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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF VENTURA — HALL OF JUSTICE

12 **Aaron Starr,**

13 Petitioner,

14 vs.

15 **Michelle Ascencion** in her official capacity as
16 Oxnard City Clerk; and
17 DOES 1 through 25, inclusive,

18 Respondents;

19 **Tim Flynn,**

20 Real Party in Interest.

Case No.: 56-2018-00508329-CU-WM-VTA

Assigned for all purposes to:
Hon. Vincent J. O'Neill, Dept. 41

IMMEDIATE ACTION REQUIRED
ELECTION LAW MATTER:
Priority Over All Civil Matters
CCP § 35; Elec. Code § 13314(a)(3)

**Petitioner's Reply to Real Party in
Interest's Opposition to Petition for Writ
of Mandate**

Action Filed: February 22, 2018
Hearing Date: March 7, 2018

Hearing:

Date: March 7, 2018

Time: 8:30 a.m.

Dept.: 41

Judge: Hon. Vincent J. O'Neill

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28 Petitioner Aaron Starr replies to Real Party in Interest Tim Flynn's Opposition as follows:

REPLY

1
2 The Elections Code plainly prohibits material in candidate statements that is false or
3 misleading or refers in any way to another candidate. (Elec. Code §§ 13308 & 13313.) In this
4 action, Petitioner Aaron Starr contends that Tim Flynn’s candidate statement included two
5 statements that are false or misleading and one statement that is an improper reference to other
6 candidates.

7 In opposition to the Petition, Tim Flynn says his “free speech is implicated,” but he
8 doesn’t otherwise demonstrate that the budget is balanced, the audit is clean, or his statements of
9 support for his council colleagues are something other than prohibited references to other
10 candidates. It seems the essence of his argument is that his statements are protected by the First
11 Amendment. In sum, this means that Flynn’s argument is that Elections Code restrictions on
12 candidate statements are unconstitutional.

13 On balance, there is a difference between government distributed sample ballots and
14 other campaign forums. Petitioner does not quibble with Flynn’s right to make false statements
15 in other forums — the First Amendment protects Flynn’s right to send campaign mail touting a
16 balanced budget even if the budget does not balance. But the constitutional question prohibiting
17 such statements in sample ballots was answered more than 25 years ago. (*Clark v. Burleigh* (1992)
18 4 Cal.4th 474, 496.)

19 Our Supreme Court’s analysis in *Clark, supra*, was thorough and had extensive analysis of
20 United States Supreme Court precedents. (*Id.* at 482-496.) In the end, the Court concluded that
21 limitations on a candidate statement do not violate the First Amendment because the Legislature
22 did not create the sample ballot and the candidate statements it contains for the purpose of
23 creating a public forum that candidates could use however they desire. (*Id.* at 488.) In reaching
24 this conclusion, the Court recognized that candidates have other forums (such as advertisements;
25 newspaper, television, and radio interviews; direct mailings; neighborhood distribution of
26 handbills; and personal appearances at local functions) where candidates can campaign however
27 they please. (*Id.* at 494.)

1 Since the First Amendment does not protect Flynn’s statements and he did not rebut
2 Petitioner’s clear and convincing evidence that the statements in question are false, misleading,
3 or otherwise inconsistent with the Elections Code, the statements in question should be stricken
4 from Flynn’s candidate statement.

5 **A. Tim Flynn’s opposition helps prove the general fund’s \$500,000 deficit.**

6 Tim Flynn argues that “there are so many *tricks* available to create a balanced budget”
7 that it is impossible to prove that the City’s budget is not balanced. (Opp. 1:21-23 [emphasis
8 added].) Even if this argument is true as it relates to Petitioner’s claim that Flynn’s statement is
9 definitively *false*, Flynn’s argument would still demonstrate clear and convincing proof that his
10 statement is *misleading* because whether a budget balances or not is a black and white, bright line
11 test. The use of “tricks” to make an unbalanced budget appear balanced is inherently misleading.

12 Regardless, merely stating that some trick might exist is different from actually using that
13 trick. Here, it seems that Flynn’s best attempt at trickery is to selectively quote a sentence from
14 the City manager’s budget summary where half the sentence supports his argument and the
15 omitted half concedes the \$500,000 deficit.

16 The full sentence in question is: “The new budget balances revenues and expenditures,
17 **and uses a planned minimal \$514,547 from General Fund reserves.**” (Supplemental
18 Declaration of Aaron Starr, concurrently filed (Starr Supp. Decl.) Exh. M, p. 9 [emphasis
19 added].) Reserves are not revenue, so while the City might plan to dip into savings to keep the
20 lights on or prevent checks from bouncing, its use of reserves does not mean its budget is
21 balanced, and Flynn does not otherwise make any further attempt to make the deficit disappear.

22 Moreover, the statement in question is that the City has the first balanced budget in
23 *decades*. Flynn addresses this issue for FY 2014-2015 and 2015-2016 but not for any prior year.
24 Starr’s declaration provided evidence that the City adopted balanced budgets in the fiscal years
25 ending in 2011, 2012, 2013, and 2014.¹ This was shown in a chart Starr compiled based on his
26 review of City budget documents. (Declaration of Aaron Starr, filed Feb. 23, 2018 (Starr Decl.)

27 _____
28 ¹ The fact that the adopted budgets, which Petitioner agrees are projections, might become out of balance as the year progressed does not change the fact that the adopted budgets were balanced.

1 Exh. C) Starr’s chart included references to the underlying documents (*ibid*), and those
2 references would have assisted Flynn’s opposition. Flynn did not dispute the evidence.

3 Therefore, assuming that the current budget was balanced and that Flynn’s assertions
4 about FY 2015-2016 and 2016-2017 are true, his statement about having the first balanced budget
5 in decades is still false because there is clear and convincing evidence of balanced budgets in at
6 least four of the last ten years.²

7 **B. The City’s 2017 audit is not complete and cannot be described as clean until all prior**
8 **adverse findings have been corrected.**

9 Some threshold considerations with respect to the City’s audits are that Tim Flynn did
10 not dispute evidence that (1) the City has not completed its 2017 Single Audit, and (2) the City’s
11 auditor expects that there will be adverse findings in the 2017 Single Audit. On this point, since
12 the City’s audits include the Single Audit, Flynn’s statement that the current audit is “clean” is
13 false.³

14 Flynn relies on a Ventura Star article (Opp. Exh. C) to support his assertion that the
15 current audit is clean. Petitioner objects to this article based on hearsay, but also recognizes (1)
16 the article relates only to the City’s CAFR, which is just one of two audits, and (2) the article
17 states that “[m]ost cities would consider three of four [audit] findings to be cause for serious
18 concern” (Tim Flynn’s Opposition, filed Mar. 2, 2018 (Opp.) Exh. C, p. 2). This is consistent
19 with Petitioner’s assertion that an audit with any findings cannot be considered clean. (Ex Parte
20 Application for Writ of Mandate, filed Feb. 23, 2016 (App.) 10:21-27.)

21 Rather than address the current audit, however, Flynn focused his attention on the prior
22 audits and whether they were clean or not. This shifts the focus from the current, unclean audit,
23 to the City’s dispute with its prior auditor.

24 ² The fact that actual financials might not mirror initial budget projections has no bearing on whether the City’s
25 adopted budget was balanced. No one could reasonably expect year end financials to match exactly with an adopted
26 budget. This tracks with Proposition 58, the California Balanced Budget Act, which similarly focused on *adopting* a
27 balanced budget. (See *St. John’s Well Child & Family Center v. Schwarzenegger* (2010) 182 Cal.App.4th 590, 597,
28 fn. 4 [Prop. 58 added Cal. Const., art. IV, § 10, subd. (f), which relates to adopting a budget]; see also *Cal.*
Commerce Casino, Inc. v. Schwarzenegger (2007) 146 Cal.App.4th 1406, 1415, fn. 5 [Prop. 58 separately addressed
the process of resolving year-end budget deficits when actual financials did not meet initial projections].)

³ Since the audit has not been completed, it is possible that the audit might be clean. But “might be” is very different
from “is.”

1 Despite the City’s dispute with its prior auditor, it is not disputed that the prior audits
2 were “clean,” in that the auditor’s opinions were not modified and there were no adverse
3 findings. This is confirmed by the City’s CAFRs. (Starr Decl. ¶ 20, Exhs. J, K, L.) While the City
4 has sued its prior auditor for malpractice (presumably over the quality of the auditor’s opinions),
5 that case is still pending, and the City’s claims have not been adjudicated as true. To this end, the
6 best evidence available with respect to prior audits is still the City’s CAFRs, which demonstrate
7 that prior audits were clean.

8 **C. A candidate statement may not be used to campaign for other candidates.**

9 The limitation of a candidate statement to a candidate’s own qualifications is very straight
10 forward. (Elec. Code § 13308.) Candidates are not allowed, *in any way*, to reference other
11 candidates. (*Ibid.*) There is no reasonable reading of this statute that limits its application to
12 statements that directly reference other candidates by name.

13 Such a limitation would be the narrowest possible reading of *Clark, supra*, which
14 considered a direct reference by name (4 Cal.4th at 488), and the broadest possible reading of
15 *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, which permitted references to institutional
16 figures who happen to be candidates for *other* offices (*id.* at 1183 & 1193.) Flynn’s statement is
17 closer to *Clark* because the other candidates he references are easily identifiable as his colleagues
18 on the City Council.

19 Flynn defends the indefensible by suggesting that “[t]he Court should consider the
20 underlying intention of the Mayor to express support for the collective body over which he
21 presides.” (Opp. 2:26-27.) This reinforces Petitioner’s position on this issue because the
22 Mayor’s intention to express support for the collective body has absolutely nothing to do with his
23 qualifications for office. This type of gratuitous campaigning in an official government
24 publication, created to give candidates an opportunity to tell voters who they are, is what section
25 13308 seeks to prevent. (*Clark, supra*, at 493.)

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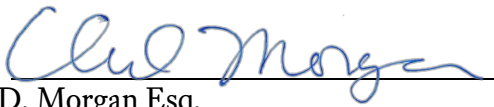
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CONCLUSION

1 Tim Flynn’s statements about the City’s budgets, its audits, and his council colleagues
2 might be part of the protected political discourse if made in a public forum, but the statements
3 have no place in the official sample ballot, where standards prohibit false and misleading
4 statements and do not permit candidates to use the space to campaign for their colleagues. A
5 peremptory writ of mandate should issue directing the Oxnard City Clerk to delete the
6 challenged statements from Tim Flynn’s candidate statement.
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9 DATE: March 5, 2018

Respectfully Submitted,
LAW OFFICE OF CHAD D. MORGAN

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11 By: 
12 Chad D. Morgan Esq.
13 Attorney for Petitioner, Aaron Starr
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