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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)
)
)
Opinion requested by)
Nicholas Sanders)
_____)

No. O-21-001
April 15, 2021

BY THE COMMISSION: Nicholas Sanders, on behalf of the California Political Attorneys’ Association, has requested an opinion of the Fair Political Practices Commission (“Commission”) on the following question:

QUESTION

When applying the contribution limits in Government Code section 85301¹, as amended by Assembly Bill 571 (2019), are contributions to local candidates made prior to AB 571’s effective date (January 1, 2021) for an election held after that date aggregated with any contribution from the same contributor to the same recipient made after the effective date?

CONCLUSION

Yes. Contributions made prior to January 1, 2021 to a local candidate subject to the contribution limit in Section 85301 are aggregated with contributions made by the same contributor on or after January 1, 2021 to the same candidate for an election held on or after January 1, 2021 for purposes of determining whether a contributor has exceeded the contribution limit.

BACKGROUND

In 2019, the Governor signed AB 571 into law with a delayed effective date of January 1, 2021. AB 571 imposes a contribution limit on elective city and county offices in jurisdictions that do not enact an ordinance imposing contribution limits. (Section 85301.) AB 571 effectively applied existing contribution limits for state elected officers to local elected officers in jurisdictions that do not have contribution limits. Typically, contribution limits apply per election, regardless of when the contribution is received. (Section 85301.)

In response to requests for informal advice, the Commission’s Legal Division has advised requestors that for those local offices subject to contribution limits established by AB 571, a contribution made prior to January 1, 2021 for an election after that date, should be aggregated with any contribution made after that date from the same contributor to the same recipient for the same election to ensure compliance with the new contribution limits. The California Political

¹ All statutory references are to the California Government Code unless otherwise indicated.

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Attorneys' Association (CPAA) argues this interpretation is a retroactive application of the law and that it does not align with the position taken when the contribution limit was imposed on elective state offices under Proposition 34, which went into effect January 1, 2001.

ANALYSIS

A. Considering Contributions Made Prior to January 1, 2021 for Elections Held on or After January 1, 2021 is not Retroactive Application of Law.

“It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.” (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 at 393.) A statute that operates to increase a party's liability for past conduct is retroactive. (*Myers v. Phillip Morris Companies, Inc.*, (2002) 28 Cal. 4th 828 at 839.) But a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474.) A statute also does not operate “retrospectively” or “retroactively” merely because the statute: (1) is applied in a case arising from conduct antedating the statute's enactment; (2) upsets expectations based in prior law; or (3) draws upon antecedent facts for the statute's operation. (*Landgraf v. Usi Film Prods.* (1994) 511 U.S. 244, 269.) A statute operates retroactively when it changes the legal consequences of an act completed before the effective date of the statute. (*Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 502.)

The Commission's conclusion here is in line with those cases where the court has said application of a law was not retroactive because it concerns events occurring before application of the law, but it does not impact liability for those events. For example, in *Kizer v. Hanna* (1989) 48 Cal. 3d 1, the State Supreme Court considered the application of a statute which permitted the Department of Health Services (“Department”) to obtain reimbursement of medical costs from the estates of Medi-Cal patients after the patient's death. The estate of a deceased Medi-Cal patient argued the statute could not be applied to medical costs incurred prior to the statute going into effect. The deceased patient's estate argued that reimbursements from the decedent's estate for Medi-Cal benefits received prior to the effective date resulted in retroactive application of the law. The Court concluded application of the statute to debts incurred before the statute went into effect was not retroactive, since it affected only estates arising after its effective date; nor was its effect retroactive, since it did not substantially change the legal effect of any past transactions, but only affected how the property of a recipient's estate would be distributed. (*Id.* at 12.)

Similarly, in *Burks v. Poppy Construction Co.*, the State Supreme Court held that the Hawkins Act, which prohibited discrimination in connection with the rental or sale of publicly assisted housing, applied even though a housing development received public assistance prior to the Hawkins Act's enactment. (57 Cal.2d at 474.) This was the case because sanctions were imposed only for violations occurring after the statute's effective date. Even though the defendant's housing development would not be subject to the Hawkins Act had he not received public assistance, the application of the Hawkins Act was not retroactive because “[a] statute

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does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.” (*Ibid.*)

The U.S. Supreme Court in *United States v. Jacobs* (1939) 306 U.S. 363 upheld the application of a tax law adopted in 1924 to property obtained in 1909 because the event that triggered the taxation was the transfer of the property via joint tenancy to the decedent’s wife, which occurred after the law went into effect, not the purchase of the property in 1909. The Court reasoned “(h)ad the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.” (*Id.* at 367.)

The U.S. Supreme Court in *Landgraf v. Usi Film Prods.* (1994) 511 U.S. 244 noted that even uncontroversial prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law’s enactment or spent his life learning to count cards. (511 U.S. at 269 n. 21.) The court provided that if every time a person relied on existing law in arranging their affairs, and were made secure against any change in legal rules, the whole body of our law would be ossified forever. (*Ibid.*)

Aggregating contributions made prior to January 1, 2021 with contributions made after January 1, 2021 does not impose liability or change the legal effect of acts occurring before AB 571 went into effect. While contributions made prior to January 1, 2021 are relevant in determining if contribution limits have been met or exceeded, a violation for a contribution over the limit would only occur as the result of a contribution made after January 1, 2021.

In *Burks*, the defendant was still subject to the housing discrimination law put in place by the Hawkins Act as a result of receiving public funds for the housing development, even though the funds were received prior to adoption of the Hawkins Act, because the prohibited discrimination occurred after the law went into place. In *Kizer*, the decedent’s estate could be made to reimburse Medi-Cal costs incurred prior to the statute going into effect because the statute was in place at the time of decedent’s death, the event triggering the reimbursement requirement. Likewise, in *Jacobs*, a new tax law could be applied to property acquired and held in joint tenancy before the law went into effect because the event triggering the tax occurred after the statute went into effect.

The facts in each of these cases are analogous to the question at issue here and therefore considering contributions made prior to January 1, 2021 for purposes of determining whether a subsequent contribution, in the aggregate, would exceed the contribution limit for an election held on or after January 1, 2021 does not result in an impermissible retroactive application of the provisions of AB 571. This is true even if it unsettles expectations or imposes burdens on those that previously contributed to a candidate committee subject to AB 571.

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B. A Comparison of AB 571 Contribution Limits to Proposition 34 Contribution Limits Indicates the Legislature did not Intend for AB 571 to Apply to City and County Offices in the Same Manner as Proposition 34 Applied to State Offices.

Where Congress adopts a new law incorporating sections of prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least in so far as it affects the new statute. (*Lorillard, Div. of Loew's Theatres, Inc. v. Pons* (1978) 434 U.S. 575, 580-581.) It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. (*Montclair v. Ramsdell* (1883) 107 U.S. 147, 152.)

Section 85306 governs the transfer of funds between a candidate's committees and the expenditure of funds raised prior to implementation of a contribution limit. The section was part of Proposition 34 ("Prop. 34") in 2000, which established the current contribution limit law for state officers. Section 85306, as amended by AB 571, reads as follows:

- (a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state, county, or city office of the same candidate. Contributions transferred shall be attributed to specific contributors using a "last in, first out" or "first in, first out" accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor shall not exceed the limits set forth in Section 85301 or 85302.
- (b) Notwithstanding subdivision (a), a candidate for elective state office, other than a candidate for statewide elective office, who possesses campaign funds on January 1, 2001, may use those funds to seek elective office without attributing the funds to specific contributors.
- (c) Notwithstanding subdivision (a), a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors.
- (d) This section does not apply in a jurisdiction in which the county or city imposes a limit on contributions pursuant to Section 85702.5.
- (e) This section shall become operative on January 1, 2021.

The amendments by AB 571 to Section 85306 consisted of adding "county or city" to subdivision (a) and adding subdivisions (d) and (e). The bill did not amend subdivisions (b) or (c). Subdivisions (b) and (c) provided that committees of state officers with funds on hand at the time Prop. 34 went into place did not have to account for the sources of those funds. This resulted in contributions received prior to implementation of Prop. 34, even if earmarked for future elections, not being counted toward the contribution limits put in place by Prop. 34.

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AB 571 did not amend subdivision (b) or (c) to apply to the contribution limits put in place for local offices nor did it provide language to the same effect for city and county offices. The Legislature could have mirrored the language of subdivisions (b) and (c) when they amended Section 85306(a) to include city and county offices, but they chose not to. Given the Legislature is presumed to have had knowledge of the interpretation given to the incorporated law, at least in so far as it affects the new statute, this indicates the Legislature did not intend to “wipe the slate clean” as Prop. 34 had done. Accordingly, this construction of Section 85306 is interpreted by the Commission to mean the Legislature was not ignorant of the language it employed and made clear which part of Section 85306 it wanted to apply to elective city and county offices and which part it did not.

Given the lack of amendments to subdivisions (b) and (c), and the fact that contribution limits are on a per election basis, AB 571 contributions for an election should be counted for purposes of contribution limits regardless of when the contribution is received. But a contribution in excess of the contribution limit made before January 1, 2021 would not violate the contribution limit put in place by AB 571 because that would be a scenario in which the statute would be restricting, limiting, or altering prior contributions and thus would be a retroactive application, as discussed above.

C. The Legislative Intent of AB 571 is to Limit Contributions made to City and County Offices in Elections Held on or After January 1, 2021.

In addition to the decision by the Legislature to construct Section 85360 in the way that it did, as analyzed above, the author’s statement in the Assembly Floor’s Analysis of AB 571 also provides insight into the intent of the Legislature when drafting AB 571, which reads as follows:

Currently, there is no limit on contributions to candidates for local office in 78% of cities and 72% of counties. In these jurisdictions, contributors can give unlimited amounts to candidates for local office. A single donor may give tens to hundreds of thousands of dollars to a candidate for city council or county board – far exceeding the amount that even state legislators can legally accept...”

AB 571 would set default local campaign contribution limits for local city and county elections, setting a new standard for these local elections. This bill respects local control in the sense that it would not prevent local jurisdictions from adopt[ing] a higher or lower limit threshold. AB 571 takes an important step in establishing a more widespread application of campaign contribution limit to prevent undue influence in local elections.

This statement details the goal and intent of AB 571 and that was to limit contributions made to elective city and county candidates, per election, by either imposing the contribution limit of the Act, or have the local jurisdiction impose its own contribution limit. If the local jurisdiction does not want to be restricted by the limit set forth under the Act, it has the option of adopting its own ordinance and implementing either a higher or lower contribution limit for these candidates.

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Since Section 85301 provides that contribution limits apply per election, regardless of when the contribution is received, AB 571 requires consideration of contributions received prior to AB 571 taking effect for purposes of determining whether the AB 571 limit has been met or exceeded as of January 1, 2021 for elections held on or after this date. This is consistent with the goal of AB 571. Any alternative interpretation would result in allowing candidates to receive up to \$4,900 after January 1, 2021 in addition to unlimited contributions received from the same source prior to January 1, 2021, for an election held after AB 571 went into effect, which would be counter to the intent of the legislation.

D. To the Extent Contribution Limits Themselves Do Not Violate the First Amendment, the Effective Date of the Contribution Limit Imposed Would Not Impose Any Greater Burden on the Speaker.

The constitutional analysis of a law which restricts speech begins with the basic premise that, generally speaking, the government may not regulate the content or subject matter of First Amendment freedoms. As the high court has pointed out, to restrict the content of expression would be to erode the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270; *Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 85.) Generally speaking, the government may only directly abridge or curtail the right to speak on any subject if the speech is not entitled to protection (*Spiritual Psychic Science Church v. City of Azusa*, (1985) 39 Cal.3d 501, 513-514) or if there is a clear and present danger to the safety of the state. (13 Cal.Jur.3d, *Constitutional Law*, sections 257-58, pp. 477-84.)

Where the purpose of the law is to regulate nonspeech activities, its application is content neutral, and its effect on protected communications is incidental, a regulation may be upheld as constitutional if it meets the test set out in *United States v. O’Brien* (1968) 391 U.S. 367, 377:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (*See Members of City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 805; *Spiritual Psychic Science Church v. City of Azusa*, supra, 30 C.3d at 516; *Dulaney v. Municipal Court*, supra, 11 C.3d at 84.)

It is well settled that laws which regulate speech involve free speech issues. (*Metromedia Inc. v. San Diego* (1980) 453 U.S. 490; *City Council of Los Angeles v. Taxpayers for Vincent*, supra, 466 U.S. at 789; *Wirta v. Alameda - Contra Costa Transit District* (1967) 68 C.2d 51) However, the fact that “an ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.” (*City Council of Los Angeles v. Taxpayers for Vincent*, supra, 466 U.S. at 803-04, quoting *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490.) For, even though a communication is potentially entitled to constitutional protection, it is not necessarily immune from regulation. (*Konigsberg v. State Bar* (1961) 366 U.S. 36.)

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Regarding campaign contributions as political speech, in *Buckley v. Valeo* (1976) 424 U.S. 1, the Supreme Court found that the need to prevent corruption or the appearance of corruption is a compelling state interest which sustains the burden imposed on First Amendment rights by contribution limitations. (*Buckley v. Valeo* (1976) 424 U.S. 1, 96.) Further, the Court found that limits on contributions involved little direct restraint on political speech because even with limits imposed, it still allows for a symbolic expression of support evidenced by a contribution, and the contribution limits do not in any way infringe the contributor's freedom to discuss candidates and issues. (*Id.* at 21.)

The aggregation of contributions made prior to AB 571's effective date with any subsequent contributions does not inhibit a contributor's ability to make a symbolic expression of support in the form of a campaign contribution. Aggregation of contributions would only restrict future contributions if the contributor has already made contributions to the candidate totaling \$4,900 or more. Accordingly, the consideration of contributions made before AB 571 taking effect for purposes of determining whether the contributor met or exceeded the AB 571 contribution limit does not violate the First Amendment right to free speech because the interpretation does not impose any greater burden on the speaker than the contribution limit itself. In other words, merely interpreting the effective date of the contribution limit, does not raise any concerns with restrictions on a contributor's First Amendment right to free speech beyond those concerns associated with the actual limit.

WE CONCUR:

[Concurring Commissioners]