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VIA EMAIL

Chair Jodi Remke
and Commissioners Audero, Hatch and Hayward
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: *Contributions From State Candidates To Recall Committees*

Dear Chair Remke and Commissioners Audero, Hatch and Hayward:

We write to support the Senate Democratic Caucus's request that the Commission issue an opinion that Government Code section 85315 permits state candidates, like any other contributor, to make contributions to another state candidate's recall committee without regard to contribution limits, including the limit set forth in section 85305. In our opinion, such a result is compelled by both the clear statutory language of sections 85315 and 85305 and the United States Constitution. The FPPC's current and prior advice does not take into consideration the constitutional constraints imposed on regulating in this area and, if permitted to stand, would result in the violation of the First Amendment rights of Senator Newman and state candidates wishing to contribute to his recall committee in amounts exceeding $4,400. We do not believe the FPPC's current interpretation of section 85315 can withstand judicial review and therefore urge the Commission to revise its advice to be consistent with the Political Reform Act and Constitution.

1. **The Plain Language Of Sections 85305 And 85315 Clearly And Unambiguously Permit State Candidates To Contribute To Officers Subject To A Recall "Without Regard" To Contribution Limits, Just Like Any Other Donor**

As both the Senate Democratic Caucus and Legislative Counsel have stated, the plain language of sections 85305 and 85315 are clear and unambiguous and lead to only one conclusion. Section 85315 states that "[a]n 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 chapter referred to in section 85315 is Chapter 5 of the Political Reform Act. Section 85305 is contained in Chapter 5, and it states that "[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" (emphasis added). In sum, section 85305 of Chapter 5 is a contribution limit on a state candidate giving to another state candidate. Therefore, by its express terms, section 85315 exempts state candidates subject to a recall from complying with the contribution limit of section 85305. Those candidates may accept contributions "without regard" to the contribution limit set forth in section 85305. There is simply no other plausible way to read these provisions.

2. Calling Section 85305 An "Inter-Candidate Transfer" Limit Does Nothing To Change The Relevant Statutory Or Constitutional Analysis

Staff's opinion turns on the argument that section 85305 sets forth an *inter-candidate transfer limit* and staff implies, without analysis, that such a transfer limit is conceptually and legally distinct from a contribution limit. *See* FPPC Staff Memo, Contribution Limits on Transfers from State Candidates to a State Candidate (July 17, 2017) ("Staff Memo") at 11 ("The FPPC's interpretation is that Section 85305 is a stand-alone limit on inter-candidate transfers that is not affected in any way by Section 85315. That is, Section 85315 does not waive the transfer limits imposed by Section 85305. Section 85305 is not one of the 'campaign contributions limits' referenced by Section 85315.").

That argument is wrong as a matter of law. Political spending is either a contribution or expenditure. Under the Political Reform Act, there is no cognizably distinct activity known as a "transfer." It is not a defined term under the Act. Further, transfers are considered contributions under the Act. Gov't Code § 82015(d) ("'Contribution' further includes any *transfer* of anything of value received by a committee from another committee . . . .") (emphasis added).

That is consistent with long-standing constitutional principles. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has analyzed campaign finance regulations as implicating either a contribution or expenditure limit, and applied the relevant constitutional test accordingly: expenditure limits are subject to exacting scrutiny, while contribution limits may be sustained if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, 134 S. Ct. 1434, 1444 (2014) (*quoting Buckley, supra,* 424 U.S. at 25).

Accordingly, "transfer" limits or bans must be analyzed as either a contribution or expenditure limit. As the Ninth Circuit has held, an "inter-candidate transfer" limit operates as a contribution limit "because it limits the amount one candidate may contribute to another." *Serv. Emps. Int'l Union, etc. v. Fair Pol. Pracs. Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992). Therefore, the argument that section 85315 does not apply to section 85305 because the latter sets forth an inter-candidate transfer rule rather than a contribution limit is meritless.

3. The FPPC's Current Interpretation Violates The Constitution

We believe one reason that the FPPC's advice concerning section 85315 is erroneous is that it does not take into consideration any of the constitutional principles that apply in this area. The FPPC, however, must provide advice consistent with statutory and constitutional parameters. *Cf. Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 305 ("[L]egislation should be construed, if reasonably possible, to preserve its constitutionality . . . ."). Since *Buckley v. Valeo*, the Supreme Court has repeatedly held that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 134 S. Ct. at 1452 (citation omitted).

In our opinion, the FPPC's current advice runs afoul of the First Amendment. As an initial matter, the State treats recall elections as ballot measures under section 82043; the "issue" or "measure" is whether the officeholder should be recalled. The Supreme Court has long held that contribution limits on ballot measure committees are unconstitutional because "the risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Citizens Against Rent Control/Coal. For Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298 (1981). Similarly, the Third District Court of Appeal held that contribution limits on candidate-controlled ballot measure committees are invalid. *Citizens to Save California v. California Fair Political Practices Com.*, 145 Cal. App. 4th 736, 741 (2006). Thus, as both a matter of state and constitutional law, contribution limits may not be imposed on committees supporting or opposing the recall question, such as Senator Newman's recall committee.

In light of *Citizens Against Rent Control* and *Citizens to Save California*, the FPPC would be hard pressed to demonstrate that recall committees can be treated differently from other ballot

measure committees, including candidate controlled ballot measure committees. It would have the burden of proving there is a sufficiently important governmental interest in limiting contributions from state candidates to candidate recall committees, even though no other contributors to those committees are subject to a contribution limit. The only governmental interest the FPPC appears to advance to justify its past and current advice is that the limit is needed in order to restrict the ability of legislative leaders to give "large sums" in "partisan recall[ ]" elections. *See* FPPC Staff Memo at 10 and 9. But the Supreme Court has repeatedly rejected that argument as providing a legitimate basis for limiting campaign speech. "[W]e have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 134 S. Ct. at 1441.

Rather, the Supreme Court has recognized only one government interest sufficient to restrict campaign financing: the prevention of quid pro quo corruption and the appearance thereof. *Id.* at 1450. As the Supreme Court has stated, there is no quid pro quo corruption present in contributions to a ballot measure committee. But even if *Citizens Against Rent Control* did not apply here, and it does, it is hard if not impossible to see how restricting contributions from fellow legislators – but not from any other person, corporation, or committee – guards against corruption or its appearance. Nor has the FPPC even attempted to make that showing. Further, even if the FPPC's interpretation did further an interest in preventing quid pro quo corruption, the FPPC could not establish that its interpretation is "closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444. Many other statutes already prohibit perceived and actual conflicts of interests of legislators, including the Legislative Code of Ethics (Gov't Code §§ 8920 et seq.) and the prohibition against vote trading. (Penal Code § 86.) These existing laws adequately serve the State's legitimate governmental interests. The FPPC's interpretation of section 85315 is "poorly tailored" to the State's interests and therefore impermissibly restricts participation in the potential process. *McCutcheon*, 134 S. Ct. at 1446.

Finally, beyond the statutory and constitutional reasons why the FPPC should change its advice, strong policy reasons also exist for doing so. The FPPC's current interpretation would result in a fundamentally unfair and asymmetrical campaign finance regime. Under the FPPC's interpretation of section 85315, state candidates may make unlimited contributions to the committee supporting the recall since it is not controlled by a state candidate, yet state candidates may only give up to $4,400 to Senator Newman's committee opposing the recall. These same concerns about fairness and symmetry informed

the Court's decision in *Citizens to Save California* to invalidate contribution limits on candidate-controlled ballot measure committees. *Citizens to Save Cal.*, 145 Cal. App. 4th at 752 ("[I]f a candidate has 'significant influence' over a controlled committee in favor of a ballot measure but no candidate is involved with the opposition committee, contribution limits are placed on the measure's proponents that are not placed on the measure's opponents. . . . This is hardly a fair and equitable opportunity to participate in governmental processes.").

We urge the Commission to reverse the staff advice and allow unlimited contributions to the recall committee, as the Political Reform Act clearly requires.

Sincerely,

Thomas A. Willis

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