ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: February 13, 2018

To: Ethics Commission Members

From: Kyle Kundert, Senior Legal & Policy Analyst

Pat Ford, Policy Analyst

Re: **Agenda Item 6 - Online Political Communications – Staff Review of Proposed Archiving Requirement**

Summary This Memo provides an update of Staff's research and review of proposals regarding paid political content on the internet and a proposed timeline for further analysis of the issue.

Action Requested That the Commission consider the information contained in this memo and provide its policy guidance regarding its desired d process and timeline.

I. Introduction

In November 2017, Vice-Chair Chiu, Commissioner Lee, and Staff met with former FEC chair Ann Ravel, UC Davis Law School professor Chris Elmendorf, and USC professor Abby Wood regarding a proposal by Ravel, Elmendorf, and Wood that the City implement new rules to address the increased use of the internet to disseminate paid political communications. Staff sought to arrange the meeting after Ravel, Elmendorf, and Wood published an op-ed in the San Francisco Chronicle calling for new local rules on the topic. Members of the group have subsequently published papers further explaining their policy recommendations. Staff has done initial analysis of their proposals, which was originally presented to the Commission at its regular December 2017 meeting. Staff, working with Professor Wood and her research assistants have identified and evaluated several legal concepts that present areas for Commission consideration. This memo is provided to update the Commission on important legal analysis, jurisdictional activity to date, and a proposed schedule for further analysis.

Specifically, Section II outlines the legal considerations evaluated by Staff and Professor Wood for establishing, or requiring online political advertisers to establish, a political file on paid online political advertisements. Section III will highlight and summarize current efforts in other jurisdictions to provide for disclosure of online political content and highlight open policy questions for analyzing online political communications and the efficacy of regulation. Finally, Section IV will outline a proposed schedule for continued review of proposals that have been presented in the context of the Commission's current policy schedule.

II. Legal considerations for requiring entities to establish a disclosure file for online political communications

The most significant provision of former Chair Ravel's online political communications disclosure proposal would require that anytime a person pays an online platform to post, distribute, or otherwise publish a political communication, the platform would be required to archive certain data about the communication. As proposed a political communication would be any communication that relates to a matter before the City, including ordinances, regulations, and decisions by commissions or other bodies. The information the platform must archive would include the content of the communication, the amount paid to publish it, and the parameters used to target the communications to certain groups of viewers. The resulting disclosure archive would be available online to the public. This requirement is similar to the Federal Communications Commission's ("FCC") "political file" rule that attaches to radio, tv, and satellite broadcasters but has not, as of yet, extended to online communications.[1]

Because a political file or similar archiving system would place a burden on interstate actors by requiring them to collect and store certain data about paid political advertisements, and because there is already a federal framework in place for the collection and storage of some political advertisements, it is possible that any local law enacted to require the collection and storage of online communications data may raise issues of preemption and exclusive federal regulatory power.

That being said, an initial review and legal research performed by Professor Wood and prepared by research assistants Justin Mello and Rachael Grant of USC Gould School of Law concludes that a political file proposal impacting only local political activity would likely not be preempted by Federal or State actors.[2] In particular, the research notes that, "[t]he FCC likely will not preempt the San Francisco regulation because this proposal seeks to "protect the public safety and welfare"[3] and it would follow the existing case law on record-keeping regulation."[4] Further, the research highlights that "it is unlikely that [] FEC regulations or related federal law would preempt the proposed San Francisco regulation because the proposal does not implicate any part of the FECA preemption provisions, nor does it involve federal elections in the slightest."[5] Finally, the research notes that while "it would be very easy for the California Legislature to pass a general law related to online political advertising that would preempt any

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[1] The FCC and the Federal Election Commission (FEC) each prescribe required disclosures for political advertisements. There are separate and specific requirements for broadcast and for internet advertising. The FCC's **political file** rule flows from the identification requirements of **the Communications Act of 1934**, which is based on the principle that the listener is entitled to know the identity of the person whose views are being expressed. For political advertising, additional disclaimer requirements were enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), which is administered by the FEC.

[2] Legal research entitled "San Francisco Disclosure Reform" (Feb. 2018), was Prepared by Justin Mello and Rachael Grant
Research Assistants to Abby K. Wood, USC Law (awood@law.usc.edu).

[3] 47 U.S.C.S. § 253(b) (2017).

[4] San Francisco Disclosure Reform (SFDR) Memo Pg. 4

[5] Id. at 2.

local ordinances, . . . nothing in the current state statutes or regulations [] are likely to preempt it at this time."[6] The full memorandum outlining and analyzing the legal research related to issues of preemption is provided as Attachment 1 following this memorandum.

III. Current Efforts to Provide for Disclosure of Online Political Content

The Commission has expressed an interest in increasing the transparency of paid online political advertisements to enable the public to learn how such communications are disseminated. The 2016 election proved that social media is now as popular a venue for news as television, print publications, or radio.[7] [8] However, to date, political advertisements on social media platforms are not regulated in the same way as advertisements on traditional media platforms. This has created the potential for paid political communications to be disseminated without proper disclaimers and financial disclosures, which harms the public's interest in knowing which communications are paid advertisements, and who is paying to influence their vote.

What follows in Parts A and B are a review of current enforcement efforts to require social media organizations to archive political communications in Seattle and New York State. Part C concludes with a number of open policy questions and points for discussion as the Commission's analysis of this matter goes forward.

A. The Seattle System

The State of Washington and City of Seattle both have had laws in place for decades that require anyone who accepts or provides political advertising to maintain and make publicly available certain information about such advertisements.[9] However, only recently have these provisions been used and targeted to online social media platform's like *Facebook*, et al.[10] Specifically, the law in Seattle states:

> Each commercial advertiser that has accepted or provided political advertising during the election campaign shall maintain open for public inspection during the campaign and for a period of no less than three years after the date of the applicable election, during normal business hours, documents and books of account which shall specify:

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[6] Id. at 7.

[7] According to Pew Research Institute, sixty-nine percent of Americans use some type of social media, including people across all age groups.

[8] See: Jeffery Gottfried and Elisa Shearer, News Use Across Social Media Platforms 2016 (May 2016). Available at http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/

[9] Revised Code of Wash. Title 42, Ch. 17A, § 345 (2018); Seattle Municipal Code Title 2, Ch. 2.04, § 280 (2018). *See also,* Eli Sanders, THE STRANGER, Seattle Says Facebook Has Failed to Follow Law on Election Ad Transparency, Feb. 5, 2018, *available at* https://www.thestranger.com/slog/2018/02/05/25781471/seattle-says-facebook-has-failed-to-follow-law-on-election-ad-transparency.

[10] Id.

1. The names and addresses of persons from whom it accepted political advertising;

2. The exact nature and extent of the advertising services rendered; and

3. The consideration and the manner of paying that consideration for such services.[11]

In December of 2017, based on local media reporting, the Seattle Ethics and Elections Commission ("SEEC") sent *Facebook*[12] a letter requesting that they comply with local law and disclose the exact nature and extent of political advertisements purchased through their platform.[13] On Friday, February 2, 2018, Facebook submitted a response to the Director of SEEC, Wayne Barnett, outlining a number of political advertisements that appeared on Facebook's URL (web address). Barnett, according to local media, found Facebook's disclosures to be "inadequate" and is reportedly working with the City Attorney's office to evaluate next steps.[14]

B. New York

New York Governor Andrew Cuomo announced in late 2017 a new "democracy agenda to protect election integrity," including a law to require disclosures and disclaimers for online political ads.[15] The legislative proposal, which is modeled upon the Honest Ads Act drafted in Congress, would expand the state's definition of political communications (electioneering) to include paid digital and Internet advertising, require platforms to maintain a public file of paid political ads, and make reasonable efforts to prevent foreign actors from buying ads. To date, New York has not formally drafted a set of rules which would define the specific requirements of a political file system. The governor has, however, noted that any proposal would necessarily require all the following:

> Require digital platforms to maintain a public file of all political communications purchased by a person or group on their platform related to New York State elections:
>
> The file would contain a digital copy of the advertisement, a description of the audience the advertisement targets, the number of views generated, the dates and times of publication, the rates charged, and the contact information of the purchaser. This archive will ensure that political ads do not disappear, and that they are viewable, and able to be fact-checked, by a larger portion of the electorate.[16]

The proposed New York system's heavy reliance on the Honest Ads Act would mean that not all advertisers would be subject to disclosure. Only those advertisers that met certain thresholds of unique

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[11] Seattle Municipal Code Title 2, Ch. 2.04, § 280 (2018).
[12] According to Pew, Facebook is the most-widely used of the major social media platforms, and its user base is most broadly representative of the population as a whole. http://www.pewinternet.org/fact-sheet/social-media/
[13] Eli Sanders, THE STRANGER, City of Seattle Tells Facebook and Google to Hand Over Political Ad Data, Dec. 14, 2017, *available at* https://www.thestranger.com/slog/2017/12/14/25627782/city-of-seattle-tells-facebook-and-google-to-hand-over-political-ad-data.
[14] Id.
[15] Governor Andrew M. Cuomo 2018 State of the State Proposals.
[16] Id.

monthly viewers would be subject to archiving. Additionally, it isn't clear whether the disclosure would extend only to "social media" advertisers or whether the law would be construed more broadly to apply to all commercial advertisers who met the given viewership threshold.

C. Practical considerations and policy questions for the Commission's consideration

Table 1 below highlights open policy questions for analyzing online political communications and the efficacy of regulation for the Commission's possible consideration going forward.

Table 1 – Open Policy Questions

Questions for further exploration	Identified concerns in each category
What, if any, additional legal barriers exist outside of federal and state preemption?	Are there any legal barriers related to federal privacy acts which would limit the ability of the Commission to require certain data to be archived? Because of the "interstate" nature of online data is there any concern that the Dormant Commerce Clause would be implicated to prohibit the Commission from passing legislation that potentially discriminates against interstate commerce?
What activity would trigger the required archiving?	Only candidate and ballot measure ads directed at influencing voters during an election, or a broader classification that also would encompass "issue" advocacy in a legislative setting?
What information is required to be disclosed?	Information contained in a Form 496 or additional audience/demographic data? The identity of the person paying for the ad?
Which entities must archive?	Any commercial vendor or only identified "social media" entities? Is the archiving done based on expenditures (e.g., payments totaling $10,000 or more) or unique visitors to an entity's URL (e.g. 500 or more visitors)?
What industry push-back can be expected, if any?	The Seattle Ethics and Election Commission's attempt to enforce advertisement disclosure laws upon online service providers may provide some

	insights into what possible responses from major internet platform companies might be.
What provisions of current SF law would need to be amended to ensure a political file requirement is operable?	Would we need to expand the definition and time period for what constitutes an electioneering communication? What other definitions or provisions would need to be amended, and can they be amended in the larger framework of state law?
What, if any, administrative costs are associated with the proposal?	What technologies or staffing would need to be directed to outreach, implementation, auditing, and enforcement to ensure any provisions enacted are effective in practice?

IV. Proposed Schedule

Table 2 below outlines a proposed schedule for the Commission's continued review of the proposals and issues that have been presented.

Table 2

Date	Event
February – March 2018	Continued Staff research and evaluation of identified policy questions
April – May 2018	Finalize list of subject matter experts for public forum or hearing Continue to monitor other jurisdictions and federal efforts to enforce local archiving laws
Mid June 2018	Target for Ethics Commission-sponsored forum or meeting with subject matter experts, stakeholders, and regulated community
July 2018	Prepare draft proposals for Commission consideration and stakeholder engagement
August – September 2018	Prepare draft legislation for Commission consideration

Recommendation

The Commission review the issues identified in this memo and the timeline proposed above and provide its further policy direction regarding how it wishes to proceed in further evaluating the political file/archiving policy proposal.

San Francisco Disclosure Reform

Prepared by Justin Mello and Rachael Grant
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Federal Preemption Generally

The Supremacy Clause of the United States Constitution[1] provides that federal laws take precedence over and preempt state laws to the contrary.[2] Supreme Court interpretations have established three varieties of federal preemption: express, conflict, and field.[3] Congress, in the language of a statute itself or through the legislative history thereof, may indicate unambiguously that it expressly intends to supersede state law.[4] Absent express preemption, implied preemption may exist in the form of field or conflict preemption.[5] Field preemption is found when Congress has established a regulatory scheme so pervasive as to imply an intent to fully and exclusively occupy that field.[6] Conflict preemption exists when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of Congress' objectives.[7] For all forms of preemption, whether state law is preempted by federal law ultimately depends completely on the intent of Congress.[8]

FEC Preemption

The Federal Election Campaign Act of 1971 brought about a new era of campaign finance regulation and with it, federal preemption of states' campaign finance laws.[9] Section 403 of FECA, a clause that specifically provides for federal preemption, reads, "no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure . . . which he could lawfully make under this Act."[10] Upon passing amendments in 1974, Congress expanded the scope of this preemption clause: "The provisions of this act, and of rules prescribed under this act, supersede and preempt any provisions of state law with respect to election to federal office."[11] Through regulation, the Federal Election Commission (FEC) has more precisely defined preemption of state law concerning: "(1) [o]rganization and registration of political committees supporting Federal candidates; (2) [d]isclosure of receipts and expenditures by Federal candidates and political committees; and (3) [l]imitation on contributions and expenditures regarding Federal candidates and political committees."[12]

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[1] U.S. CONST., art. VI, cl. 2.
[2] *See* Christine M. Gimeno & Tammy E. Hinshaw, *Preemption by Federal Government—How Preemption Occurs*, 5 MICH. CIV. JUR. CONST. L. § 155 (2017); *see also* Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005).
[3] *See* Gimeno & Hinshaw, *supra* note 2.
[4] *See id.; see also* Nat'l Meat Ass'n v. Harris, 565 U.S. 452 (2012).
[5] *See* Gimeno & Hinshaw, *supra* note 2.
[6] *See id.*; *see also* Chamber of Commerce of the United States v. Brown, 554 U.S. 60 (2008); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).
[7] *See* Gimeno & Hinshaw, *supra* note 2; *see also* Wyeth v. Levine, 555 U.S. 555 (2009); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
[8] *See* 555 U.S. at 565 ("purpose of Congress is the ultimate touchstone in every preemption case").
[9] Sam Levor, Note, *The Failures of Federal Campaign Finance Preemption*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 528 (2017); *see also* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).
[10] Federal Election Campaign Act of 1971, *supra* note 9, at §403.
[11] Federal Election Campaign Act of 1974, Pub. L. No. 93-443, § 301, 88 Stat. 1289 (1974) (codified at 2 U.S.C. § 453, transferred as amended to 52 U.S.C. § 30143); *see also* Lisa Babish Forbes, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections*, 42 CASE W. RES. 509, 515 (1992).
[12] 11 C.F.R § 108.7(b) (2017).

The FEC, as the agency responsible for regulating the federal campaign finance regime, has interpreted the preemption provision, and the corresponding regulations, broadly.[13] Over the last five decades, the FEC has issued advisory opinions to preempt a California provision prohibiting contributions by lobbyists to state elected officials,[14] a Minnesota statute providing for public financing for federal congressional candidates,[15] and a New Hampshire state law requiring disclaimers on certain campaign-related telephone surveys made on behalf of federal candidates, their authorized campaign committees, or other federal political committees.[16]

The FEC has only rarely allowed state campaign finance law to survive preemption when it directly affects federal elections.[17] The FEC has found to not be preempted state laws regulating the transfer of funds from a candidate's state campaign committee to their federal committee[18] and those prohibiting payment for a variety of services on Election Day.[19]

While there has not been a major FEC preemption case in the Ninth Circuit, other Circuits have exhibited greater restraint than the FEC in finding state law preempted.[20] In the Second Circuit, Fifth Circuit, and the Eighth Circuit, the boundaries of preemption have been pushed back.[21] The actions by other Circuits may indicate a national trend towards relaxing the preemption standards issued by the FEC. With that being said, *Chevron* deference will come into play should a court find a provision of the appropriate statute ambiguous. Under *Chevron*, a court must defer to an agency's reasonable interpretation of ambiguous statutory language, in a statute that the agency administers, where the intent of Congress is not clear.[22] Particularly relevant to preemption, the Supreme Court has said that "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it."[23] Because the FEC has rarely found state law to not be preempted, it appears that in this realm there is a presumption of preemption.[24]

Notwithstanding the aforementioned presumption, it is unlikely that the FEC regulations or related federal law would preempt the proposed San Francisco regulation because the proposal does not implicate any part of the FECA preemption provisions, nor does it involve *federal* elections in the slightest. First, requiring online advertisements—related to only municipal candidates and measures—to be placed in a public file system does not fall within any of the listed preemption provisions. The closest preemption provision that could interfere with the implementation of this proposal is 11 C.F.R. § 108.7(b)(2), which calls for preemption of state law concerning "[d]isclosure of receipts and expenditures by Federal

[13] Levor, *supra* note 9, at 529-30.
[14] Dannemeyer, FEC Advisory Op. No. 1978-66 (Sept. 19, 1978).
[15] Minn. Indep. Republican Party, FEC Advisory Op. No. 1991-22 (Oct. 7, 1991); *see also* Forbes, *supra* note 11, at 544-54.
[16] Greenberg Quinlan Rosner Research, Inc., FEC Advisory Op. No. 2012-10 (Apr. 27, 2012).
[17] Levor, *supra* note 9, at 530.
[18] Davis, FEC Advisory Op. No. 1978-20 (May 31, 1978).
[19] Conroy, FEC Advisory Op. No. 1980-47 (May 13, 1980).
[20] Levor, *supra* note 9, at 531-33.
[21] Reeder v. Kan. City Bd. of Police Comm'rs, 733 F.2d 543 (8th Cir. 1984); Stern v. Gen. Elec. Co., 924 F.2d 472 (2d Cir. 1991); Janvey v. Democratic Senatorial Campaign Comm., Inc., 712 F.3d 185 (5th Cir. 2013).
[22] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
[23] New York v. FCC, 486 U.S. 57, 64 (1988).
[24] Levor, *supra* note 9, at 533.

candidates and political committees." However, the proposed public file system does not directly call for the disclosure of any type of expenditure. As a method of challenging the proliferation of "fake news," this public file system is focused on collecting advertising data. More importantly, the FEC preemption provisions apply to *federal* candidates, and a municipal candidate could not simultaneously be a candidate in a federal election. This system would only apply to local municipal candidates and measures. Finally, there is no indication that the FEC will be required to interpret an ambiguous statutory provision, so as to earn deference from a court toward its position.

FCC Preemption

Section 253 of the Telecommunications Act provides for the preemption of all state or local laws that may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[25] However, Section 253 expressly allows states to "impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[26] In order for state law to be preempted by the FCC, the federal and state laws must not be severable and the FCC must demonstrate that the state law impedes an important federal interest.[27] In *California v. FCC*, the most defining FCC preemption case, the Court recognized that if the effect of a state regulation on a subject matter was such that a carrier's activities would be affected in a manner inconsistent with federal policy, inseverability can be found on this basis only.[28]

Pursuant to Section 253(d), "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[29] In determining whether state law is to be preempted, the FCC has exhibited a pattern of being particularly careful and concise.[30] For example, in determining whether to preempt state caller ID laws, the FCC went through notice-and-comment rulemaking, concluding that it was within its scope of authority to preempt state regulation on interstate caller ID services.[31] The FCC went through similar procedures in efforts to preempt intrastate rate caps[32] and state law regulation providing small incumbent telephone companies with a ten-day protection period from competition.[33]

In the same fashion as FEC preemption efforts, courts have been willing to narrow the authority of the FCC to preempt state law. Most recently, the D.C. Circuit held that the FCC's proposal for caps on intrastate rates exceeded its statutory authority.[34] Furthermore, the Second Circuit held the preemption

[25] 47 U.S.C.S. § 253(a) (2017); *see also* Communications Law and Practice § 4.02.
[26] 47 U.S.C.S. § 253(b) (2017).
[27] La. Pub. Serv. Com v. FCC, 476 U.S. 355 (1986).
[28] 905 F.2d 1217, 1242-44 (9th Cir. 1990).
[29] 47 U.S.C.S. § 253(d).
[30] Communications Law and Practice § 4.02.
[31] 9 FCC Rcd 1764 (F.C.C. Mar. 29, 1994).
[32] In re Rates for Interstate Inmate Calling Servs., 30 FCC Rcd 12763.
[33] 12 FCC Rcd 15639; 13 FCC Rcd 16356.
[34] Glob. Tel*Link v. FCC, 859 F.3d 39 (D.C. Cir. 2017).

doctrine inapplicable when independent antitrust causes-of-action were involved.[35] Finally, most relevant to the public disclosure system here, the United States District Court for the District of Puerto Rico held that record-keeping requirements imposed by a municipal ordinance establishing monthly charges of 5% of a telecommunication provider's revenue for use of public rights-of-way were not so burdensome as to have the effect of prohibiting the provider from offering its services.[36] While these are just a few examples of FCC preemption issues reaching the courts, it is fairly clear that a court will independently make a constitutional judgment of preemption rather than deferring to the FCC.

The FCC likely will not preempt the San Francisco regulation because this proposal seeks to "protect the public safety and welfare"[37] and it would follow the existing case law on record-keeping regulation. First, the proposal aims to create an affront to the proliferation of "fake news" impacting the voting public of San Francisco. In *Communications Telesystems Intern. v. California Public Utility Com'n*, the Ninth Circuit said that a three-year suspension from the provision of interstate long distance telephone services was not preempted by the Telecommunications Act because in response to telephone service provider's slamming, the regulation was appropriate to protect the public safety and welfare.[38] As a response to the "fake news" epidemic, this regulation would directly affect a problem in the same fashion as in *Communications Telesystems.* Second, the proposed regulation calls for maintaining a public file, which closely resembles the record-keeping in *P.R. Tel. Co. v. Municipality of Guayanilla*.[39]

State Law Preemption

For the purposes of federal preemption, "the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."[40] This stems from the recognition that local municipalities are "political subdivisions of the [s]tate" and "the [s]tate, therefore, at its pleasure may modify or withdraw all such powers . . . without the consent of the citizens, or even against their protest."[41] The constitutional idea that local municipalities are subservient to the state underlies the rule that state law generally preempts conflicting local regulations and ordinances.[42]

As a "home rule" state, however, California has chosen to grant to cities (provided they are organized as charter cities) the power to regulate their "municipal affairs," notwithstanding contrary state law.[43] What is more, the California Constitution explicitly identifies both "conduct of city elections" and the "manner" of electing city officials as municipal affairs.[44] In these matters, then, local law can preempt state law. However, this authority over municipal affairs has been circumscribed by the California Supreme Court, restricted to concerns that are purely municipal with no statewide impact. The state

[35] Law Offices of Curtis v. Trinko, L.L.P. v. Bell Atl. Corp., 294 F.3d 307 (2d Cir. 2002).
[36] *See* P.R. Tel. Co. v. Municipality of Guayanilla, 283 F. Supp. 2d 534 (D.P.R. 2003).
[37] 47 U.S.C.S. § 253(b) (2017).
[38] Commc'ns Telesystems Int'l v. Cal. Pub. Util., 196 F.3d 1011, 1016-17 (9th Cir. 1999).
[39] *See* 283 F. Supp. 2d 534.
[40] Hillsborough Cnty. v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985).
[41] Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907); *see also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978).
[42] *See generally* 5 McQuillin: The Law of Municipal Corporations § 15:18 (3d ed.); *see also* Tolman v. Underhill, 39 Cal. 2d 708, 712 (1952).
[43] CAL. CONST., art. XI, § 5, subd. (a).
[44] CAL. CONST., art. XI, § 5, subd. (b)(3), (b)(4).

legislature "may preempt such conflicting charter city legislation only where the matter addressed is one of such statewide concern as to warrant the Legislature's action,"[45] but courts will accord great weight to the Legislature's evaluation of whether a certain subject matter is of municipal or statewide concern.[46]

Whether something is a municipal affair is not a "fixed or static" idea.[47] Courts must decide on a case-by-case basis whether the subject matter is of municipal or statewide concern.[48] "[The] purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation [citation], and . . . factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern."[49] Furthermore, a local municipal ordinance that is in conflict with a general law adopted by the Legislature is invalid if it attempts to impose additional requirements in a field that is preempted by the general law.[50] Finally, any doubt regarding preemption "must be resolved in favor of the legislative authority of the state."[51]

State regulation can preempt conflicting local regulation either expressly or implicitly.[52] Express preemption occurs when a state law prohibits local governments from enacting certain regulations.[53] Implied preemption, not as uniformly practiced and accepted as express preemption, occurs when: "(1) general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; (2) general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or (3) general law partially covers the subject and the adverse effect of a local ordinance on transient citizens of the state outweighs the possible municipal benefit."[54]

Another type of field preemption may occur where a subject matter has been delegated to a state agency, and that agency has been given explicit authority to exclusively regulate. For example, public utilities in California are regulated by a state agency; all local ordinances that conflict with agency regulations must give way. In 2013, the California Public Utility Commission (CPUC) issued regulations for ride-sharing platforms such as Uber and Lyft, preempting local regulation of the ride-sharing industry[55]—this despite the fact that municipalities had traditionally regulated taxi services. The jurisdiction of CPUC over ride-sharing networks was confirmed by the enactment of Assembly Bill 2293

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[45] Fielder v. City of L.A., 14 Cal. App. 4th 137, 143 (1993); *see also* 54 Cal. 4th at 552, 555-556.
[46] *See* Bishop v. San Jose, 1 Cal. 3d 56, 61-63 (1969).
[47] *See* 54 Cal. 3d at 16.
[48] *See* Cox Cable San Diego v. City of San Diego, 188 Cal. App. 3d 952, 961 (1987).
[49] 188 Cal. App. 3d at 961 (citation omitted).
[50] *See* Agnew v. Los Angeles, 51 Cal. 2d 1 (1958).
[51] State Bldg. & Constr. Trades Council of Cal. v. City of Vista, 54 Cal. 4th 547, 578 (2012) (Werdegar, J., dissenting) (citing Baggett v. Gates, 32 Cal. 3d 128, 140 (1982)).
[52] *See, e.g.*, Lauren E. Phillips, Note, *Impending Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2233-35 (2017).
[53] *See, e.g., id.*
[54] Big Creek Lumber Co. v. Cty. of Santa Cruz, 38 Cal. 4th 1139, 1157-58 (2006) (citing People ex rel. Deukmejian v. Cty. of Mendocino, 36 Cal. 3d 476, 485 (1984)); *see also* Sequoia Park Assocs. v. Cty. of Sonoma, 176 Cal. App. 4th 1270, 1278 (2009).
[55] The CPUC rulemaking was denoted as Commission Proceeding No. R 12-12-011. Documents in the Rulemaking are available at the CPUC website: https://apps.cpuc.ca.gov/apex/f?p=401:1:0::NO:RP by entering "r1212011" in the "proceeding number" field.

(Bonilla) on September 17, 2014, which added §§5430 through 5443 to the Public Utilities Code. As a result, municipalities were prohibited from enacting ordinances related to ride-sharing.[56]

In 1974, California voters enacted Proposition 9, known as the Political Reform Act.[57] This comprehensive regulation of campaign finance also created an independent authority—the Fair Political Practices Commission (FPPC)—responsible for ensuring compliance with the Act. The Political Reform Act and the regulations promulgated by the FPPC do apply to municipal candidates, although they do not expressly prohibit localities from adopting more stringent requirements. In this way, the FPPC has markedly less preemption power than the CPUC. In fact, the Political Reform Act specifically contemplates that local ordinances may be adopted, and only requires that the FPPC be notified, and that such ordinances not impose any different or additional requirements unless they apply exclusively to local candidates, committees, or measures.[58] Since the Political Reform Act contemplates coexisting state and municipal legislation relating to campaign finance, the Act and the existence of the FPPC do not rise to the level of express or implied field preemption by the state of California.

Local ordinances may still have to give way to conflicting general laws enacted to address a matter of statewide concern. To determine when conflict preemption is appropriate in California, a four-part test is used. A court must determine: (1) whether the local ordinance regulates a municipal affair; (2) whether an actual conflict exists between the local and state laws; (3) whether the state law addresses a matter of statewide concern; and (4) whether the state statute "is reasonably related to resolution of that concern and narrowly tailored to avoid unnecessary interference in local governance."[59] If the court determines that the subject of the statute is a matter of statewide concern and that it is reasonably—and sufficiently narrowly—related to resolving that concern, then the local ordinance is preempted by state law.[60]

Charter cities have broad authority to regulate municipal elections.[61] In *Johnson v. Bradley*, the California Supreme Court considered a voter-enacted amendment to the Los Angeles city charter establishing a public funding scheme for city political campaigns, which conflicted with a state statute prohibiting the acceptance of "public moneys" for campaign purposes.[62] Following the four-step process, above, the court acknowledged that city elections are municipal affairs, and that an actual conflict existed between the state and local laws.[63] At the third step, however, the court found that the conflicting statute was not restricted to a matter of statewide concern:

> We can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions. … That [Government Code §85300] expressly dealt with this subject and

[56] CAL. CONST., art. XII, § 8 ("A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities] Commission.").
[57] Cal. Gov't Code §§ 81000-91015 (2017).
[58] Cal. Gov't Code §81009.5.
[59] *Id.* at 556; Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 54 Cal. 3d 1, 16-17 (1991).
[60] 54 Cal. 3d at 16-17, 24.
[61] *See* Canaan v. Abdelnour, 40 Cal. 3d 703, 710 (1985), *overruled in part by* Edelstein v. City & Cty. of S.F., 29 Cal. 4th 164 (2002).
[62] Johnson v. Bradley, 4 Cal. 4th 389, 393 (1992), citing Cal. Gov't Code §85300.
[63] 4 Cal. 4th at 398-99.

> intended that its prohibition extend to campaigns and candidates for local office does not convert the decision of the City of Los Angeles, to follow a different path with its own money, into a matter of statewide concern.[64]

Yet not all cases implicating local elections have reached the same conclusion. In *Jauregui v. City of Palmdale*, a California court of appeal considered the conflict between the California Voting Rights Act (CVRA) of 2001—enacted to remedy dilution of minority votes—and the City of Palmdale's decision to hold at-large rather than district-based city elections.[65] Using the same four-part test, this court too acknowledged that city elections are municipal affairs, and that an actual conflict existed between the state and local laws.[66] However, the court explained in detail that the CVRA addressed issues of statewide concern—the constitutional right to vote, equal protection, and the integrity of the electoral process.[67] Therefore, because the state statute was narrowly tailored to achieve its objectives, it preempted the contrary municipal preferences of the city of Palmdale.[68]

In deviating from the conclusion of *Johnson*, the *Jauregui* court noted that "[t]he right to vote is fundamental" and protected as a constitutional right.[69] The state's interest in facilitating the exercise of the people's right of suffrage "is one that goes to the legitimacy of the electoral process" and arises not "*merely* from a municipal concern."[70] In California, "the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern."[71] This is more significant than the expenditure of city resources to fund campaigns, which arguably did not effect as directly the fundamental right to vote.

The foregoing analysis, however, only applies when a state law and a municipal ordinance actually conflict. Nothing in the California Elections Code or related regulations currently prohibits or interferes with the public file proposal. When state and local law can coexist, the preemption analysis is concluded.

Conclusion

It does not appear that San Francisco public file proposal will be preempted on a federal level. Further, there is nothing in the current state statutes or regulations that are likely to preempt it at this time. However, it would be very easy for the California Legislature to pass a general law related to online political advertising that would preempt any local ordinances. Facebook—like Uber—is a California-based company and is likely to seek relief from the state legislature if it is faced with burdensome local regulation. And in light of the significance that California places on the fundamental right to vote as well

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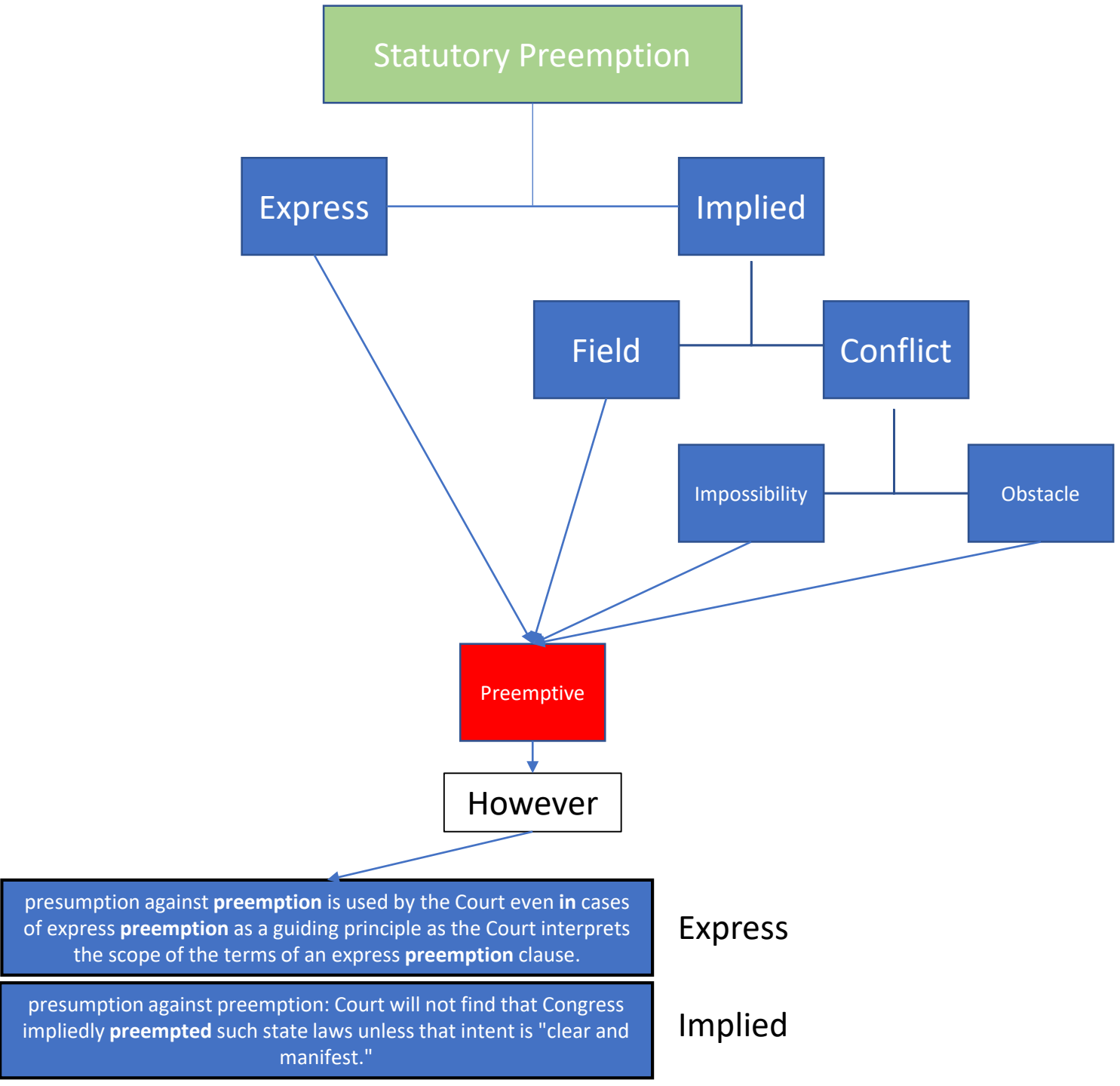
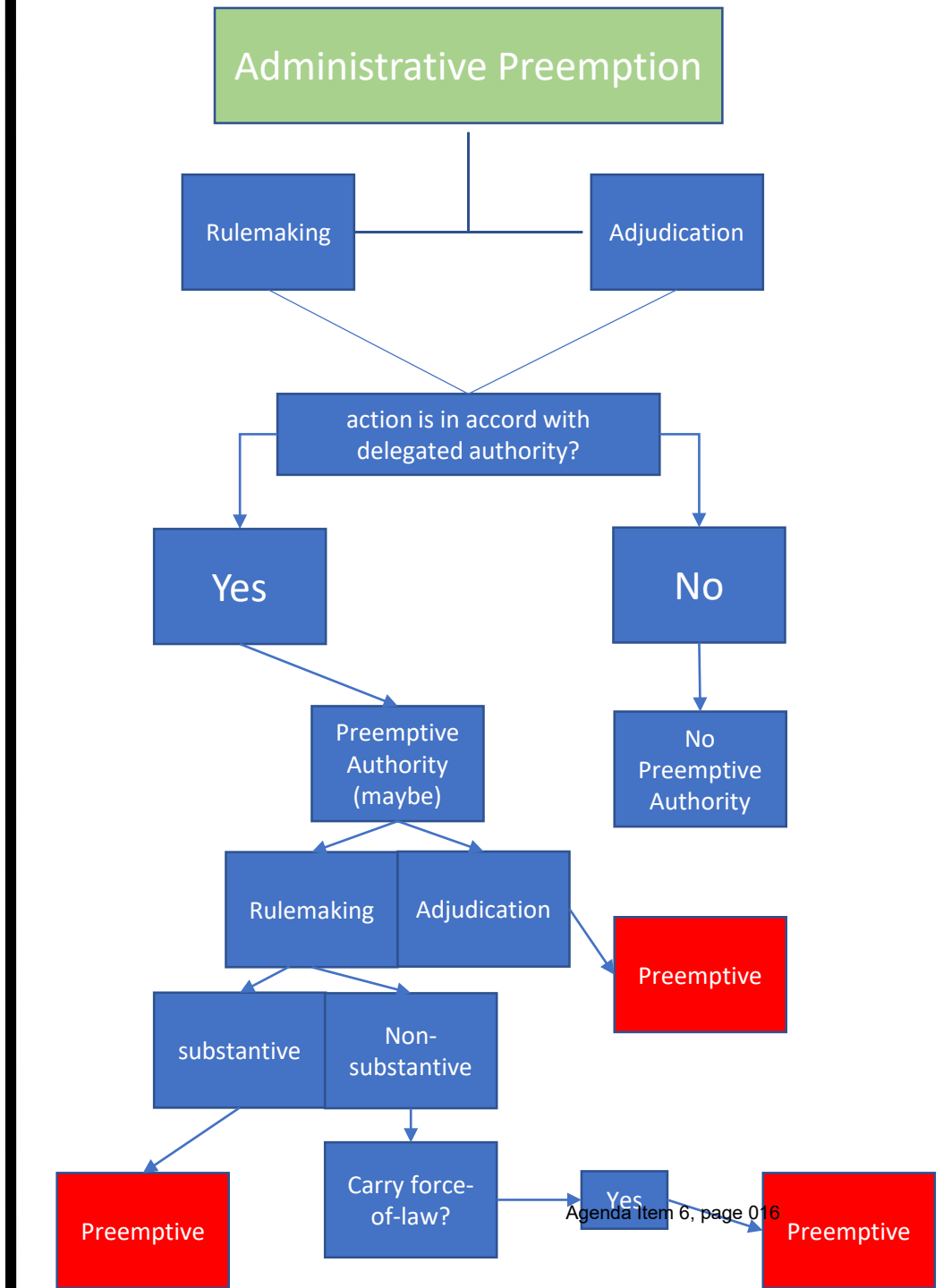
[64] *Id.* at 407.
[65] Jauregui v. City of Palmdale, 226 Cal. App. 4th 781, 795-802 (2014).
[66] *Id.* at 796-98.
[67] *Id.* at 798-801.
[68] *Id.* at 802.
[69] *Id.* at 799-800; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the right to vote is "a fundamental political right, because preservative of all rights"); Cawdrey v. City of Redondo Beach, 15 Cal. App. 4th 1212, 1226 (1993) (recognizing "the fundamental right to vote" as "obviously" a matter of statewide concern).
[70] 226 Cal. App. 4th at 800.
[71] 4 Cal. 4th at 409, citing 35 Ops.Cal.Atty.Gen. 230, 231-232 (1960) (concluding that state campaign financial disclosure laws implicated a matter of statewide concern because they were "aimed at obtaining the election of persons free from domination by self-seeking individuals or pressure groups").

as the integrity of the electoral process, state legislation aimed at transparency in political advertising will undoubtedly relate to a matter of statewide concern. Nevertheless, moving forward with the proposal could still yield benefits in spite of the risk of eventual preemption. San Francisco's ordinance could serve as a model for state legislation, and it could serve as an impetus for Facebook and other platforms lobbying for statewide legislation, which could further expand this initiative.


Statutory Preemption
Express
Implied
Field
Conflict
Impossibility
Obstacle
Preemptive
However
presumption against **preemption** is used by the Court even **in** cases of express **preemption** as a guiding principle as the Court interprets the scope of the terms of an express **preemption** clause.
Express
presumption against preemption: Court will not find that Congress impliedly **preempted** such state laws unless that intent is "clear and manifest."
Implied


Administrative Preemption
Rulemaking
Adjudication
action is in accord with delegated authority?
Yes
No
Preemptive Authority (maybe)
No Preemptive Authority
Rulemaking
Adjudication
Preemptive
substantive
Non-substantive
Preemptive
Carry force-of-law?
Yes
Preemptive