

BEFORE THE SAN FRANCISCO ETHICS COMMISSION

**In the Matter of Progress San Francisco,
Vince Courtney, Jr., and Shawnda Deane**)
) **Case No. 2021-025**
)
Respondents) **Finding of Probable Cause**
)
)

The San Francisco Ethics Commission (“Commission”) has authority to investigate and administratively enforce violations of City law relating to campaign finance, lobbying, conflicts of interest, governmental ethics, and whistleblower protection. SF Charter § C3.699-13; SF C&GCC Art. IV.

In accordance with Ethics Commission Enforcement Regulation 7(B), on November 2, 2022, the Commission’s Enforcement Director submitted a Probable Cause Report in the above-captioned matter. The Probable Cause Report alleges that Progress San Francisco -- a general purpose committee variously filing with the City and County of San Francisco and the State of California – and its Principal Officer Vince Courtney, Jr., and Treasurer Shawnda Deane (collectively, “Respondents”), engaged in conduct in violation of the campaign finance provisions within Article I of the San Francisco Campaign and Governmental Conduct Code (“SF C&GCC”) when the Committee failed to properly report certain local campaign contribution activity to the Ethics Commission as required under the law.

The Ethics Commission may bring an administrative action under the Campaign Finance chapter if it commences no more than four years after the date on which the violation occurred. SF C&GCC § 1.168I(3). For statute of limitations purposes, an administrative action commences on the date on which the Commission “forwards a complaint or information in its possession regarding an alleged violation to the District Attorney and City Attorney[.]” *Id.* Each of the violations alleged in this report occurred less than four years prior to the date of commencement of this administrative action.

Respondents filed a Response to the Probable Cause Report as provided for in Sec. 7(B)(4) of the Enforcement Regulations on November 30, 2022. The Enforcement Director filed a Rebuttal on December 8, 2022. A Probable Cause Conference with both parties was held on December 15, 2022.

According to Ethics Commission Enforcement Regulations, the Executive Director may recommend a finding probable cause that a violation occurred “if the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed or caused a violation.” Enforcement Reg. § 7(D)(1). The Executive Director’s determination that probable cause exists or does not exist to believe a violation of law has occurred must be in writing and “must be based solely on the evidence and argument presented in the Probable Cause Report, Response, and Rebuttal, as well as any evidence or argument presented by the parties at the Probable Cause Conference.” § 7(D)(2). Based on these standards and requirements, this written determination provides my assessment of the evidence and arguments presented and my findings regarding the allegations contained in the Probable Cause Report filed in this matter.

SUMMARY OF FINDINGS

Based on a review of the applicable law, information, and exhibits presented in the Probable Cause Report filed with me on November 2, 2022, Respondents' Response to the Probable Cause Report filed on November 30, the Rebuttal filed on December 8, and information and arguments provided in the Probable Cause Conference held on December 15, 2022, according to the standard and requirements established under Enf. Regs. § 7(D)(1) and 7(D)(2) and for the reasons enumerated in this Determination, I find that the evidence is sufficient to find that probable cause exists to believe that Respondent caused or committed the violations of law as detailed below:

Count One: Respondents violated Gov't Code § 84203 and SF C&GCC § 1.106 by failing to report nine late contributions made during the 90 days before the June 2018 election to the Ethics Commission within 24 hours.

Count Two: Respondents violated Gov't Code § 84203 and SF C&GCC § 1.106 by failing to report 13 late contributions made in the 90 days before the November 2018 election to the Ethics Commission within 24 hours.

Count Three: Respondents violated Gov't Code § 84203 and SF C&GCC § 1.106 by failing to report two late contributions made in the 90 days before the November 2019 election to the Ethics Commission within 24 hours.

Count Four: Respondents violated Gov't Code § 84211 and SF C&GCC § 1.106 by failing to disclose a contribution on a semiannual campaign statement.

BACKGROUND

During the period April 11, 2016 through March 11, 2021, Progress San Francisco ("the Committee") qualified with the CA Secretary of State as a recipient committee (ID Number 1381519) and existed over multiple election years. In April 2016, the Committee was organized as a state general purpose Committee with the purpose to support and oppose state and local candidates. (PC Report Exhibit A, Statement of Organization, CA Form 410). On April 26, 2016, the committee amended the description of its activity to also support and oppose state and local ballot measures. (PC Report Exhibit C, Form 410). The Committee terminated on March 11, 2021 (PC Report Exhibit B, Form 410).

Respondent Deane served as the Committee's professional Treasurer and Respondent Courtney served as Principal Officer of the Committee starting from at least April 26, 2016.

Over the period from October 2016 through January 2019, the Committee reclassified its status six times, alternating its designation between a city general purpose committee and a state general purpose committee. Five of the six re-designations occurred in a one-year period between early 2018 and early 2019. During that same period, local elections were held in the City and County of San Francisco in June 2018 and November 2018, and 98.5 percent of the Committee's contributions went to support City candidates or measures.

APPLICABLE LAW

State and local laws impose certain restrictions and reporting requirements on political committees involved in City elections. These committees generally both raise and spend funds to influence City elections and therefore are required to file reports disclosing money that they raise or spend pursuant to state and local laws. These campaign finance disclosure laws are designed to inform the public about who is supporting certain candidates and positions in electoral contests, ensure the integrity of campaigns, and safeguard the accountability of governmental processes.

Article I, Chapter 1 of the SF C&GCC and its implementing regulations govern campaign finance in the City and County of San Francisco. The SF C&GCC incorporates into City law provisions of the California Political Reform Act (the “PRA”), California Government Code section 81000 *et seq.* and any subsequent amendments, as they apply to local elections. SF C&GCC § 1.106. Treasurers and principal officers may be held “jointly and severally liable, along with the committee, for violations committed by the committee.” *See Committee for Quality Schools – Yes on Measure T, Randy Freeman, and Xochitl Tafolla-Molina*, FPPC Case No. 16/330; Gov’t Code § 83116.5, 91006; SF C&GCC § 1.170(g-h).

Campaign Finance Disclosures – Filing Jurisdiction

A general purpose committee includes any recipient committee that is “formed or exists primarily to support or oppose more than one candidate or ballot measure.” Gov’t Code § 82027.5(a). A recipient committee includes any combination of persons that “receives contributions totaling two thousand dollars” or more in a calendar year. Gov’t Code § 82013(a).

A general purpose committee is responsible for determining and verifying whether it qualifies as a state or city general purpose committee, and for complying with the requirements of the relevant jurisdiction. A committee must verify its filing jurisdiction quarterly (at the end of March, June, September, and December) by reviewing its contributions and expenditures. 2 CCR § 18227.5(d)(1). In San Francisco, City general purpose committees are required to file campaign statements with the Ethics Commission. Gov’t Code § 84215(d).

A committee qualifies as a city general purpose committee if it “makes more than 70 percent of its contributions or expenditures to support or oppose candidates or measures voted on in only one city, or in one consolidated city and county, including contributions to city general purpose committees in the same city or the same consolidated city and county.” 2 CCR § 18227.5(c)(1). In calculating that number, a committee must count contributions and expenditures made to support or oppose candidates or measures during whichever of the following time periods most accurately reflects the current and upcoming activities of the committee:

- (A) the immediately preceding 24 months [“24-month Test”]; or
- (B) the current two-year period, beginning with January 1 of an odd-numbered year and ending with December 31 of the following even-numbered year [“Current Period Test”].

Id. at § 18227.5(d)(3) (defined terms added).

A committee whose status changes from one jurisdiction to another must amend its Statement of Organization (Form 410) to reflect the change. 2 CCR 18227.5(e)(1).

Late Contribution Reporting – Form 497

City law incorporates the PRA’s definition of *contribution*. SF C&GCC § 1.104. The PRA defines *contribution* as “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment[.]” Gov’t Code § 82015(a).

A late contribution is any contribution that totals \$1,000 or more and is made to a candidate, a candidate-controlled committee, or a primarily formed committee to support or oppose a candidate or measure during the 90-day period preceding the date of the election. Gov’t Code § 82036. Any City committee that makes a late contribution is required to report the late contribution within 24 hours to the Ethics Commission via a Form 497. *Id.* § 84203(a), 84215(d).

Campaign Statements

Committees are required to file campaign statements that disclose their financial activity. Gov’t Code § 84200(a). Campaign statements covering activity from July 1 through December 31 are due by the following January 31 via a Form 460. (*Id.*). These statements must include information for all expenditures and contributions over \$100. Gov’t Code § 84211(i), (k).

SUMMARY OF FACTS AND EVIDENCE

After the Committee qualified as a committee in April 2016 and prior to its termination in March 2021, it filed a Statement of Organization (“Form 410”) to reflect its reclassification as follows:

Date Form 410 Executed	Purpose of Filing, per Committee Form 410	PC Report Exhibit
April 11, 2016	Upon qualifying; classified as State General Purpose Committee	A
April 26, 2016	Amend to add Vince Courtney as Principal Officer	C
October 10, 2016	Reclassify as City General Purpose Committee	F
February 28, 2018	Reclassify as State General Purpose Committee	G
July 2, 2018	Reclassify as City General Purpose Committee	J
September 21, 2018	Reclassify as State General Purpose Committee	K
October 11, 2018	Reclassify as City General Purpose Committee	L
January 30, 2019	Reclassify as State General Purpose Committee	Q
March 11, 2021	Upon terminating as a committee	B

(Source: PC Report Exhibits as indicated).

Between February 1, 2018, and February 1, 2019, the Committee reclassified itself five times. Based on these reclassifications as a state or a City general purpose committee, the Committee’s disclosure filings were alternately filed with the State or the Ethics Commission.

A committee qualifies as a city general purpose committee if it “makes more than 70 percent of its contributions or expenditures to support or oppose candidates or measures voted on in only one city, or in one consolidated city and county, including contributions to city general purpose committees in the same city or the same consolidated city and county.” 2 CCR § 18227.5(c)(1). In calculating that number, a committee must:

count contributions and expenditures made to support or oppose candidates or measures during whichever of the following time periods most accurately reflects the current and upcoming activities of the committee:

- (A) the immediately preceding 24 months [“24-month Test”]; or
- (B) the current two-year period, beginning with January 1 of an odd-numbered year and ending with December 31 of the following even-numbered year [“Current Period Test”].

June and November 2016 Elections

The Probable Cause Report includes an analysis showing that from April 11, 2016, through the June 7, 2016 Presidential Primary Election (“June 2016 election”), the Committee made a total of \$225,036 in contributions to support candidates or measures voted on in non-City elections, and a total of \$57,510 in contributions to support candidates or measures voted on only in the City and County of San Francisco (“City candidates or measures”). (PC Report Exhibit D).

After the June 2016 election and in advance of the November 8, 2016 General Election, the Report shows, the Committee made \$10,000 in contributions to support non-City candidates or measures, and contributions totaling \$1,623,000 to support City candidates or measures. (PC Report Exhibit E).

On October 10, 2016, the Committee executed an amended Statement of Organization Form (“Form 410”) to reclassify itself from a state committee to a City committee. (PC Report Exhibit F) and began filing its Late Contribution Reports (“Form 497”) with the Ethics Commission. The Committee made no contributions or expenditures in 2017 or in the first quarter of 2018. (PC Report Exhibit T).

June 2018 Special Election

On February 28, 2018, three months before the June 5, 2018 Statewide Primary Election (“June 2018 election”), the Committee executed an amended Form 410 to reclassify itself from a City committee to a state committee. (PC Report Exhibit G).

An analysis in the Probable Cause Report shows that as of February 28, 2018, the Committee had made 87.7 percent of its contributions and expenditures to support City candidates or measures over the prior 24 months. (PC Report Exhibit H). From January 1, 2017, through February 28, 2018, the Committee made no contributions or expenditures. (PC Report Exhibit T).

Further analysis included in the Probable Cause Report shows that following the redesignation, from April through the June 2018 election, the Committee made no contributions to support candidates or measures voted on in state elections (“state candidates or measures”), and contributions totaling \$615,000 to support City candidates or measures. (PC Report Exhibit I). As shown in Figure 1 below, this \$615,000 in contribution activity included nine contributions within 90 days of the June 5, 2018 election totaling \$430,000 for which the Committee did not file any Form 497s with the Ethics Commission. Instead, the Committee disclosed and filed these contributions with the Secretary of State. (PC Report Exhibit T).

Figure 1: Nine Late Contributions Made by Progress San Francisco in support of City Candidates or Ballot Measures Leading up to the June 2018 Election

Date of Contribution	Name of Committee Receiving Contribution	Amount	Candidate / Measure Supported by Committee	Date Contribution Required to be Reported by Progress San Francisco on Form 497
04/30/2018	San Francisco for London Breed	\$50,000	London Breed, San Francisco Mayor	05/01/2018
05/07/2018	San Francisco for London Breed	\$60,000	London Breed, San Francisco Mayor	05/08/2018
05/14/2018	San Francisco for London Breed	\$50,000	London Breed, San Francisco Mayor	05/15/2018
05/21/2018	San Francisco for London Breed	\$50,000	London Breed, San Francisco Mayor	05/22/2018
05/25/2018	It's Our Time, SF Women Supporting London Breed for Mayor 2018	\$40,000	London Breed, San Francisco Mayor	05/26/2018
05/30/2018	San Francisco for London Breed	\$60,000	London Breed, San Francisco Mayor	05/31/2018
06/04/2018 ¹	Affordable Housing for All, Yes on D	\$30,000	San Francisco Measure D	06/05/2018
06/04/2018	San Francisco for London Breed	\$50,000	London Breed, San Francisco Mayor	06/05/2018
06/04/2018	It's Our Time, SF Women Supporting London Breed for Mayor 2018	\$40,000	London Breed, San Francisco Mayor	06/05/2018
	Total	\$430,000		

November 2018 Election

Between the June 2018 election and the November 6, 2018 General Election (“November 2018 election”), the Committee reclassified back-and-forth between a state committee and a City committee three times. On July 2, 2018, the Committee amended its Form 410 to reclassify itself from a state committee to a City committee. (PC Report Exhibit J). On September 21, 2018, the Committee filed another amended Form 410 to reclassify itself from a City committee back to a state committee (PC Report Exhibit K). And on October 11, 2018, the Committee executed another amended Form 410 to reclassify itself from a state committee back to a City committee. (PC Report Exhibit L).

¹ This late contribution was reported to the Ethics Commission after the election on a Form 497 filed on June 26, 2018.

Here, the Probable Cause Report shows that while classified as a City committee from July through September 20, 2018, the Committee made a total of \$10,000 in contributions to support State candidates or measures and a total of \$244,900 in contributions to support City candidates or measures. (PC Report Exhibit M). This \$244,900 in contribution activity included three contributions totaling \$24,900 to support City candidates that were made on September 20, 2018 -- within 90 days of the November 2018 election – but for which the Committee did not file any Form 497s with the Ethics Commission within 24 hours. These late contributions are included in Figure 2 below. (PC Report Exhibit T). The Committee filed Form 497s with the Secretary of State for these contributions four months later on January 26, 2019. (*Id.*).

As of September 21, 2018, the day it reclassified to become a state committee, the Committee had made 99.2 percent of its contributions and expenditures to support City candidates or measures over the prior 24 months. (PC Report Exhibit H). From January 1, 2017, through September 21, 2018, the Committee had made 98.9 percent of its contributions and expenditures to support City candidates or measures. (*Id.*).

From September 21, 2018, through October 11, 2018, while classified as a state committee, the Committee made no contributions to support state candidates or measures but made contributions totaling \$620,000 to support City candidates or measures. (PC Report Exhibit N). This \$620,000 in contribution activity included eight contributions totaling \$570,000 to support City candidates within 90 days of the November 2018 election for which the Committee did not file any Form 497s with the Ethics Commission. (PC Report Exhibit T). These late contributions are also included in Figure 2 below. The Committee disclosed these contributions on Form 497s filed with the Secretary of State. (*Id.*).

While again classified as a City committee, from October 12, 2018 and through the November 5, 2018 election the Committee made contributions totaling \$22,000 to support state candidates or measures, and \$535,000 in contributions to support City candidates or measures. (PC Report Exhibit O). This \$535,000 in contribution activity included two contributions totaling \$100,000 to support candidates for City office within 90 days of the November 2018 election for which the Committee did not file any Form 497s with the Ethics Commission. (PC Report Exhibit T). These late contributions are also included in Figure 2 below. Instead, the Committee disclosed these contributions on Form 497s filed with the Secretary of State. (*Id.*).

As shown below in Figure 2, during the November 2018 election cycle, the Committee made a total of 13 late contributions totaling \$694,900 to City candidates or measures which it did not report on Form 497s filed with the Ethics Commission.

Figure 2: Thirteen Late Contributions Made by Progress San Francisco in support of City Candidates or Ballot Measures Leading up to the November 2018 Elections

Date of Contribution	Name of Committee Receiving Contribution	Amount	Candidate / Measure Supported by Committee	Date Contribution Required to be Reported by Progress San Francisco on Form 497
09/20/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$5,500 (Non-Monetary)	Christine Johnson & Sonja Trauss, District 6 Supervisor	09/21/2018
09/20/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$2,500 (Non-Monetary)	Christine Johnson & Sonja Trauss, District 6 Supervisor	09/21/2018
09/20/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$16,900	Jessica Ho, District 4 Supervisor	09/21/2018
09/26/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$100,000	Christine Johnson & Sonja Trauss, District 6 Supervisor	09/27/2018
09/26/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$100,000	Jessica Ho, District 4 Supervisor	09/27/2018
10/02/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$25,000	Christine Johnson & Sonja Trauss, District 6 Supervisor	10/03/2018
10/02/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$25,000	Jessica Ho, District 4 Supervisor	10/03/2018
10/03/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$80,000	Christine Johnson & Sonja Trauss, District 6 Supervisor	10/04/2018
10/03/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$80,000	Jessica Ho, District 4 Supervisor	10/04/2018
10/10/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$80,000	Christine Johnson & Sonja Trauss, District 6 Supervisor	10/11/2018
10/10/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$80,000	Jessica Ho, District 4 Supervisor	10/11/2018

10/24/2018	San Franciscans for Change, Supporting Johnson & Trauss for Supervisor 2018	\$50,000	Christine Johnson & Sonja Trauss, District 6 Supervisor	10/25/2018
10/24/2018	Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018	\$50,000	Jessica Ho, District 4 Supervisor	10/25/2018
	Total	\$694,900		

Post-Election Contribution and 2019 Election

On December 31, 2018, while still designated as a City committee, the Committee made a campaign contribution in the amount \$6,512 to Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018, a primarily formed committee supporting Jessica Ho's candidacy for San Francisco Board of Supervisors District 4 (PC Report Exhibit P). The Committee did not disclose this contribution in its campaign statement Form 460 filed on January 31, 2019, which covered the period from July 1, 2018 to December 31, 2018. (*Id.*). The Committee instead disclosed this contribution when it filed an amended Form 460 on July 26, 2019. (*Id.*).

On January 30, 2019, the Committee filed another amended Form 410 to reclassify itself from a City committee to a state committee. (PC Report Exhibit Q). As of January 30, 2019, the Committee had made 98.5 percent of its contributions and expenditures to support City candidates or measures over the prior 24 months. (PC Report Exhibit H). From January 1, 2019, through January 30, 2019, the Committee made 100 percent of its contributions and expenditures to support City candidates or measures. (*Id.*). The Committee had no activity from January 30, 2019, through November 2, 2019. (PC Report Exhibit T).

In November 2019, in the days leading up to the November 5, 2019 Municipal Election ("November 2019 election"), the Committee made contributions totaling \$50,000 to support City candidates or measures. (PC Report Exhibit R). This contribution activity included two contributions totaling \$35,000 to support candidates for City office within 90 days of the November 2019 election for which the Committee did not file any Form 497s with the Ethics Commission. (PC Report Exhibit T). The late contributions are shown in Figure 3 below. Instead, the Committee disclosed these contributions on Form 497s filed with the Secretary of State. (*Id.*).

Figure 3: Two Late Contributions in support of City Candidates Leading up to the November 2019 Elections

Date of Contribution	Name of Committee Receiving Contribution	Amount	Candidate / Measure Supported by Committee	Date Contribution Required to be Reported by Progress San Francisco on Form 497
11/4/19	Friends and Neighbors in Support of Vallie Brown for Supervisor 2019	\$10,000	Vallie Brown, District 5 Supervisor	11/5/19

11/4/19	San Franciscans for a Safter City, supporting Suzy Loftus for SF District Attorney 2109	\$25,000	Suzy Loftus, District Attorney	11/5/19
	Total	\$35,000		

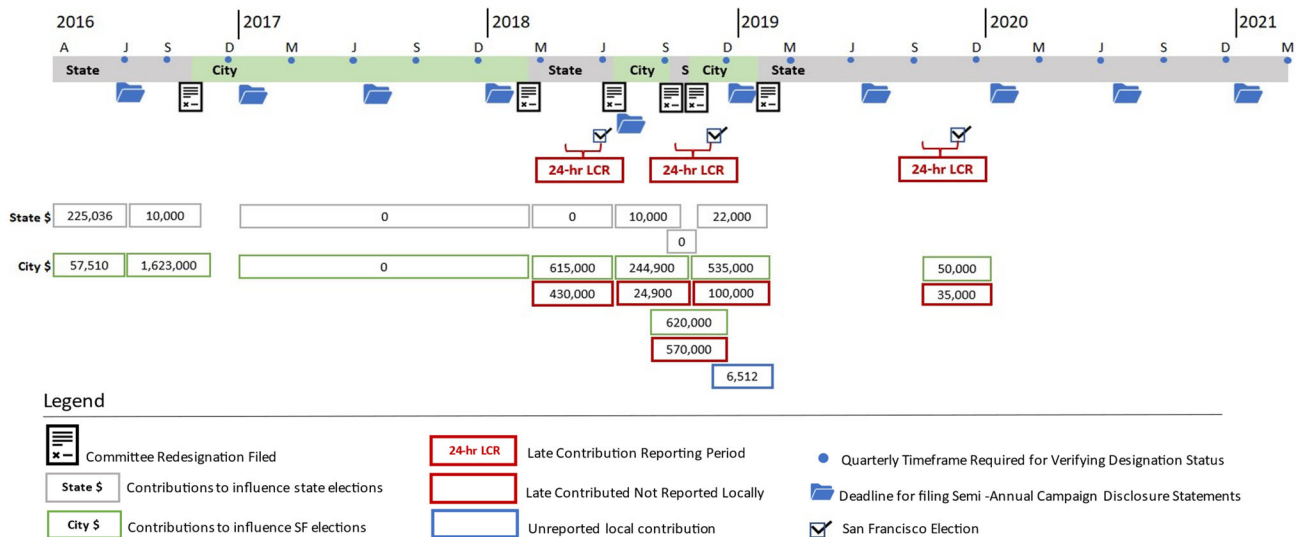
On February 22, 2021, the Ethics Commission issued an audit report of the Committee for the 2018 calendar year and determined that the Committee failed to timely disclose several late contributions. (PC Report Exhibit S). The audit found that the Committee had improperly redesignated itself as a state general purpose committee and had improperly filed several Late Contributions Reports with California’s Secretary of State instead of with the Ethics Commission. (*Id.*). On August 17, 2021, a preliminary review report summarizing Respondent’s alleged violations was sent to the District Attorney and City Attorney for their respective reviews thereby satisfying the statute of limitations as of that date for all counts alleged in this report. (PC Report Exhibit T).

ASSESSMENT OF EVIDENCE AND FINDINGS

State and local laws impose certain public reporting requirements on political committees involved in City elections. These committees generally both raise and spend funds to influence City elections. They are required to file reports disclosing money that they raise or spend pursuant to state and local laws to inform the public about who is supporting certain positions in electoral contests, ensure the integrity of campaigns, and safeguard the accountability of governmental processes.

As described above, the Probable Cause Report details the contribution activity and committee re-designations by Progress San Francisco during the period relevant to this matter. A summary of this activity is depicted in the illustration below.

Contribution Activity and Committee Re-designations by Progress San Francisco
SFEC Case No. 2122 -028



Exhibits provided in the Probable Cause Report demonstrate that from February 28, 2018, to January 30, 2019, the Committee reclassified itself five times, alternating between designation as a state committee and a City committee. During that span, the Probable Cause Report concludes, the Committee inappropriately switched to become a state committee three times: on February 28, 2018; September 21, 2018; and January 30, 2019. Figure 4 summarizes the Probable Cause Report analysis regarding the Committee’s three reclassifications in light of applicable legal tests for proper classification and the Committee’s contribution activity during these periods.

Figure 4: Legal Tests to Determine Proper Classification at the Time of the Committee’s Inappropriate Reclassifications from a City Committee to a State Committee

Election	Date of Reclassification	Reclassification	Classification Test	City Contribution Total	Non-city Contribution Total	% City Contribution
Jun. 2018	2/28/2018	City→State	24-Month	\$1,680,510	\$235,036	87.7%
			Current Period	\$0	\$0	N/A
Nov. 2018	9/21/2018	City→State	24-Month	\$2,401,400	\$20,000	99.2%
			Current Period	\$909,000	\$10,000	98.9%
Nov. 2019	1/30/2019	City→State	24-Month	\$2,062,912	\$32,000	98.5%
			Current Period	\$5,500	\$0	100%

By regularly utilizing redesignation in a way that evaded local reporting requirements, the Probable Cause Report concludes, Respondents undermined local laws that require appropriate disclosure of local campaign activities. The Report cites four counts on which Respondents violated applicable campaign disclosure laws.

COUNT ONE:

Respondents violated Gov’t Code § 84203 and SF C&GCC § 1.106 by failing to report nine late contributions made during the 90 days before the June 2018 election to the Ethics Commission within 24 hours.

The Committee’s filing obligation is determined by its activity. If the Committee conducted more than 70 percent of its activity in San Francisco, it was required to report all late contributions to the Ethics Commission. Gov’t Code § 84215(d). 2 CCR § 18227.5(c)(1). This is because the Committee would qualify as a City committee, and City committees in San Francisco must file statements and reports with the Ethics Commission.

The Committee reclassified itself from a City committee to a state committee on February 28, 2018. At that time, however, the Committee had made 87.7 percent of its contributions and expenditures in the last 24 months to support City candidates or measures. It thereby qualified under the 24-month Test as a City committee (not a state committee). The Committee had not made any contributions or expenditures since the beginning of the current two-year period that began on January 1, 2017. This meant that there was no activity to analyze for purposes of the Current Period Test.

Committees must use the test that “most accurately reflects the current and upcoming activities of the committee.” 2 CCR § 18227.5(d)(3). The 24-month Test reflected the Committee’s activity over

the prior two years, while the Current Period Test did not reflect any of its prior activity. The Committee, therefore, should have used the 24-Month Test.

Second, even if the Committee had incorrectly used the Current Period Test, it should not have reclassified from a City to a state committee. With no past activity to analyze for purposes of the Current Period Test, the Committee could only rely on its upcoming activity during that period. Because its subsequent activity during the June 2018 election cycle was 100 percent focused on City candidates or measures, the Committee would also be a City committee under the Current Period Test and could not have relied on the Current Period Test to justify reclassifying to become a state committee.

Therefore, the Committee inappropriately reclassified from a City committee to a state committee on February 28, 2018. 2 CCR § 18227.5(d)(3).

Under the above tests, the Committee was a City general purpose committee required to report all late contributions to the Ethics Commission. Gov't Code § 84215(d). 2 CCR § 18227.5(c)(1). As shown above in Figure 1, the Committee made nine late contributions totaling \$430,000 between April 2018 and the June 2018 election without filing the required Form 497 with the Ethics Commission.

Because the Committee did not file nine required late contribution reports with the Ethics Commission, Respondents violated City and state law. SF C&GCC § 1.106; Gov't Code § 84203.

COUNT TWO:

Respondents violated Gov't Code § 84203 and SF C&GCC § 1.106 by failing to report 13 late contributions made in the 90 days before the November 2018 election to the Ethics Commission within 24 hours.

As noted above in Count One, the Committee's filing obligation is determined by its activity. If the Committee conducted more than 70 percent of its activity in San Francisco, it was required to report all late contributions to the Ethics Commission. Gov't Code § 84215(d). 2 CCR § 18227.5(c)(1).

After the June 2018 election, the Committee reclassified itself from a state committee to a City committee on July 3, 2018. As the November 2018 election approached, the committee reclassified itself again from a City committee back to a state committee on September 21, 2018. At that time, 99.2 percent of the Committee's contributions and expenditures in the last 24 months had gone to support City candidates or measures. It thereby qualified under the 24-month Test as a City committee (not a state committee). Also at that time, 98.9 percent of the Committee's contributions and expenditures since January 1, 2017 had gone to support City candidates or measures. Thus, under either the Current Period test or the 24-month test, the Committee was qualified as a City committee and inappropriately reclassified to a state Committee on September 21, 2018. 2 CCR § 18227.5(d)(3).

Under the above tests, the Committee was a City general purpose committee required to report all late contributions to the Ethics Commission. Gov't Code § 84215(d). 2 CCR § 18227.5(c)(1). As shown above in Figure 2, the Committee made 13 late contributions totaling \$694,900 between September 2018 and the November 2018 election without filing the required Form 497 with the Ethics Commission.

Per Figure 2 above, of these 13 contributions, the Committee made eight (totaling \$570,000) between September 21, 2018 and October 11, 2018, the period during which it was incorrectly classified as a state committee. The other five contributions (totaling \$124,900) were made either before September 21, 2018 or after October 11, 2018, during periods when the Committee was correctly classified as a City general purpose committee. However, even during these times, when the Committee was designated as a City committee, the Committee still did not file Form 497s with the Ethics Commission for these contributions. For each of these 13 contributions, the Committee was required to file a late contribution report with the Ethics Commission. Because it did not do so, Respondents violated City and state law. SF C&GCC § 1.106; Gov't Code § 84203.

COUNT THREE:

Respondents violated Gov't Code § 84203 and SF C&GCC § 1.106 by failing to report two late contributions made in the 90 days before the November 2019 election to the Ethics Commission within 24 hours.

Here, as in Counts One and Two, the Committee's filing obligation is determined by its activity. If the Committee conducted more than 70 percent of its activity in San Francisco, it was required to report all late contributions to the Ethics Commission. Gov't Code § 84215(d). 2 CCR § 18227.5(c)(1).

The Committee reclassified itself from City committee to state committee on January 30, 2019. At that time, 98.5 percent of the Committee's contributions and expenditures in the last 24 months had gone to support City candidates or measures. Under the 24-month Test, the Committee was thus a City committee (not a state committee). Also at that time, 100 percent of the Committee's contributions and expenditures since January 1, 2019 had gone to support City candidates or measures. The Committee was thus a City committee under the Current Period Test, as well. For the remainder of the 2019 election period, furthermore, the Committee made 100 percent of its contributions and expenditures to support City candidates or measures. Under either test, the Committee inappropriately reclassified from a City committee to a state committee. 2 CCR § 18227.5(d)(3).

Under the above tests, the Committee was a City general purpose committee required to report all late contributions to the Ethics Commission. Gov't Code § 84215(d). 2 CCR § 18227.5(c)(1). Per Figure 3 above, the Committee made two late contributions totaling \$35,000 in November 2019 without filing the required Form 497s with the Ethics Commission.

Because the Committee did not file two required late contribution reports with the Ethics Commission, Respondents violated City and state law. SF C&GCC § 1.106; Gov't Code § 84203.

COUNT FOUR:
Respondents violated Gov't Code § 84211 and SF C&GCC § 1.106 by failing to disclose a contribution on a semiannual campaign statement.

On December 31, 2018, the Committee was correctly classified as a City general purpose committee. On that day, the Committee made a contribution of \$6,512 to Safe & Clean Sunset Coalition, Supporting Ho for D4 Supervisor 2018, a primarily formed committee supporting Jessica Ho's candidacy for San Francisco Board of Supervisors District 4. (PC Response Exhibit Q). State and City laws required the Committee to report that contribution on its next required campaign statement, the Form 460 due by January 31, 2019. Gov't Code § 84200(a), (i), (k). The Committee did not disclose this contribution on its campaign statement Form 460 filed on January 31, 2019. The Committee did not disclose the contribution until its next Form 460 filed on July 26, 2019, 176 days later. Because the Committee failed to disclose this contribution and information about the contributor, Respondents violated City and state law. SF C&GCC § 1.106; Gov't Code § 84211(a), (i), (k).

Respondents' Response to the Probable Cause Report and Enforcement Director Rebuttals

Respondents' Response to the Probable Cause Report contains arguments related to the procedural history of this matter and to legal and policy considerations of the Counts at issue, and provides their assessment of the degree to which any public harm results from the alleged violations.

For purposes of the required legal standard that applies to this determination -- whether the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that Respondents caused or committed the violations as alleged -- consideration of Respondents' arguments is limited here to those presented as to the merits. These arguments are addressed below. As the Enforcement Director notes in the Rebuttal, evidence of public harm is not a factor in determining probable cause for a violation. Should a violation be determined to have occurred in fact, arguments by both parties regarding public harm would be considered at that future time as a factor in calculating and assessing penalties. Consequently, both parties may reserve the right to address that topic in any appropriate future forum.

Count Four

Respondents state they do not dispute Count Four and that they conceded in response to the Ethics Commission campaign audit that they erred in not reporting that contribution as required. Therefore, there appears to be no dispute about the underlying facts of Count Four or Respondents' liability for the alleged violation.

Count Two

Regarding Count Two, Respondents state they redesignated the Committee as a city committee after examining its activity at the end of June 2018, and filed its late contribution reports with the City thereafter. Respondents assert their subsequent September 21, 2018 Form 410 amendment moving the Committee back to a state committee was "an inadvertent error on the part of the Committee's retained professionals." Respondents state that, as a result, "several of Progress' LCRs -- for

contributions it made between September 21 through October 1,” were not filed with the Ethics Commission.

The Rebuttal notes that of the 13 late contribution filings at issue in Count Two (see Figure 2 above), eight came during the period from September 21, 2018 to October 11, 2018, when the Committee was inappropriately designated as a state committee. Three are prior to September 21, 2018, when the Committee was appropriately designated as a City committee, and two others are from after October 11, 2018, when the Committee was also appropriately designated as a City committee. Respondents claim that prior to September 21, the Committee filed its late contribution reports with the City, and further claim that after redesignating as a City committee on October 11, contributions were “filed with the Ethics Commission.” Respondents’ assertions are not supported by evidence.

Based on the evidence presented and Respondents’ own apparent admission to having failed to file late contribution reports as required, I find it reasonable to conclude that the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that Respondents committed or caused the alleged in Count Two.

Counts One and Three

Regarding Counts One and Three, which allege Respondents’ failure to file late contribution reports with the Ethics Commission after inappropriately reclassifying the Committee as a state committee on multiple occasions, Respondents do dispute these Counts. They argue that Counts One and Three fail for the following reasons.

First, Respondents argue that the Probable Cause Report misreads applicable law concerning the tests used to determine a committee’s designation, and that Counts One and Three are therefore based on “an assumption, found nowhere in the law, that a general purpose committee cannot switch back to a different designation at the beginning of a new election cycle if that new designation accurately reflects the current and upcoming activities of the committee.” (Response p.5).

They note that existing committees are required to review their status quarterly and have 10 days thereafter to amend their Form 410 if their designation has changed. They argue that applicable legal tests contain no rule prohibiting a committee from changing its status based on the Current Period Test at the beginning of a new, two-year election cycle “if at the time of the redesignation its current and upcoming activities are more accurately reflected” by the application of that test. (Response p.6).

Respondents note that the Committee had not been active at all in 2017 or at the beginning of 2018 and thus, for the first 14 months of the two-year 2018 election cycle, it did not have expenditures or contributions. After assessing its potential upcoming activities at the end of February 2018, Respondents assert, they concluded that the Committee would likely qualify as a state general purpose committee at least through the June 2018 primary election, as it did in 2016. Therefore, based on subdivision B, the Committee’s status was changed back to a state general purpose committee. Respondents conclude there is nothing in section 18227.5 that prohibited that change in designation and assert the plain language of 18227.5(d)(1) permits it: “An existing general purpose committee that has not made contributions and/or expenditures of \$5,000 or more to support or oppose candidates or measures in the preceding quarterly time period is not required to review or change its status.”

Respondents state that at the beginning of 2018, it assessed its likely activity for 2018 and determined at that time that it would more likely be a state committee at least through June 2018. They note they were “free to choose which test more accurately reflected its upcoming activity, and that such a determination allows for some subjective judgment on the part of a committee and its responsible officers, treasurers and/or counsel at the time the designation is made before spending in the new cycle.” (Response p.7). Respondents conclude that the Probable Cause Report “tries to read subdivision (B) out of existence” and that in making its judgment Respondents were “not required to rely solely on past activity as Enforcement seems to argue.” *Id.* Respondents argue that this argued method “introduces a post hoc analysis to subdivision (B) that is not supported by the plain language and in any event would be impossible to administer in real time, as is required by the quarterly review test.”

In his Rebuttal, the Enforcement Director also notes that Fair Political Practices Commission (“FPPC”) Regulation 18227.5 requires a committee to determine whether it made contributions and expenditures of 70 percent or more in one jurisdiction. The regulation offers two separate tests for calculating this number: (1) contributions and expenditures made during the “immediately preceding 24 months” (“24-month Test”); and (2) contributions and expenditures made during “the current two-year period, beginning with January 1 of an odd-numbered year and ending with December 31 of the following even-numbered year” (shall). 2 CCR § 18227.5(d)(3). The Rebuttal also points out language in the regulation that committees “shall” use whichever time period “most accurately reflects the current and upcoming activities of the committee[.]” *Id.*

The Rebuttal points out that at the time of reclassification, the Committee had made 87.7 percent of its contributions and expenditures to support City candidates or measures under the 24-month Test. Under the Current Period Test, the Committee had made no contributions or expenditures. The Rebuttal describes Respondents conclusions as relying on a misunderstanding of FPPC Regulation 18227.5 and a misreading of the Probable Cause Report. It notes that Respondents offer the same set of defenses for Count Three, because of a misstatement of the facts as discussed further under Count Three below, these defenses do not apply.

Taking these arguments in turn, the Rebuttal first notes that Respondents are incorrect in their argument that the text of FPPC Regulation 18227.5 permitted the Committee’s reclassification under the Current Period Test. It cites that the text of the regulation clearly states that when determining “where to file[.]” a committee “shall count contributions and expenditures *made* to support or oppose candidates or measures...” (emphasis added). 2 CCR § 18227.5(d)(3). Thus, when applying the 24-month and Current Period Tests, the Committee is only permitted to consider past activity: the contributions and expenditures it has “made” thus far in the relevant period.

The Rebuttal agrees that Respondents are correct that they may consider current and upcoming activities to choose between the two tests if their application points in different directions. For example, if the 24-month Test showed 80 percent of activity in City elections, but the Current Period Test showed 75 percent of activity in state elections, the Committee would then consider its current and upcoming activity in deciding which result was more appropriate to use for designation purposes. But it is only after each test is applied to past activity, and a percentage determined, that a Committee would then

consider current and upcoming activity to decide which percentage yielded by the two tests is more appropriate.

In this case, the evidence makes clear, the Committee had no past activity during the period defined by the Current Period Test at the time of its reclassification on February 28, 2018. Therefore, the Current Period Test cannot be applied to find the percentages required to reach a conclusion about jurisdiction; no percentage can be calculated because there was no activity. Respondents cannot rely on potential future activity to select this test because the test cannot even be performed in the first place. Therefore, Respondents inappropriately reclassified to become a state committee.

Second, the Rebuttal challenges as incorrect Respondents' claim that the Enforcement Division's interpretation "tries to read" the Current Period Test out of existence. It argues the Current Period Test presents a valuable alternative to the 24-month Test that can shorten how far back a committee has to look if its activity has recently changed. If a committee has shifted its activity from city to state (or vice versa) in a new cycle, it is permitted to determine its jurisdiction using the data from that cycle, rather than reaching back two years. But the regulation only allows this if there is actual activity upon which to apply the Current Period Test. With no activity to assess, the Current Period Test yields no result, and thus cannot be the basis for assessment. The Rebuttal concludes that this reading gives meaning to the regulation's unambiguous statement that when determining jurisdiction, a committee "shall count contributions and expenditures *made...*" (emphasis added). 2 CCR § 18227.5(d)(3).

The Rebuttal describes Respondents' understanding of the Current Period Test as one crafted to allow them to operate like a newly formed committee every other year, ignoring any and all past activity and choosing their jurisdiction anew based solely on their unverifiable prediction of how they may operate in the future. It further concludes this is not how Regulation 18227.5 operates, for the obvious reason that this would allow inappropriate manipulation of filing jurisdiction by committees.

As a case illustrating the logic of this approach, the Rebuttal cites the instant case. Despite Respondent's claims that the Committee believed it would shift to state activity, it went on to make over 95 percent of its contributions and expenditures in the upcoming election cycles to support candidates and measures in City elections. If the law does not require concrete evidence of a shift in activity, then any Committee could choose its own jurisdiction with speculative claims of future activity. The Rebuttal is persuasive in arguing that the Current Period Test clearly does not operate as this kind of pure discretionary tool, as Respondents attempt to argue.

Applying Regulation 18227.5 correctly by looking at "contributions and expenditures made," it is clear that the Committee was a City committee at the time it redesignated to be a state committee. As of February 28, 2018, the Committee had made 87.7 percent of its \$1.9 million in contributions and expenditures over the prior 24 months to support City candidates or measures. With no activity in the current two-year period to show otherwise, the Committee was required to remain designated as a City committee and file its late contribution reports with the Ethics Commission. Instead, the Committee attempted to rely on an inapplicable test to justify reclassification in defiance of the overwhelming majority of its activity.

The Rebuttal concludes that Respondents inappropriately rely on FPPC Regulation 18227.5(d)(1), which states that a Committee “that has not made contributions and/or expenditures of \$5,000 or more to support or oppose candidates or measures in the preceding quarterly time period is not required to review or change its status.” The Rebuttal notes this is not relevant here, since the Committee did in fact review and change its status, even though not required by law to do so. It notes that Respondents rely on this subsection for two conclusions. First, they claim it suggests that a committee “is not required to but may change its designation.” In the Rebuttal, the Enforcement Division agrees with this, so long as that change in designation complies with all other requirements of the law; voluntary redesignating does not exempt a committee from following the redesignation rules. As discussed above, Respondents’ reclassifications did not comply with the law. Second, Respondents claim that the above language plainly makes clear that “after a new election cycle has begun, a committee may redesignate based on [the Current Period Test] if the new election cycle designation will more accurately reflect the committee’s upcoming expected activity.” This provision is designed to allow committees not to reclassify every quarter if they have not engaged in a certain level of activity during that quarter; it does not follow that a committee could also reclassify however it wants in the absence of this level of activity.

Count Three alleges that Respondents failed to report two late contributions to the Commission in advance of the November 2019 election after inappropriately reclassifying the Committee from a City committee to a state committee on January 30, 2019. Respondents claim the Committee was appropriately reclassified by applying the Current Period Test at the time of reclassification.

In rebuttal, the Director of Enforcement first concludes, Respondents incorrectly summarize the facts. Respondents incorrectly state that the Committee had no contributions or expenditures under the Current Period Test as of the time of reclassification. On its Form 460 covering January 1, 2019 through June 30, the Committee reported a \$5,500 contribution to a committee supporting a candidate in a City election on January 2, 2019. As evidenced in the Probable Cause Report, at the time of the Committee’s reclassification on January 30, 2019, it had made 98.5 percent of its contributions and expenditures to support City candidates according to the 24-month Test, and 100 percent of its contributions and expenditures to support City candidates according to the Current Period Test. Therefore, the Committee incorrectly reclassified in January 2019 to become a state committee and failed to properly report its November 2019 late contributions to the Ethics Commission.

Second, even if Respondents’ claim were accepted that there were no contributions or expenditures under the Current Period Test at the time of the Committee’s reclassification, that reclassification is still inappropriate. In that instance, the rebuttal to Count One detailed above would also apply to Count Three.

In sum, the Rebuttal concludes that Respondent’s arguments are insufficient to overcome a finding that a person of ordinary caution and prudence would believe or entertain a strong suspicion that Respondent committed the violations as detailed in the Probable Cause Report. I concur. Based on my review of the arguments and evidence presented, the Probable Cause Report provides evidence sufficient to believe that Respondents violated Gov’t Code § 84203 and SF C&GCC § 1.106, as described in Counts One and Three of the Probable Cause Report.

CONCLUSION

For the reasons detailed above, I find the evidence presented sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that Respondents committed or caused the violations detailed above, and therefore I find probable cause that Respondents violated Counts One through Four as alleged in the Probable Cause Report.

DATED: December 29, 2022

LeeAnn Pelham

LEEANN PELHAM
Executive Director
San Francisco Ethics Commission