LEGISLATIVE COUNSEL
Diane F. Boyer-Vine

CHIEF DEPUTY
Aaron D. Silva

PRINCIPAL DEPUTIES
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Rachelle M. Weed
Genevieve Wong
Jenny C. Yun
Jack Zorman

LEGISLATIVE COUNSEL BUREAU

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LEGISLATIVE COUNSEL BUREAU
925 L STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 341-8000
FACSIMILE (916) 341-8020
INTERNET WWW.LEGISLATIVECOUNSEL.CA.GOV

June 27, 2017

Honorable Kevin de León
Room 205, State Capitol

CONTRIBUTION LIMITATIONS: RECALL ELECTIONS - #1716447

Dear Senator De León:

Government Code section 85305,[1] which is in chapter 5[2] of the Political Reform Act of 1974 (PRA),[3] prohibits a candidate for elective state office, or a committee controlled by that candidate, from making a contribution to another candidate for elective state office in an amount above the specified limit. However, section 85315 authorizes an elected state officer to accept campaign contributions to oppose a recall measure "without regard to the campaign contributions limits set forth in [chapter 5]." You have asked us whether a court would uphold a determination by the Fair Political Practices Commission (FPPC) that the limit set forth in section 85305 does not apply to a contribution made by a candidate for elective state office, or a committee controlled by that candidate, to a committee controlled by an elected state officer opposing a recall measure as described in section 85315.[4]

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[1] All further section references are to the Government Code, unless otherwise indicated.

[2] § 85100 et seq.; hereafter chapter 5.

[3] § 81000 et seq.

[4] We note that the FPPC has issued advice finding that section 85305 is not a campaign contribution limit waived by section 85315. (FPPC, Johnson Advice Letter, No. A-08-032 (2008); hereafter Johnson Advice Letter.) However, because we think that the plain language and voter intent of Proposition 34 support the opposite conclusion, as explained *post*, this opinion addresses whether a court would uphold a determination by the FPPC to withdraw its previous advice and instead conclude that section 85305 is a campaign contribution limit waived by section 85315.

1. Background

Proposition 34, approved by the voters at the November 7, 2000, statewide general election,[5] amended the PRA to, among other things, impose campaign contribution limitations. The general campaign contribution limitations are contained in chapter 5. In particular, section 85301, subdivision (a) imposes a $3,000 limit on the making of contributions to, or the acceptance of contributions by, any candidate for elective state office[6] other than a candidate for statewide elective office, which includes Members of the Legislature.[7] Section 85301, subdivisions (b) and (c) impose higher limits on the making of contributions to, or acceptance of contributions by, candidates for statewide elective office and the Governor. Additionally, section 85305 imposes a general limit on inter-candidate campaign contributions as follows:

> "A candidate for elective state office or committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301."

However, section 85315 provides an exception to all campaign contributions limits in chapter 5, providing:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. *An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter.* The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election.
>
> "(b) After the failure of a recall petition or after the recall election, the committee formed by the elected state officer shall wind down its activities and dissolve. Any remaining funds shall be treated as surplus funds and shall be expended within 30 days after the failure of the recall petition or after the recall

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[5] Hereafter Proposition 34.

[6] A candidate for elective state office "means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, member elected to the Teachers' Retirement Board, and member of the State Board of Equalization." (§ 82024.)

[7] This limit is adjusted for inflation pursuant to section 83124.

election for a purpose specified in subdivision (b) of Section 89519." (Emphasis added.)

Thus, the campaign contributions limits of chapter 5 do not apply to the acceptance of contributions to a committee formed by an elected state officer to oppose a recall measure.[8]

Under the California Constitution, voters may remove an elective officer by recall.[9] A recall election makes two determinations: whether to recall an officer and, if appropriate, to elect a successor.[10] The first determination falls within the definition of a "measure" under the PRA.[11] As a result, "state law treats recall elections as ballot measures, the 'issue' being whether the officeholder should be recalled."[12]

2. Analysis

Because the FPPC is the administrative agency charged with interpreting and enforcing the PRA, its expertise is entitled to great weight from the courts and its interpretation of the statute will be followed unless it is arbitrary and capricious.[13] However, an administrative agency's authority is not unlimited and courts have overturned the FPPC's implementation of the PRA where its interpretation was at odds with the language of the PRA and inconsistent with the legislative intent underlying the PRA's contribution limits.[14] Accordingly, in order to answer your question, we will address the following two issues: first, whether the limit in section 85305 is a "campaign contribution limit," and second, whether the waiver in section 85315 applies to both the making and the acceptance of contributions.

2.1 The limit in section 85305 is a campaign contribution limit

As described above, section 85305 provides that a "candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301." In turn, section 85315 provides that "An elected state officer *may accept campaign contributions ... without regard to the campaign contributions limits* set forth *in this chapter*." (Emphasis added.) Accordingly, by its plain language,[15] section 85315

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[8] Cal. Code Regs., tit. 2, § 18531.5, subd. (b).

[9] Cal. Const., art. II, §§ 13-19.

[10] Cal. Const., art. II, § 15.

[11] § 82043.

[12] FPPC Internet Web site, Fact Sheets, Recall Elections FAQs, Question No. 1, p. 1; <http://www.fppc.ca.gov/media/factsheets.html> (last accessed June 19, 2017).

[13] See *Citizens to Save California v. California Fair Political Practices Com'n* (2006) 145 Cal.App.4th 736, 754 (hereafter *Citizens to Save California*); *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.

[14] *Citizens to Save California, supra,* 145 Cal.App.4th at p. 751 (finding based upon the language and intent of the PRA that the FPPC interpretation was arbitrary and capricious).

[15] In construing a statute, courts begin with the statutory language because it is

(continued...)

waives the application of "campaign contributions limits" found within chapter 5 but it does not define the phrase "campaign contributions limits." In order to determine whether section 85305 is a campaign contributions limit for purposes of the waiver in section 85315, a court would consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part.[16] And, although section 85305 does not use the exact term "campaign contributions limits," it does use analogous language. For instance, section 85305 prohibits a candidate from making a "contribution" in excess of specified "limits." The dictionary defines "limit" as "a prescribed maximum or minimum amount, quantity, or number."[17] In our view, a maximum monetary amount for a campaign contribution would fall within the plain meaning[18] of the phrase "campaign contributions limits." Additionally, section 85305 is located in an article titled "Contribution Limitations," which supports a conclusion that section 85305 is a campaign contributions limit for purposes of section 85315.[19]

Further, there is evidence that the voters intended for section 85305 to be viewed as a campaign contributions limit.[20] The Legislative Analyst's analysis of Proposition 34 refers to the restriction in section 85305 as a campaign contribution limit by stating as follows:

> "*Campaign Contribution Limits* ... This measure repeals a provision of Proposition 208 that bans transfers of funds from any state or local candidate or officeholder to another candidate, but establishes limits on such transfers from state candidates."[21]

(continued...)

generally the most reliable indication of legislative intent, and if the statutory language is unambiguous, courts presume the Legislature meant what it said, and the plain meaning of the statute controls. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 45.)

[16] *In re J.F.* (2011) 196 Cal.App.4th 321, 331.

[17] Merriam-Webster Online Dict., available at <https://www.merriam-webster.com/dictionary/limit> (last accessed June 21, 2017).

[18] When construing statutes, a court looks first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning. (*People v. Mejia*, (2012) 211 Cal.App.4th 586, 611.)

[19] However, we note that not every provision of the article may be considered a contribution limitation. (See § 85315.)

[20] When an enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language in the enactment. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 306.)

[21] Ballot Pamp., Gen Elec. (Nov. 7, 2000) pp. 13-14; emphasis added.

Because the descriptive language presented to the voters framed section 85305 as a "campaign contribution limit," we can presume that, in enacting section 85315, the voters intended to include section 85305 in the limits waived by that section.

This interpretation of section 85305 is also supported by language from case law that describes a previous complete ban on inter-candidate transfers as a "contribution limitation" rather than an "expenditure limitation."[22] Therefore, in our view, the plain language of sections 85315 and 85305 and indicia of the voters' intent in enacting Proposition 34 support the conclusion that the phrase "campaign contributions limits" includes the limit described in section 85305.

On the other hand, one could argue that a court would decline to view section 85305 as a campaign contribution limit because doing so would render that section duplicative of section 85301.[23] Nevertheless, we do not think that a court would find this argument persuasive for two reasons. First, prior to Proposition 34, two previous propositions attempted to impose a complete ban against inter-candidate transfers of campaign funds. However, these bans were eventually overturned by the courts.[24] Thus, section 85305 serves the purpose of making it clear that inter-candidate contributions of campaign funds are not completely prohibited if the amount contributed is not above the prescribed amount. Second, section 85305 prohibits contributions between all candidates "for

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[22] In *Service Employees Intern. Union v. Fair Political Practices Com'n* (9th Cir. 1992) 955 F.2d 1312, 1322 (hereafter *Service Employees*), overruled on other grounds, the court distinguished inter-candidate bans from intra-candidate bans on transfers of contributions between campaign funds for the same candidate. The court reasoned that "the ban on intra-candidate transfers operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent," but found that the inter-candidate ban "operates as a contribution limitation because it limits the amount one candidate may contribute to another." (*Ibid.*)

[23] Courts avoid constructions that render words, phrases, or clauses superfluous. (*In re* C.H. (2011) 53 Cal.4th 94, 103.)

[24] Proposition 73, an initiative measure approved by the voters at the June 7, 1988, statewide primary election (hereafter Proposition 73), among other things, completely banned inter-candidate transfers of funds between candidates. The Ninth Circuit Court of Appeals in *Service Employees, supra,* 955 F.2d at page 1322, held that the inter-candidate transfer ban in Proposition 73 violated the First Amendment. Proposition 208, approved by the voters at the November 5, 1996, statewide general election (hereafter Proposition 208), was enjoined pending the outcome of a constitutional challenge to some of its provisions, including a complete ban on inter-candidate transfers. (*California Prolife Council Political Action Committee v. Scully* (E.D. Cal. 1998) 989 F.Supp. 1282.) After the adoption of Proposition 34, which repealed many of the provisions of Proposition 208, the federal district court dismissed that action challenging some of the provisions of Proposition 208.

elective state office" in excess of the limit specifically identified only in subdivision (a) of section 85301, which is $3,000 as adjusted for inflation. A candidate for elective state office is defined to include, among others, Members of the Legislature, the Governor, and other statewide elected state officers.[25] Thus, section 85305 imposes the same contribution limit for all inter-candidate contributions regardless of whether the candidate is a candidate for the Legislature, a statewide office, or Governor.[26] Section 85301, on the other hand, imposes different contribution limits for each of these three different types of candidates. Consequently, the inter-candidate contribution limit prescribed by section 85305 has a significantly different effect than the general contribution limit contained in section 85301. In order to mirror section 85301, section 85305 would have to impose a different inter-candidate contribution limit for the Governor, statewide elected officers, and other state officers. However, section 85305 imposes a single, uniform inter-candidate contribution limit for all three of those categories of candidates. Accordingly, in our view, section 85305, by its own terms, cannot be construed as duplicative of section 85301.[27] Instead, it stands as its own contribution limitation that is specific to inter-candidate contributions and has a very different effect than that of section 85301.

For the foregoing reasons, we conclude that the phrase "campaign contributions limits" includes the limit described in section 85305.

2.2 The waiver in section 85315 applies to both accepting and making contributions

The plain language of section 85315 waives contribution limits for accepting campaign contributions, whereas section 85305 prohibits candidates from making inter-candidate campaign contributions. Thus, an argument could be made that section 85315 does not waive the application of section 85305 because section 85305 only applies to making, rather than accepting, contributions. Under this reading of the statute, section 85315 would waive the contribution limits for recipients, but not contributors.

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[25] § 82024.

[26] California Code of Regulations, title 2, section 18535, subdivision (b) provides that the limit in section 85305 "applies to contributions made by officeholders or candidates for Governor, other statewide elective offices, the Legislature, and the Board of Administration of the Public Employees' Retirement System, and their committee(s), to other candidates for elective state office."

[27] For example, section 85301 permits a candidate for the office of Governor to accept a general contribution of up to $29,200 per donor, whereas section 85305 limits a candidate for Governor to accepting a maximum inter-candidate contribution of $4,400. (FPPC, Campaign Manual 4 (Jan. 2017) State Contribution Limits, ch. 5, p. 2.) This example illustrates that the argument that the two sections are duplicative if section 85305 is construed as a "campaign contribution limit" is unpersuasive.

However, in determining the effect of statutory language, it is a well-established rule of statutory construction that the provisions should be read "'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citations.]"[28] Moreover, a literal interpretation will not be followed where it would cause an absurd result.[29] In that regard, it must be noted that sections 85301, 85302, and 85303 all include limits on making, as well as accepting, contributions. If the waiver in section 85315 does not apply to the making of contributions, then it would not waive the limits on making contributions contained in sections 85301 to 85303 either, thereby causing the waiver to become wholly ineffective, which is an absurd result.

Accordingly, in order for the exception in section 85315 to have any meaning at all, it must be read to waive limits on making a contribution as well as limits on accepting a contribution. And courts may read into a statute an exception that must be reasonably and necessarily implied.[30] Thus, if section 85315 is interpreted as waiving limits for making contributions for purposes of sections 85301 to 85303, then it must necessarily be implied that section 85315 waives the limit on making contributions for purposes of section 85305 too. We conclude, consequently, that section 85315 waives the limit imposed by section 85305 on contributions made by a candidate to a committee controlled by an elected officer opposing a recall measure.

3. Additional Consideration

We think a court may also consider the application of section 85303, subdivision (c) in determining whether the limit in section 85305 applies to contributions made by one candidate to the committee of another candidate opposing a recall measure. Section 85303, subdivision (c) provides that "nothing in this chapter shall limit a person's contributions to a committee ... provided the contributions are used for purposes other than making contributions to candidates for elective state office." Although a "candidate" is defined to include "any officeholder who is the subject of a recall election,"[31] one could argue that making a contribution to a committee to oppose a recall measure may be viewed as having a purpose other than making a contribution to a candidate for elective office. Because a recall is considered a ballot measure, rather than an election for an office, we think a court may find that section 85303, subdivision (c) prohibits the application of section 85305 to contributions made to a candidate's committee to oppose a recall election.[32] For example, in

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[28] *People v. Skiles* (2011) 51 Cal.4th 1178, 1185.

[29] *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.

[30] See *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1265.

[31] § 82007.

[32] A court may also view a limitation on the amount a candidate may contribute to another candidate's committee to oppose a recall measure as an unconstitutional infringement on the contributor's constitutional rights. (See *Citizens Against Rent Control v. Berkeley* (1981)

(continued...)

Citizens to Save California, supra, 145 Cal.App.4th 736, the court held that the FPPC overstepped its authority in adopting section 18530.9 of title 2 of the California Code of Regulations, which limited contributions to candidate-controlled ballot measure committees, in part, due to the fact that it conflicted with section 85303, subdivision (c). The court supported its conclusion by emphasizing that contributions to a candidate-controlled ballot measure committee are not required to be included in a candidate's one bank account under section 85201, which requires all contributions to the candidate, "or to the candidate's controlled committee," to be deposited into one bank account.[33] Because the contribution was made to oppose or support a ballot measure, and was not included in the candidate's one bank account, the court did not view the contribution as being for a candidate for elective office.[34]

Similarly, the PRA requires contributions to committees formed to oppose a recall measure to be deposited "in a single bank account ... which is separate from any other bank account held by the officer, including any campaign bank account."[35] Additionally, after failure of a recall petition or after a recall election, any remaining funds from the recall committee must be disposed of as surplus funds in compliance with section 89519.[36] Thus, a court may follow the reasoning of *Citizens to Save California* and find that the funds contributed to a candidate's committee to oppose a recall measure are used for purposes other than making contributions to a candidate for elective state office. If so, then section 85303, subdivision (c) would also preclude applying the limit in section 85305 to such contributions.[37]

(continued...)

454 U.S. 290 (hereafter CARC) [holding that an ordinance limiting contributions to ballot measure committees violated the First Amendment]; *Service Employees, supra,* 955 F.2d at p. 1322 [holding that a complete ban on inter-candidate contributions of campaign funds violated the First Amendment].) As such, a court may construe the limit in section 85305 to not apply to contributions to a committee opposing a recall campaign in order to avoid a potentially unconstitutional interpretation of section 85305 (*Walnut Creek Manor v. Fair Employment and Housing Commission* (1991) 54 Cal.3d 245, 268), especially in light of the fact that a stated purpose of Proposition 34 is to "fully comply with court rulings" (Ballot Pamp., Gen Elec. (Nov. 7, 2000) rebuttal to argument against Prop. 34, p. 17). On the other hand, if a court were to find those cases distinguishable this may not be a consideration.

[33] *Citizens to Save California, supra,* 145 Cal.App.4th at p. 750; italics omitted.

[34] *Citizens to Save California, supra,* 145 Cal.App.4th at p. 750.

[35] Cal. Code Regs., tit. 2, § 18531.5, subd. (c)(1).

[36] See § 85315, subd. (b).

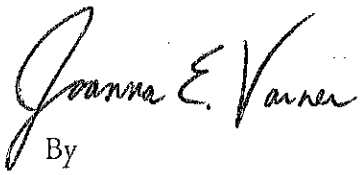
[37] However, a court may find that *Citizens to Save California* is distinguishable because that case involved a candidate-controlled ballot measure committee for an initiative measure, rather than a recall election.

4. Conclusion

For the foregoing reasons, we conclude that the limitation on inter-candidate contributions of campaign funds in Government Code section 85305 does not apply to contributions described in Government Code section 85315. Therefore, it is our opinion that a court would uphold a determination of the Fair Political Practices Commission that the limit set forth in Government Code section 85305 does not apply to a contribution made by a candidate for elective state office, or a committee controlled by that candidate, to a committee controlled by an elected officer opposing a recall measure as described in Government Code section 85315.[38]

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Joanna E. Varner
Deputy Legislative Counsel

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[38] Because the Fair Political Practices Commission has currently adopted the opposite conclusion in the Johnson Advice Letter, any individual candidate should not rely on this advice in making a contribution and should seek individualized legal counsel with respect to any contribution.