaign against Measure C and in negative press coverage.

As detailed in Part I above, the 9111 Report is replete with inflammatory and argumentative language of the type that the County has not used in past 9111 reports and never uses to describe the County's own proposed amendments to its General Plan and Zoning Ordinance. The danger of allowing the undisclosed use of public funds to disseminate such statements has been amply illustrated by the ways in which the 9111 Report's inflammatory and argumentative statements have been used in the campaign against Measure C and in the media.

For instance, these statements were prominently featured in the local press coverage that immediately followed release of the Miller Starr Report and the Board's receipt of that Report the following week. *See, e.g.,* Barry Eberling, "Napa County report looks for flaws in the planned watershed and oak initiative*," Napa Valley Register* (Feb. 22, 2018) (attached as Exhibit 12); *see also* Exhibit 13. This article quotes the Miller

[8] *See* Napa County General Plan Draft Environmental Impact Report (2007), *available at* https://www.countyofnapa.org/DocumentCenter (last visited April 20, 2018).

[9] *See Wilson v. County of Napa,* 9 Cal.App.5th 178 (2015). The County also used the Miller Starr firm to analyze two other measures proposed for the 2018 ballot. But, again, these reports stand in stark contrast to how the County analyzed and communicated to the public the impacts of Measure P and other proposed legislative changes.

Starr Report's statement that "'the initiative could subject the county to lawsuits, and could be partially invalidated.'" Yet, as discussed previously, the Report is repeatedly forced to concede that the Initiative would likely be *upheld* against any such challenges—concessions it buries deep in the text where they might be easily overlooked. *See, e.g., supra* notes 5-6.

The same article also cited the report to say that some parts of the Measure are "unlawfully vague or misleading." However, as explained above and shown in Exhibits 9 & 10, each of the terms that the Report contends are potentially vague or otherwise unconstitutional appear repeatedly in nearly identical contexts throughout the County's existing Code and General Plan.

These statements also featured prominently in the ballot arguments against Measure C signed by two of the Board members who authorized the expenditure of public funds to prepare the Miller Starr Report. *See supra* Part I; Exhibits 4-5.

In short, all four factors set forth in Regulation 18420.1(d) support a finding that the Miller Starr Report constitutes "campaign material and is not a fair presentation of facts serving only an informational purpose."

III. None of the exceptions in FPPC Regulation § 18420.1(e) are applicable here.

Subdivision (e) of Regulation § 18420.1 specifies five exceptions in which a payment for a communication that unambiguously urges a particular result in an election nonetheless "shall not be considered a contribution or an independent expenditure." None of these exceptions applies here.

First, the 9111 Report is not "[a]n agency report providing the agency's *internal* evaluation of a measure made available to a member of the public upon the individual's request." *See* FPPC Regulation 18420.1(e)(1). By statute, a 9111 Report is not an "internal evaluation," but is instead specifically intended to be a public document that is "presented to the board of supervisors" at a public meeting. *See* Elections Code § 9111(b); *Tuolumne Jobs,* 59 Cal.4th at 1041 (explaining that the "goal" of such reports is "*informing voters and* local officials about the potential consequences of an initiative's enactment"). That is exactly what happened here; and the Report was also promptly made available and distributed to the public—not just "upon the individual's request"—but on the County's website and the website for Supervisors Ramos.

Similarly, the Miller Starr Report did not consist of the "[a]nnouncement of an agency's position at a public meeting or within the agenda or hearing minutes for the meeting." *See* FPPC Regulation 18420.1(e)(2). Indeed, although two Supervisors later signed the ballot arguments against Measure C, the Board as a whole did not take a position on the report and, in fact, several members of the Board seemed to initially acknowledge that the Report was inappropriately one-sided and biased at the February 27, 2018, hearing at which the Report was received.[10]

The Report itself also was not a "written argument filed by the agency for publishing in the voter information pamphlet." *See* FPPC Regulation 18420.1(e)(3). While the Board as whole—and individual Board members—have the right to file such arguments, they do not have the right to use public funds to hire a law firm to provide the fodder for such arguments. *See Vargas,* 46 Cal.4th at 36-37.

Nor is the Report a "departmental view presented by an agency employee upon request by a public or private organization, at a meeting of the organization," or a "communication clearly and unambiguously authorized by law." *See* Regulation 18420.1(e)(4) & (5). That the Elections Code authorizes reports to be prepared containing the information set forth in Elections Code section 9111 does not mean that any statement contained in such reports is "clearly and unambiguously authorized by law." To the contrary, this language is based on the potential exceptions discussed in prior Supreme Court cases.

As the Supreme Court explained in *Vargas,* the "clearly and unambiguously" language refers to situations where a statute uses "clear and unmistakable language specifically authorizing a public entity to expend public funds for campaign activities or materials." *Vargas,* 46 Cal.4th at 23-24. Elections Code section 9111 does not contain any such language. *See id.* at 29-30 (explaining why Gov't Code § 54964 does not do so). And even if it did, that would raise a "serious constitutional question" of its legality. *Id.* at 24. Indeed, to interpret this regulation otherwise would mean that public agencies could engage even in express advocacy for or against a measure, so long as they placed that advocacy within a section 9111 report. Clearly, that is not the law.

[10] Napa County – Board of Supervisors Meeting (Feb. 27, 2018), *available at* http://napa.granicus.com/MediaPlayer.php?view_id=2&clip_id=4004 .

Thank you for your prompt attention to this important matter. Please do not hesitate to contact me if you have any questions or would like further documentation of the statements contained in this letter.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Robert "Perl" Perlmutter

Enclosures

cc: Jeffrey Brax, Acting County Counsel
Silva Darbinian, Deputy County Counsel
Clients

Exhibit List

1. **January 30, 2018 Board Agenda Letter to Napa County Board of Supervisors**

2. **February 20, 2018 Memorandum from Sean Marciniak, Miller Starr Regalia, to the Napa County Board of Supervisors.**[11]

3. **Excerpt from website of Napa County Supervisor Belia Ramos, http://myemail.constantcontact.com/BELIA-S-FEBRUARY-E-NEWSLETTER.html?soid=1127040720328&aid=vbJkN1XYvE0, (last downloaded April, 20, 2018)**

4. **Ballot Argument Against Measure C (March 16, 2018)**

5. **Rebuttal to the Argument in Favor of Measure C (March 23, 2018)**

[11] Although the first sentence of this memorandum indicates that it is "*part* of the report prepared pursuant to Elections Code § 9111," it is in fact *the entirety of the 9111 Report*. *See, e.g.,* February 27, 2018 Board Agenda Letter to Napa County Board of Supervisors, attaching this report as Exhibit A "9111 Report-Oaks Watershed."

6. **Measure C, the Napa County Watershed and Oak Woodland Protection Initiative of 2018**

7. **Impartial Analysis of Measure C prepared by Napa County Counsel pursuant to Elections Code section 9160(b) (March 9, 2018)**

8. ***Apallas v. Tuteur*, Napa County Superior Court Case No. 18CV000425, Notice of Entry of Judgment (Filed April 10, 2018)**

9. **February 26, 2018 Letter from Robert "Perl" Perlmutter to Napa County Board of Supervisors**

10. **Partial listing of Napa County Code and General Plan provisions using the same Measure C terms that the Miller Starr Report claims are allegedly "unconstitutionally vague" and pose a "significant likelihood" of litigation terms as Measure C).**

11. **Elections Code Section 9111 Report, Save Measure J Initiative (June 2, 2008) (This Report states that it evaluates "*Measure O*, the Save Measure J Initiative." In fact, the Save Measure J Initiative appeared on the November 4, 2008 ballot as "*Measure P*").**

12. **Barry Eberling, "Napa County report looks for flaws in the planned watershed and oak initiative," *Napa Valley Register* (Feb. 22, 2018), *available at* http://napavalleyregister.com/news/local/napa-county-report-looks-for-flaws-in-the-planned-watershed/article_709e93ab-6815-5616-87ad-f9e0e104cda8.html.**

13. **Barry Eberling, "Napa County supervisors place oak woodland initiative on June ballot," *Napa Valley Register* (Feb. 27, 2018), *available at* http://napavalleyregister.com/news/local/napa-county-supervisors-place-oak-woodland-initiative-on-june-ballot/article_8931e1dc-9707-5cbf-a62a-4bdaf39048a9.html.**