

# California Legislature

October 20, 2023

Chairman Miadich and Commissioners  
Wilson, Wood, Baker, and Ortiz  
Fair Political Practices Commission  
1102 Q Street, Suite 3050  
Sacramento, CA 95811

**RE: Proposed Amendments to Regulations 18531.2 and Regulation 18537.1**

Dear Chairman Miadich and Commissioners:

On behalf of both the Senate Democratic Caucus and the Assembly Democratic Caucus, we write to express strong concerns with the Commission's proposed amendments to Regulations 18531.2 and 18537.1, which require candidates to refund contributions raised for their general or runoff elections in lieu of transferring those contributions to a committee for subsequent office as is currently permitted under the Political Reform Act and advice letters issued by the Commission. Inasmuch as the proposed regulations restrict a candidate's ability to transfer those funds to another committee controlled by the candidate, they impose restrictions on candidates' ability to make intra-candidate transfers. Such limitations on intra-candidate transfers have uniformly been invalidated by courts as impermissible expenditure limitations in violation of the First Amendment of the United States Constitution. Moreover, imposing restrictions on candidates' ability to transfer funds now – when the 2024 and 2026 election cycles are already underway – would abruptly change existing campaign finance rules in the middle of the campaign cycle to the detriment of candidates who have reasonably relied on the current state of the law to plan for their upcoming elections.

Commission staff is proposing three options for amending Regulations 18531.2 and 18537.1, all of which would change rules that apply to the transfer of contributions made to a candidate's general or runoff election when a candidate withdraws from the primary or wins their primary election outright. Option 1 requires candidates who withdraw from a primary or special primary election to refund any contributions received for the general election but allows a candidate who wins the primary election outright to transfer remaining primary and general election funds to a committee for subsequent election to the same office without attribution to contributors. Option 2 similarly requires candidates who withdraw from a primary or special primary election to refund contributions received for the general election but allows candidates who win the primary election outright to transfer remaining funds for the primary election to a committee for subsequent election to the same office without attribution to contributors; contributions raised for the general election could be transferred to a committee for a subsequent election to the same office with attribution to contributors. Option 3 requires candidates who withdraw from the primary or special primary election, or who win outright in the primary election, to refund any contributions received for the general election, while remaining funds from the primary

election could be transferred to a committee for a subsequent election to the same office without attribution.

Attempts to restrict candidates' ability to make intra-candidate transfers have uniformly been invalidated by Courts as unconstitutional expenditure limitations that violate the First Amendment. Indeed, the FPPC was a party to the seminal case on this issue – *SEIU v. FPPC*, 955 F.2d 1312, 1322 (9th Cir. 1992) – in which the Ninth Circuit invalidated the intra-candidate transfer ban enacted in Proposition 73 (Primary Election, 1988). That language of Proposition 73 provided: “Transfers of funds between candidates or their controlled committees are prohibited.” Proposition 73, Proposed Section 85304(a), June 1988 Primary Election. After a federal district court invalidated that provision on First Amendment grounds, the Ninth Circuit agreed, explaining that a “ban on intra-candidate transfers operates as an expenditure limitation because it limits the purpose for which money raised by a candidate may be spent.” *Serv. Emps. Int'l Union, etc. v. Fair Political Practices Com.*, 955 F.2d 1312, 1322 (9th Cir. 1992). Accordingly, such restrictions are “subject to strict scrutiny and will be upheld only if they are ‘narrowly tailored to serve a compelling state interest.’” *Id.*

Applying that standard, the Ninth Circuit rejected the Commission's assertion that the intra-candidate transfer ban was justified by the government's interest in preventing funds from being raised for one office and spent for another:

Even if we were to recognize this to be a compelling state interest, we would invalidate the ban as violative of the First Amendment because it is not narrowly tailored. We agree with the district court that this interest in ensuring that contributors are not misled could be served simply by requiring candidates to inform contributors that their contributions might be spent on other races. Concerns about the unintended use of contributors' money can be met “by means far more narrowly tailored and less burdensome than a restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose. We hold, therefore, that the intra-candidate transfer ban fails the narrowly tailored prong of the strict scrutiny test.

*Id.* (internal citations and quotations omitted).

The same analysis has been repeatedly applied in the context of other intra-candidate transfer restrictions. For example, in 2002, the California Attorney General's Office was asked to advise on the constitutionality of a county ordinance that prohibited the transfer of funds to a county candidate's campaign committee from another campaign committee controlled by that candidate. Citing *SEIU v. FPPC* and a similar Eighth Circuit case, the Attorney General advised that “the intra-candidate transfer prohibition of the county ordinance in question is unconstitutional as a violation of the First Amendment of the United States Constitution” because “[i]t unduly limits the freedom of expression of candidates in a manner that is too broad in application.” 2002 Cal. AG LEXIS 10, 85 Ops. Cal. Atty. Gen. 43, \*8. The Attorney General acknowledged that a county could prohibit transfers of funds *between different candidates* (inter-candidate transfers) to “prevent contributors from circumventing contribution limits,” but specifically distinguished *intra-candidate* transfer prohibitions as unconstitutional. *Id.* at \*10.

It is thus unsurprising that the Commission's own advice letters have repeatedly observed that prohibitions on intra-candidate transfers are unconstitutional and have properly permitted candidates to transfer funds between controlled committees. See *Lawler Adv. Ltr.*, No. I-07-047, 2007 Cal. Fair. Pract., LEXIS 62 (rejecting an interpretation of Section 85306 that would have restricted intra-candidate transfers as likely unconstitutional, and finding the transfer of funds between a candidate's committees

was permissible, subject to attribution and contribution rules); *Morrel Adv. Ltr.*, No. A-03-089, 2003 Cal. Fair. Pract., LEXIS 135 (advising that a candidate could transfer funds from their federal committee to their state committee, subject to attribution and contribution limit rules, citing the constitutional concerns associated with transfer restrictions); *Reno Adv. Ltr.*, No. A-00-038, 2000 Cal. Fair. Pract., LEXIS 46 (finding a candidate could transfer funds between their own controlled committees, citing *SEIU v. FPCC* and the longstanding rule that intra-candidate transfers of funds are not considered a contribution). *See also Miller Adv. Ltr.*, No. A-00-242, 2000 Cal. Fair. Pract., LEXIS 182.

Here, the Commission's proposed regulations threaten to cross this clear constitutional line by banning the transfer of funds between candidate-controlled committees in certain scenarios. *First*, by requiring a candidate who withdraws from, or wins outright in, the primary election, to refund contributions received for the general election, the proposed regulations prohibit candidates from making intra-candidate transfers of contributions raised for the general election to another committee controlled by the same candidate for a subsequent election. *Second*, where the regulations permit the transfer of a candidate's funds but only to the extent that the transfer be made *to a committee for subsequent election to the same office*, they impermissibly restrict candidates from transferring funds to a committee established for a different office. This restriction would be particularly onerous on candidates who were subject to term limits and candidates who simply wish to run for a different office.

The fact that these proposed amendments do not ban intra-candidate transfers exactly as Proposition 73 did does not save them. Even in circumstances where such transfer restrictions are not expressly stated, they have been rejected as unconstitutional. For example, in *Migden v. Fair Political Practices Comm'n*, No. 2:08-CV-00486-EFB (E.D. Cal. 2008), the court enjoined the Commission from enforcing a provision of the Political Reform Act that would have prohibited a candidate from making intra-candidate transfers to a subsequent campaign committee after they became surplus funds. *See also Morrel Adv. Ltr.* (citing unconstitutionality concerns as a basis for allowing intra-candidate transfers of surplus funds).

The proposed regulations also raise several policy concerns. First, adoption of this regulation at this point in the election cycle would unfairly disadvantage candidates who plan on transferring funds to a separate committee in advance of the upcoming elections. For example, candidates with 2024 campaign committees who are eligible for the 2024 March primary but decide to run for a separate office would be prohibited from transferring general election funds to their new committee, regardless of the time and energy they have invested in fundraising for their campaign. Similar restrictions would be applied to candidates who intend to run for statewide office in 2026. Moreover, proposed Regulation 18531.2 may incentivize candidates to engage in practices that mislead voters. Candidates could create numerous committees for election to future office and only accept contributions toward primary elections in an attempt to compensate for the loss of general election contributions that would result if they ran for a different office before a primary election. This would confuse voters by making it difficult to determine which office a candidate actually intends to run for. *See Brown Adv. Ltr.* (finding the Brown interpretation will "decrease[] the likelihood of candidates engaging in the potentially misleading practice of opening campaign committees for multiple offices simply for the purpose of maximizing their potential contributions for seeking one particular office.")

The proposed regulations may also exceed the Commission's rulemaking authority. The Commission is permitted to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of [the Political Reform Act]," however, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." *See Cal. Gov't Code* § 83112; *Cal. Gov't Code* § 11342.2. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs." *Citizens to Save Cal. v. Cal. Fair Political Practices Com.*, 145 Cal. App. 4th 736, 747 (2006).

Section 85318 provides “[i]f the candidate for elective state, county, or city office is defeated in the primary election or special primary election, *or otherwise withdraws from the general election or special general election, the general election or special general election funds shall be refunded to the contributors on a pro rata basis...*” Cal. Gov’t Code § 85318(a) (emphasis added).<sup>1</sup> This statute unambiguously outlines the specific scenarios where general election contributions must be returned, neither of which includes withdrawing from the primary. In the context of withdrawal, the refund requirement only applies if a candidate withdraws from (1) the general election or (2) a special general election. *Id.* The statute does not apply this rule to withdrawing from all elections, but repeatedly references this only applies to two types of *general* elections. In contrast, primary elections are only mentioned when discussing *defeat* in the primary election. As noted in the *Brown* letter, “[h]ad the drafters intended Section 85318 to apply to when a candidate withdraws before the primary election, it seems logical that they would have stated that.” *Brown Adv. Ltr.* Phrased differently, Proposed Regulation 18531.2 would expand this withdrawal restriction to an entirely new category of elections despite the authorizing statute unambiguously limiting the withdrawal rule only to general elections.

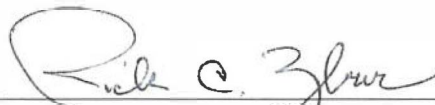
Given these important issues, we request that the Commission strongly consider whether to proceed with the proposed amendments to Regulations 18531.2 and 18537.1. If it chooses to proceed, it should only do so consistent with the constitutional and other principles set forth above. We appreciate the opportunity to provide these comments.

Sincerely,



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Senator Monique Limon, Chair  
Senate Democratic Caucus



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Assembly Member Rick Chavez Zbur, Chair  
Assembly Democratic Caucus

cc: Richard Rios, Olson Remcho LLP

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<sup>1</sup> We are unaware of prior litigation challenging Section 85318 as an unconstitutional intra-candidate transfer restriction. However, Section 85318’s requirement that general election funds be returned if a candidate is defeated in the primary election or withdraws from general election would be vulnerable to the same legal arguments that apply to the Commission’s proposed regulations.