The Law Offices of
Max D. Kanin

427 North Canon Drive, Suite 214, Beverly Hills, CA 90210
Phone: (424) 256-6214; Email: MDKanin@CalPACLegal.com

July 25, 2017

VIA ELECTRONIC MAIL

The Honorable Jodi Remke, Esq., Chair
The Honorable Commissioners Maria Audero, Brian Hatch, and Allison Hayward
Fair Political Practices Commission
801 Capitol Mall, Suite 150
Sacramento, CA 95814

Re: Request by Senate Democratic Caucus's Request for Commission Opinion and Regulation regarding staff interpretation of California Government Code §§85315 and 85305

Dear Chair Remke and Commissioners,

I am writing on behalf of West Hollywood City Councilman John Heilman ("Councilman Heilman").[1] He is submitting this comment letter in support of the Senate Democratic Caucus's request for an opinion from the Fair Political Practices Commission (the "Commission") on the interpretation of California Government Code Section 85305 ("Section 85305") of the Political Reform Act (the "Act"). Although Councilman Heilman concurs with the legislative analysis of the Senate Democratic Caucus, he is writing separately to argue that the proposed interpretation urged by the FPPC Staff Opinion, while ordinarily reasonable, would violate the First Amendment of the United States Constitution[2] and Article I, Section 2 of the California Constitution[3] rendering Section 85305 unconstitutional. Thus, to ensure that Section 85305 remains constitutionally valid, Councilman Heilman urges the Commission to issue an opinion adopting the interpretation of Section 85305 proposed by the Senate Democratic Caucus.

This opinion was requested by the Senate Democratic Caucus in response to a recall effort launched by the California Republican Party against State Senator Josh Newman. Senator Newman has created a committee to oppose the recall (hereinafter "Senator Newman's Recall Committee"). The Senate Democratic Caucus as well as the Legislative Counsel's office have urged the Commission to interpret Section 85305 as not being applicable to state candidates who wish to contribute to candidate controlled recall committees. The FPPC Staff have issued an opinion stating the opposite and are supported by the California Republican Party. None of the opinions submitted to the Commission thus far address the critical issue of whether the proposed interpretation of Section 85305 violates the First Amendment or Article I, Section 2. This is critical as a provision of the Act that resembles 85305 has already been held unconstitutional.

---

[1] Councilman Heilman is an interested party as his duties, rights, and responsibilities as a candidate under the Act could potentially be impacted by the Commission's ultimate interpretation of Section 85305.

[2] U.S. CONST. amend. I; *Buckley v. Valeo*, 424 U.S. 1, 14-16 (1976)(*per curiam*).

[3] CAL. CONST. art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); *Woodland Hills Residents Association v. City Council of Los Angeles*, 26 Cal. 3d 938, 946 (Cal. 1980).

The Law Offices of
Max D. Kanin
427 North Canon Drive, Suite 214, Beverly Hills, CA 90210
Phone: (424) 256-6214; Email: MDKanin@CalPACLegal.com

A. Authority of the Commission

The Commission has broad authority to interpret and implement the Act.[4] Under the California Constitution, the Commission has no authority to refuse to enforce legislation on the grounds that it is unconstitutional unless an appellate court has issued a decision providing as such.[5] However, when the Commission simply interprets a statute in a way to ensure that it will remain constitutional, it does not violate the California Constitution.[6] An administrative agency may still analyze a statute in light of constitutional standards and should interpret provisions in a way that will render them constitutional.[7] This method of statutory interpretation is commonly known as the constitutional avoidance doctrine.[8]

Under the doctrine of constitutional avoidance, "a statute should not be construed to violate the Constitution 'if any other possible construction remains available.'"[9] "[A] statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality."[10] "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable."[11] A statutory provision "will not be invalidated if it is readily susceptible to a narrowing construction that would make it constitutional."[12] Thus, the Commission has frequently applied the constitutional avoidance doctrine when interpreting provisions the Act through the formal opinion process as well as the advice letter process.[13]

---

[4] CAL. GOV'T. CODE § 83111; *Californians for Political Reform Foundation v. Fair Political Practices Commission*, 61 Cal. App. 4th 472, 484 (Cal. Ct. App. 1998); *In re Pirayou*, 19 FPPC Ops. 1, 5 (2006).
[5] CAL. CONST. art. III, § 3.5(a)(b).
[6] *In Re Olson*, O-01-112, Page 5, n. 8 (2001). *See also* CAL. GOV'T. CODE § 83111.5 ("the [C]ommission shall take no action to implement this title that would abridge constitutional guarantees of freedom of speech, that would deny any person of life, liberty, or property without due process of law, or that would deny any person the equal protection of the laws.").
[7] *See Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1102 n. 31 (Cal. 2004). *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575, 583 (Cal. 1989); *Goldin v. Public Utilities Commission*, 23 Cal. 3d 638, 669 fn. 18 (Cal. 1979); *Regents of the University of California v. Public Employment Relations Board*, 139 Cal. App. 3d 1037, 1042 (Cal. Ct. App. 1983).
[8] This canon of statutory interpretation is sometimes referred to as the doctrine of "constitutional doubt" and sometimes referred to as the doctrine of "constitutional avoidance." *California Chamber of Commerce v. State Air Resources Board*, 10 Cal. App. 5th 604, 611 n.19 (Cal. Ct. App. 2017).
[9] *People v. Garcia*, 2 Cal. 5th 792, 804 (Cal. 2017).
[10] *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1151 (Cal. 2001).
[11] *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1153 (Cal. 2001).
[12] *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 464 (Cal. Ct. App. 2002).
[13] *See*, *e.g.*, *In Re Olson*, O-01-112, Page 5, n. 8 (2001); *Morrell* Advice Letter, No. A-03-089 (2003); *Miller* Advice Letter, No. A-00-242(2000).

The Law Offices of
Max D. Kanin
427 North Canon Drive, Suite 214, Beverly Hills, CA 90210
Phone: (424) 256-6214; Email: MDKanin@CalPACLegal.com

B. The FPPC Staff and California Republican Party's interpretation of Section 85305 would create a different campaign contribution limit for different speakers and different messages.

Section 85305 provides "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."[14] Section 85315 of the Act, which is in the same chapter as Section 85305, provides "*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. 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."[15] However, the FPPC Staff interprets Section 85305 as a stand-alone provision that limits contributions to Senator Newman's Recall Committee from other state candidates.[16]

This interpretation of Section 85305 would establish the following campaign finance scheme: Committees formed either in support or opposition of a recall may receive unlimited contributions.[17] This includes Senator Newman's Recall Committee which is a candidate controlled committee controlled by a target officer subjected to a recall.[18] Those unlimited contributions to Senator Newman's Recall Committee may ordinarily come from individuals, labor unions, registered 501(c)(4) non-profit organizations, corporations, and limited liability companies.[19] Those unlimited contributions to Senator Newman's Recall Committee may also come from both local candidates, who are not state candidates, and their controlled committees and federal candidates, who are not state candidates, and their controlled committees.[20]

However, under this interpretation of Section 85305, state candidates, and *only* state candidates, are subject to different rules than any other person in California and may only contribute $4400 to Senator Newman's Recall Committee. Notably, this rule does ***not*** apply to state candidates who wish to contribute to any committee formed to support Senator Newman's

---

[14] CAL. GOV'T. CODE § 85305.
[15] CAL. GOV'T. CODE § 85315(a) (*emphasis added*). It should be noted that campaign contributions to committees formed for recalls may not be constitutionally limited. *Farris v. Seabrook*, 677 F. 3d 858, 861 (9th Cir. 2012) (affirming the permanent preliminary injunction against campaign contribution limits placed on recall committees as likely violating the First Amendment).
[16] A "state candidate" is "a candidate who seeks nomination or election to any elective state office." CAL. GOV'T. CODE § 82050. An "elected state office" is "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." CAL. GOV'T. CODE § 82024
[17] CAL. CODE. REGS. tit. 2, § 18531.5(b)(3)(2017).
[18] CAL. CODE. REGS. tit. 2, § 18531.5(b)(1)(2017).
[19] CAL. GOV'T. CODE § 82407.
[20] *Reese* Advice Letter, No. A-01-182 (2001); *Stark* Advice Letter, No. A-88-470; *Marsh* Advice Letter, No. I-89-056; *Riffenburgh* Advice Letter, No. A-90-761; *House* Advice Letter, No. A-92-111.

recall, as long as that committee is not controlled by another state candidate.[21] The FPPC Staff interpretation of Section 85305 creates both a distinction among different speakers and different messages when it comes to recall committees.

Some real life hypothetical examples help illustrate how the FPPC Staff's interpretation of Section 85305 makes distinctions by both speaker and message. If United States Senator Diane Feinstein and United States Senator Kamala Harris wish to contribute to Senator Newman's Recall Committee, both are subject to different contribution rules. Why? Senator Feinstein is not considered a state candidate under the Act as she is a federal candidate and controls no state committees.[22] Senator Harris, who still maintains an open committee for the office of Attorney General, is still technically considered a state candidate under the Act.[23] Thus, Senator Feinstein can theoretically give any amount of money to Senator Newman's Recall Committee from either her personal finances or from any federal campaign committee that she controls. If Senator Harris attempted to give the same amount to Senator Newman's Recall Committee, she would violate the Act having exceeded the $4,400 limit.

Similarly, Congressman Adam Schiff (D-Glendale), as a solely federal candidate, may give unlimited amounts to Senator Newman's Recall Committee. However, Congressman Jimmy Gomez (D-Echo Park), who was recently elected to an adjacent Congressional District, is limited to contributing $4,400 to Senator Newman's Recall Committee because he is still technically a state candidate under the Act.[24] The proposed interpretation creates distinctions that restrict the ability to contribute of those who are not in elected office. For example, State Senator Ellen Corbett (D-San Leandro) who was termed out of office in 2014 remains a state candidate under the Act.[25] State Senator Isadore Hall (D-Compton) who opted to not run for reelection to the California State Senate in 2016 and was unsuccessful in his bid for Congress is still considered a state candidate under the Act.[26] Neither may contribute more than $4,400 to Senator Newman's Recall Committee. By contrast, Los Angeles Mayor Eric Garcetti, a

---

[21] It should be noted that a committee formed to recall Senator Newman would not be a candidate-controlled committee under the Act if controlled by the California Republican Party. CAL. GOV'T. CODE § 82016(b).

[22] CAL. GOV'T. CODE § 82007 (providing that under the Act, a "'Candidate' does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971."). Although Senator Feinstein was at one time a state candidate when she ran for Governor in 1990, that committee has long been terminated and she has no active state committees as of July 20, 2017.

[23] As of July 25, 2017, Re-elect Kamala Harris as Attorney General 2014 is an active committee controlled by Senator Kamala Harris and reports $1,078,501.11 cash-on-hand. "An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214." CAL. GOV'T. CODE § 82007. "Candidates shall terminate their filing obligation pursuant to regulations adopted by [FPPC]." CAL. GOV'T. CODE § 84214. "The filing obligations of a candidate or officeholder who has one or more controlled committees terminate when the individual has terminated all his or her controlled committee(s) and has left office." CAL. CODE. REGS. tit. 2, § 18404(d)(1)(2017).

[24] As of July 25, 2017, Friends of Jimmy Gomez for Assembly 2016 is still an active committee.

[25] As of July 25, 2017, Ellen Corbett for Attorney General 2018 is still an active committee.

[26] As of July 25, 2017, Hall for Senate 2016 is still an active committee.

powerful Democratic Party leader and rumored Presidential candidate, is not a state candidate under the Act and may give unlimited amounts to Senator Newman's Recall Committee.

Among state candidates, a distinction is created not just by the identity of the speaker (state candidates vs. non-state candidates) but by the message expressed by state candidates. The current political stances of the leaders of the California State Senate are not hypothetical and demonstrate the distinction. California State Senate President Pro Tempore Kevin De Leon (D-Los Angeles) is vociferously opposed to the recall of Senator Newman. California State Senate Minority Leader Patricia Bates (R-Laguna Niguel) supports the recall effort against Senator Newman. Under the FPPC Staff's interpretation, Senator De Leon may not contribute more than $4,400 to Senator Newman's Recall Committee. Nor may any of his colleagues in the State Senate who oppose the recall. However, Senator Bates may contribute to the committee formed to support Senator Newman's recall in unlimited amounts. So may any of her colleagues in the State Senate who *favor* rather than oppose the recall effort against Senator Newman.

C. The proposed interpretation of Section 85305 by the FPPC Staff would make Section 85305 unconstitutional as a violation of both the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution.[27]

The Commission is not a typical regulatory agency but one that regulates in the most sensitive areas of fundamental constitutional rights.[28] Thus, restrictions on political campaign expenditures must survive strict scrutiny to remain permissible under the First Amendment.[29] Restrictions on political campaign contributions and their solicitations must now also likely survive strict scrutiny to remain permissible under the First Amendment.[30] Restrictions on political campaign contributions and political campaign expenditures do not need to be complete; simply restricting one's ability to contribute or make expenditures can suffice as a limitation on one's First Amendment rights.[31]

---

[27] *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (*plurality opinion*); *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008). These decisions were all issued by the United States Supreme Court *after* the *Johnson* Advice letter, No. A-08-032 was issued by the Commission.

[28] *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("[The] power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.")).

[29] *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

[30] *Williams-Yulee v. Florida State Bar*, 135 S. Ct. 1656, 1664-1665 (2015) (holding that reviewing a restriction on a solicitation was properly evaluated under the strict scrutiny standard). At the very least, contributions must be "closely drawn" to match an important governmental interest. *McConnell v. Federal Election Comm'n*, 540 U. S. 93, 136 (2003), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) *(per curiam*), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

[31] *See Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 754-755 (2011) (holding that a government program that burdened, even without limiting, expenditures by privately financed campaigns violated the First Amendment).

The ***only*** permissible governmental interest that permits a restriction on political campaign contributions and political campaign expenditures that satisfies the First Amendment is that of preventing quid pro quo corruption.[32] Restrictions on political campaign contributions and expenditures based upon the notion of "leveling the playing field" are strictly impermissible.[33] As the Supreme Court has explained, "the argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications" for the First Amendment.[34] When it comes to restricting both political campaign expenditures and political campaign contributions, the First Amendment prohibits distinguishing speech on the basis of the speaker or distinguishing on the basis of the speech.[35]

When the government restricts political campaign expenditures and political campaign contributions, it has the burden of proving that the restriction is permissible under the First Amendment.[36] The burden of proof requires actual evidence demonstrating harms to the public and not merely conjecture of possible corruption.[37] Finally, it should be noted that political candidates and political officeholders are not subjected to any less protection under the First Amendment than ordinary citizens.[38]

---

[32] *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) (explaining that "we find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-497 (1985) (holding that "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

[33] *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 741, 753 (2011)(holding that a state public campaign financing system that gave more money to publicly financed campaigns in response to increased spending by independent expenditures and privately financed campaigns was unconstitutional); *Davis v. FEC*, 554 U.S. 724, 742 (2008) (holding that imposing different contribution limits on campaigns based solely on a candidate's decision to spend personal funds above a certain amount was unconstitutional).

[34] *Davis v. FEC*, 554 U.S. 724, 738-744 (2008) (noting that the Supreme Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.").

[35] *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

[36] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014)(*plurality opinion*).

[37] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Colorado Republican Federal Campaign Committee. v. FEC*, 518 U.S. 604, 618 (1996); *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 644 (1994).

[38] *See Bond v. Floyd*, 385 U.S. 116, 132-133 (1966) (holding that an elected official does not have any less protection under the First Amendment than an ordinary citizen); *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 950 (Cal. Ct. App. 1996) (holding that the protections afforded by the anti-SLAPP statute protected an elected official just as much it did ordinary citizens).

The United States Supreme Court's decision in *McCutcheon v. Federal Elections Committee*[39] demonstrates that the FPPC Staff's proposed interpretation of Section 85305 would render the provision unconstitutional.[40] In *McCutcheon*, the Supreme Court held that aggregate campaign contribution limits on donors under the Bipartisan Campaign Reform Act violated the First Amendment.[41] There, federal campaign finance laws limited the total aggregate amount that a donor could contribute to federal candidates in a single year to $48,600.[42] Thus, even though contribution limits for individual campaigns at the time were $2600 for both the primary and general election cycles, once a contributor had reached the $48,600 total limit, that contributor could not make any further contributions to additional candidates.[43] As a result, the Court held that the aggregate limits represented a significant First Amendment restriction on political campaign contributions as "to require one person to contribute at lower levels than others" imposes a burden on participation in the electoral process.[44]

The government attempted to defend the aggregate limits on the grounds it furthered the prevention of quid pro quo corruption.[45] However, the Supreme Court disagreed, noting that once the aggregate limits kicked in, they banned all contributions of *any* amount."[46] However, the Court reasoned that if Congress believed a $5,200 base limit for contributions to Congressional campaigns for a single electoral cycle was appropriate, it indicated that "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption."[47] The Court concluded that if there was no corruption concern in giving nine candidates up to $5,200 each, "it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime."[48]

If there was no risk of corruption presented by the base contribution limits, the government was required to defend the aggregate limits by demonstrating that they were a valid anti-circumvention measure to protect the base limits.[49] Analyzing the rationales provided by the

---

[39] 134 S. Ct. 1434, 1442 (2014) (*plurality opinion*).
[40] It goes without saying that the same constitutional rules that apply to federal campaign finance restrictions apply equally to state campaign finance restrictions. *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516, 517 (2012); *Randall v. Sorrell*, 548 U.S. 230, 236-237 (2006) (*plurality opinion*).
[41] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (*plurality opinion*).
[42] *Id*.
[43] *Id*. at 1443 (explaining that "the base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.").
[44] *Id*. at 1448-1449 ("To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.").
[45] *Id*. at 1452.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.

government, the Court found that the anti-circumvention rationales were speculative at best and rejected them.[50] Accordingly, the Court held that the aggregate contribution limits violated the First Amendment. *McCutcheon* is instructive as to why the FPPC Staff's interpretation of Section 85305 is constitutionally invalid.

It is difficult to see what anti-corruption rationale is advanced by limiting state candidates to contributing $4,400 to Senator Newman's Recall Committee when all other contributors, including local and federal candidates, may give unlimited amounts to the very same committee. If a large and profitable corporation, a well-funded and politically powerful labor union, a big city mayor, a senior member of Congress, and an individual billionaire may give an unlimited contribution to Senator Newman's Recall Committee, it is hard to see how limiting *only* a state candidate to contributing $4,400 prevents corruption. Certainly, there is no finding of fact within the Act itself that says that contributions from state candidates to other state candidates are somehow more corrupting than from others.[51]

Theoretically, individuals could attempt to sway Senator Newman's votes on certain pieces of legislation by promising him massive campaign contributions to his Recall Committee in exchange for certain votes. This action would be a serious crime under state law already.[52] One could perhaps argue that the FPPC Staff's interpretation of Section 85305 ensures there is no appearance of quid pro quo on the part of Senator Newman's colleagues who are state candidates. However, the underlying logic of restricting contributions by *only* state candidates for the purposes of avoiding the appearance of quid pro quo corruption is lacking when a large and profitable corporation, a well-funded and politically powerful labor union, a big city mayor, a senior member of Congress, or an individual billionaire may give an unlimited contribution to Senator Newman's Recall Committee at the same time for the same election.

This abstract anti-corruption argument is also completely undercut by the fact that the same risk theoretically applies the other way around and is unrestricted. Senator Newman's State Senate colleagues could theoretically attempt to sway Senator Newman's votes on certain pieces of legislation and threaten to penalize him by making large contributions to the *committee formed to support his recall*. There are only a very small handful of permissible campaign finance restrictions on entire groups of speakers that are permissible under the First Amendment, most notably restrictions on foreign contributions, but they restrict all speakers regardless of their message.[53]

---

[50] *Id*. at 1452-1457 (explaining that it was speculative at best to assume that aggregate limits helped ensure that someone could not recontribute the funds they had received to another candidate).
[51] *See* CAL. GOV'T. CODE § 81001. *Accord Wagner v. FEC*, 793 F. 3d 1, 10-18 (D.C. Cir. 2015) (*en banc*) (Garland, J.) (detailing the lengthy history of corruption of campaign contributions by those seeking federal contracts and the ample evidence provided by the government necessity of implementing a contribution ban on federal contractors in order to maintain clean government and the ban's narrow yet effective tailoring to that compelling interest).
[52] *E.g.*, CAL. GOV'T. CODE § 9056.
[53] *Bluman v. FEC*, 565 U.S. 1104 (2012) (affirming the district court's decision to uphold the total ban on contributions from foreign individuals).

Thus, Russian President Vladimir Putin may not contribute to Senator Newman's Recall Committee.[54] However, Vladimir Putin may not contribute to committees in support of Senator Newman's recall either. The fact that different messages from the same speaker receive different treatment makes this interpretation of Section 85305 all the more suspect under the First Amendment.[55] This proposed interpretation would disfavor not only a particular speaker (state candidates) but also a particular viewpoint (opposition to the recall instead of support for it).

Additionally, there is also no risk of circumventing regular election campaign limits that the FPPC Staff's interpretation of Section 85305 would prevent given the way the Act is structured. First, as previously mentioned, there are no campaign contribution limits to recall committees that could be circumvented.[56] If an ordinary citizen may give an unlimited contribution directly to Senator Newman's Recall Committee, it makes little sense that they would attempt to funnel the money through other state legislators where their contributions would be limited. Second, recall committees cannot be used to funnel money into other candidate committees. Should the recall effort fail, the remaining funds of Senator Newman's Recall Committee are treated as surplus and all remaining funds must be spent within thirty (30) days.[57] Because they would be surplus, any remaining funds of Senator Newman's Recall Committee may not be contributed to other state candidates or even political party committee funds that support or oppose other candidates.[58]

Moreover, individuals, including fellow state candidates, are already prohibited from making contributions to Senator Newman's Recall Committee (or any committee) with an arrangement that their contributions be directed towards other candidates.[59] Should the recall succeed and Senator Newman be recalled, the funds raised for opposing the recall cannot be carried over to the next election for office that Senator Newman seeks.[60] And to the extent that any funds can be transferred to another committee in favor of supporting Senator Newman's election to another office, those funds must be transferred with proper attribution and within the applicable contribution limits for that election.[61] Senator Newman's Recall Committee cannot serve as an additional election committee to the very same office.[62]

---

[54] CAL. GOV'T. CODE § 85320(a).
[55] *See Brown v. Entertainment Merchant's Society*, 564 U.S. 786, 802 (2011)(explaining that a statute that is under-inclusive "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."); *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (explaining that if laws preventing independent expenditures by corporations within 60 days were really meant to protect shareholders of companies, the law would prohibit those same independent expenditures at all times rather than just at certain times and in certain forms).
[56] CAL. GOV'T. CODE § 83315(a);
[57] CAL. GOV'T. CODE § 83315(b).
[58] CAL. GOV'T. CODE § 89519(b)(4)(5).
[59] CAL. GOV'T. CODE § 85704.
[60] CAL. CODE. REGS. tit. 2, § 18537.1(c)(1)(2017).
[61] CAL. GOV'T. CODE § 85306(a).
[62] *See* CAL. GOV'T. CODE § 85201(c).

The Law Offices of
Max D. Kanin
427 North Canon Drive, Suite 214, Beverly Hills, CA 90210
Phone: (424) 256-6214; Email: MDKanin@CalPACLegal.com

The FPPC Staff opinion unfortunately does not once mention how its interpretation of Section 85305 prevents corruption or serves as an anti-circumvention measure. Instead, the FPPC Staff opinion argues that "The legislative history of Proposition 34 confirms that this provision was designed to restrict the ability of legislative leaders from contributing large sums to determine the outcome of close races."[63] The FPPC Staff opinion further argues "Policy considerations also favor the agency's interpretation of the inter-candidate transfer restrictions. As stated above, the legislative history of Proposition 34 shows that Section 85305 was intended to rein in legislative leaders providing the major funding and determining the outcome of key races."[64] The FPPC Staff opinion then concludes that "Given that the legislative history of Proposition 34 shows that the electorate voted for a measure that would restrict legislative leaders determining the outcome of key races, for policy reasons the inter-candidate transfer restrictions should not be weakened in the recall situation, as recalls have a history of being used in partisan political fights."[65]

If that reasoning is the sole basis for their interpretation of Section 85305 (and it appears to be), that reasoning would make Section 85305 completely unconstitutional because it is longstanding law that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[66] As explained in *McCutcheon*, whether a campaign contribution restriction is permissible cannot be evaluated under whether the majority of voters approve of the restriction or evaluated on whether "a legislative or judicial determination that particular speech is useful to the democratic process."[67] If the Commission accepts this interpretation of Section 85305 on this basis, it will render the law almost certainly unconstitutional. Councilman Heilman respectfully urges the Commission to reject this proposed interpretation.

D. The FPPC Staff's interpretation of Section 85305 would render the provision virtually identical in nature to Section 85501 of the Act, a provision restricting candidate contributions and expenditures that has already been held to be unconstitutional.

Section 85501 of the Act provides "A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates."[68] However, this provision of the Act is no longer in effect, having been struck down as unconstitutional and permanently enjoined in *FPPC v. Reed*.[69] Although only a superior court decision, the Commission opted to not appeal the decision, accepted the judicial decision that Section 85501 is

[63] FAIR POLITICAL PRACTICES COMMISSION LEGAL DIVISION, CONTRIBUTION LIMITS ON TRANSFERS FROM STATE CANDIDATES TO A STATE CANDIDATE (OR CANDIDATE-CONTROLLED COMMITTEE) TO OPPOSE A RECALL ELECTION (2017), Page 10.
[64] *Id*.
[65] *Id*. at 11.
[66] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*).
[67] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014).
[68] CAL. GOV'T. CODE § 85501.
[69] Sacramento County Superior Court, Case No. 34-2013-80001709, filed April 2, 2014 (hereinafter referred to as "*Reed*").

unconstitutional, and settled with the complainant.[70] In the wake of the *Reed* decision, the Commission has acknowledged that Section 85501 is no longer in effect and advised candidates that they may make contributions to independent expenditure committees and may make independent expenditures from candidate controlled committees.[71]

In *Reed*, the court found that Section 85501 acted as a restraint on political contributions as well as a restraint on expenditures.[72] Notwithstanding the fact that the court applied a lower level of scrutiny than strict scrutiny to the contribution ban, the court still held that the ban was unconstitutional.[73] Addressing the Commission's argument that candidate committees were different, the court philosophically asked "why is candidate controlled speech entitled to less protection?"[74] The Commission defended the provision by arguing that if it was permissible to limit contributions made directly to candidates, it should be permissible to limit contributions made by candidate-controlled committees.[75] But the court disagreed, reasoning that this "argument focuses on the **wrong** contributions. Section 85501 does not limit contributions **to** candidate-controlled committees. Rather it bans contributions **from** candidate-controlled committees."[76]

The court addressed the various scenarios that the Commission presented to it in defense of the law and found that none actually addressed any actual quid pro quo.[77] The court considered the Commission's concern that an elected official "could make a contribution to 'curry favor with a candidate running for election to the same public body in anticipation of an important matter being voted on by the body.'"[78] The court took this argument to mean that "core political speech may be limited to prevent a mayor from attempting to buy the support of a city council member."[79] However, the court rejected this as a justifying rationale for the law.[80] There was no justification to explain how a candidate engaging in independent expenditures or making contributions like any other citizen would create any additional risk of corruption.[81]

---

[70] Ramona Giwargis, *State to pay Chuck Reed $106,173.50*, SAN JOSE MERCURY NEWS (June 3, 2015), http://blogs.mercurynews.com/internal-affairs/2015/06/03/chuck-reeds-1-fine-will-cost-taxpayers-106173-50/.
[71] *Downing* Advice Letter, No. A-14-148 (2014).
[72] *Reed* at 8 (explaining that Section 85501 works as both a contribution ban as well a ban on independent expenditures).
[73] *Id*. at 9 (reasoning that "if independent expenditures raise no corruption concerns, then neither do contributions to a committee that makes only independent expenditures.").
[74] *Id*. at 10 (reviewing extensive case law demonstrating that candidates cannot be subjected to any greater restrictions than regular citizens).
[75] *Id*. at 11.
[76] *Id*. (**emphasis in original**).
[77] *Id*. at 12.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*. ("Moreover, it is not at all clear government has an interest in preventing one candidate from simply **currying favor** with another.").

Finally, the court finally noted that the Commission provided no evidence at all that there was "any actual corruption caused by contributions made by candidate-controlled committees."[82]

Here, the FPPC Staff asks the Commission to adopt a construction of Section 85305 that effectively makes the provision mimic Section 85501. There is no contribution limit to Senator Newman's Recall Committee under the Act for any other individuals. This includes large and profitable corporations, well-funded and politically powerful labor unions, registered non-profits, billionaires, big city mayors, and Congressional leaders. However state candidates and *only* state candidates would be limited to $4,400. There is no evidence or analysis provided that interpreting Section 85305 in this way is necessary to prevent corruption. Instead, the only rationale given for enacting this provision appears to be a desire to limit the political power of state candidates. The Commission should reject this interpretation of 85305 in the same way that the court in *Reed* rejected Section 85501 and adhere to the First Amendment.[83]

E. Conclusion

Section 85305 of the Act is open to two possible interpretations. The first, advocated by the Senate Democratic Caucus and supported by the Legislative Counsel's Office, interprets the law to not apply in situations where state candidates contribute to candidate controlled committees formed to oppose recalls. This interpretation would put all state candidates in the same position regardless of whether they supported or opposed a recall. It would also put state candidates in line with all other citizens in California. Section 85305 would be akin to provisions of Chapter 3 that limit the overall contribution amounts of every day citizens and the corporations and limited liability companies that they happen to control.[84]

The second, advocated by FPPC Staff and supported by the California Republican Party, interprets Section 85305 in a way that creates distinctions among both speakers and political messages by the same category of speakers. Although both are ordinarily reasonable interpretations of Section 85305, the second is clearly unconstitutional as it violates both the First Amendment and Article I, Section 2. The Commission should interpret its laws in a way that will not render them unconstitutional. Accordingly, Councilman Heilman respectfully urges the Commission to accept the opinion request of the Senate Democratic Caucus and issue an opinion holding that Section 85305 does not apply in instances where state candidates wish to contribute to state candidate controlled recall committees.

Very truly yours,
Max D. Kanin

Max Kanin

---

[82] *Id*. at 14.
[83] *See Schmid v. Lovette*, 154 Cal. App. 3d 466, 474 (Cal. Ct. App. 1984) (holding that a public community college district was not required to continue applying a law that required public employees to sign an anti-Communist-Party loyalty oath when similar statutes had already been held unconstitutional in United States Supreme Court and California Supreme Court decisions).
[84] CAL. GOV'T. CODE § 85311.