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11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SACRAMENTO**

13 CITIZENS TO SAVE CALIFORNIA, a California
14 Public Benefit Corporation; Assembly Member
15 KEITH RICHMAN, M.D.,
16 Plaintiffs,
17 vs.
18 CALIFORNIA FAIR POLITICAL PRACTICES
19 COMMISSION, et al.,
20 Defendants

21 ARNOLD SCHWARZENEGGER, etc., et al.
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28 Plaintiffs/Intervenors,

CASE NO.: 05AS00555

**BRIEF *AMICUS CURIAE* ON BEHALF OF
THE CALIFORNIA PUBLIC INTEREST
RESEARCH GROUP IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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1 **I. INTRODUCTION**

2 Since 2001, candidates for the State Legislature and, since November 2002, candidates for
3 statewide office in California have been subject to limits on the size of contributions that they may
4 accept from any one individual or entity. In June 2004, in the wake of massive fundraising into several
5 candidate-controlled committees, most of which came through contributions vastly in excess of the
6 contribution limits, the Fair Political Practices Commission (“FPPC”) came to the inescapable
7 conclusion that the candidate contribution limits would be rendered completely ineffectual unless they
8 applied to *all* committees “controlled” by the candidate. Plaintiffs and intervenor/plaintiffs, who include
9 several officeholders who want to raise unlimited amounts of money into their “controlled” committees,
10 have argued that this rule is “blatantly illegal.” It is not. It is, in fact, an obvious and essential part of
11 any comprehensive scheme that seeks to limit the influence of large contributors in the political process.

12 While plaintiffs urge that their constitutional rights are being infringed, it is important to keep in
13 mind that the regulation at issue does *not* prohibit any member of the public from financially supporting
14 or opposing a ballot measure. It does *not* even prohibit anyone from giving an unlimited amount of
15 money to a ballot measure campaign – so long as that committee is not controlled by a candidate. It
16 does *not* prohibit the candidate from giving his or her personal funds – in any amount – to support or
17 oppose a ballot measure, nor does it prohibit a candidate from using funds lawfully raised in accordance
18 with the contribution limits to support or oppose a ballot measure. It does *not* prohibit a candidate from
19 endorsing a measure, advocating its adoption or defeat, appearing in advertisements, or even controlling
20 a ballot measure committee. The only thing the candidate cannot do is solicit and accept contributions
21 into his or her “controlled” ballot measure committee that exceed the limits otherwise applicable to that
22 candidate.

23 The U.S. Supreme Court recently discussed the fact that contribution limits need only be “closely
24 drawn” to meet a “sufficiently important interest,” and observed

25 Our treatment of contribution restrictions reflects more than the limited burdens
26 they impose on First Amendment freedoms. It also reflects the importance of the
27 interests that underlie contribution limits – interests in preventing “both the actual
28 corruption threatened by large financial contributions and the eroding of public
confidence in the electoral process through the appearance of corruption.” [] We have

1 said that these interests “directly implicate “the integrity of our political process, and, not
2 less, the responsibility of the individual citizen for the successful functioning of that
3 process.” (*McConnell v. Federal Election Commission* (2003) 540 U.S. 93, 136-137
[internal citations omitted].)

4 Over the years, California voters have approved several ballot measures that imposed
5 contribution limits for precisely the reasons identified in *McConnell*. The first two (proposition 73 in
6 1988 and Proposition 208 in 1996) were invalidated by the courts. In 2000, California voters adopted
7 Proposition 34. Among the purposes of Proposition 34 were:

- 8 (1) To ensure that individuals and interest groups in our society have a fair and equitable
9 opportunity to participate in the elective and governmental processes.
- 10 (2) To minimize the potentially corrupting influence and appearance of corruption
11 caused by large contributions by providing reasonable contribution and voluntary
12 expenditure limits.
- 13 (3) To reduce the influence of large contributors with an interest in matters before state
14 government by prohibiting lobbyist contributions.

15 Plaintiffs and intervenor/plaintiffs have attempted to argue that simply because the FPPC had a
16 different regulatory view previously, it cannot change that view in the face of clear evidence that the
17 contribution limits imposed by Proposition 34 were being eviscerated by unlimited fundraising into
18 candidate-controlled ballot measure committees. As discussed more below, this argument flies in the
19 face of case law that makes it clear that the agency can revise its regulatory interpretation when
20 presented with new circumstances, but it also ignores well-established campaign finance law that has
21 identified “circumvention” of existing limits as a valid justification for regulatory intervention.

22 **II. STATEMENT OF FACTS**

23 The facts here are fairly straightforward. The Political Reform Act (“PRA”), enacted in 1974,
24 was primarily a “disclosure” statute. It required candidates and other participants in the political system
25 to operate through “committees” whose receipts and expenditures had to be reported so that the public
26 could be informed about the sources and amounts of contributions and could also be assured that
27 political contributions were being used for lawful purposes. The PRA defined any committee that was
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1 controlled “directly or indirectly” by a candidate, including a ballot measure committee, as a “controlled
2 committee.” (Gov. Code, § 82016.) Other than certain disclosure obligations, no particular
3 consequences attached to fact that a committee was “controlled.”

4 Although the question of contribution limits to candidate-controlled committees surfaced
5 periodically over the years, because the contribution limits themselves were invalidated, the issue never
6 took on much significance. In 1997, after Proposition 208 contributions limits went into effect, FPPC
7 staff advised then-Senator Quentin Kopp that candidate-controlled ballot measure committees were
8 subject to the same contributions limits that applied to the controlling candidate. (FPPC Advice Letter
9 No. A-97-390.) Upon formal review of this advice, the FPPC overruled the staff in a 3-2 vote. (FPPC
10 Advice Letter No. A-97-390A.) The debate focused heavily on the effect of *Citizens Against Rent*
11 *Control, Inc. v. City of Berkeley* (1981) 454 U.S. 290. Although *Citizens* is discussed more extensively
12 below, it is reasonable to say that the constitutional concerns expressed in that case led the FPPC to a
13 fairly conservative view of the regulatory reach of the statute.

14 In Fall of 2003, California experienced the historic recall election. By coincidence, this election
15 was the first election in which Proposition 34’s contribution limits applied to statewide officers, namely,
16 the gubernatorial candidates. Faced with enormous time pressure in which to make a decision (and
17 some specific statutory provisions relating to recall elections), the FPPC re-affirmed its previous view
18 that a ballot measure committee, even if candidate-controlled, was not subject to contribution limits, and
19 that the recall committees would be treated as ballot measure committees for purposes of contribution
20 limits.

21 As a result, in the first statewide election subject to limits, then-Governor Davis, and candidates
22 Bustamante and Schwarzenegger all solicited funds in excess of the candidate limits -- albeit legally --
23 into various recall and/or ballot measure committees. This was followed in 2004 by Governor-elect
24 Schwarzenegger’s establishment of several candidate-controlled committees (most notably the
25 California Recovery Team) which raised millions of dollars in excess of the contribution limits to
26 advertise Schwarzenegger’s position on various measures in the 2004 primary and general elections. In
27 the wake of Schwarzenegger’s fundraising – including dinners at which a contributor could become a
28

1 Recovery Team “chairperson” for \$500,000,¹ the impetus for the FPPC to re-examine its previous
2 regulatory course became insurmountable. In June, 2004, after discussion and debate at several FPPC
3 meetings, the FPPC adopted Regulation 18530.9 which makes it clear that Gov. Code § 85301, which
4 provides that “a person . . . may not make to any candidate” and “a candidate . . . may not accept from
5 any person” a contribution in excess of certain limits, applied equally to contributions made to the
6 candidate through a candidate-controlled ballot measure committee.²

7 **III. ARGUMENT**

8 **A. ADOPTION OF REGULATION 18530.9 IS WITHIN THE SCOPE OF THE**
9 **FPPC’S REGULATORY AUTHORITY**

10 The PRA has long empowered the FPPC to adopt regulations to “carry out the purposes and
11 provisions” of the Act. (Gov. Code, § 83112.) Where a regulation is deemed necessary to effectuate the
12 purposes of the statute, the courts will require only that the regulation be reasonable. (*Californians for*
13 *Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, 484.)
14 Here, the experience of 2003 and 2004 leads to the unavoidable conclusion that the *only* reasonable
15 interpretation is that reflected in Regulation 18530.9.

16
17 Plaintiffs make much of the fact that the FPPC enacted Regulation 18530.9 as the result of its
18 reexamination of its earlier decisionmaking. This fact, however, does not alter the court’s obligation to
19 defer to the agency’s judgment regarding matters within its authority. Even when an agency changes its
20 interpretation of a statute, courts must still apply a deferential standard of review. (*Californians for*
21 *Political Reform, supra*, at p.488.) Unless clearly unreasonable, the court cannot substitute its own
22 judgment for the agency’s within the agency’s authorized area of expertise. (*Pacific Legal Foundation*
23 *v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101; *Thirteen Committee v. Weinrub* (1985) 168
24 Cal.App.3d 528, 532.). This principle is particularly applicable where, as here, the subject matter of the
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26 ¹ L.A. Times (February 5, 2004).

27 ² Adjusted for inflation, the contribution limits are currently: \$22,300 for Governor, \$5,600 for all other statewide
28 offices, and \$3,300 for candidates for legislative office. (Gov. Code, §§ 85301(a)-(c).)

1 challenged regulation concerns controversial issues that could drag the court into the political thicket.
2 (*Californians for Political Reform, supra*, at p. 484.)

3 **1. The Voters Clearly Adopted Proposition 34 to Eliminate The Influence of**
4 **Large Contributions.**

5 Ascertaining the voters’ intent in adopting Proposition 34 is paramount to interpreting the extent
6 of the FPPC’s authority. (*Diamond International Corp. v. Boas* (1979) 92 Cal.App.3d 1015, 1031.) It is
7 well-settled that courts must liberally construe statutes enacted pursuant to the people’s “precious right”
8 of initiative in order to effectuate their intent. (*Watson v. Fair Political Practices Commission* (1990)
9 317 Cal.App.3d 1059, 1069.) In ascertaining the intent of the voters, the court should be guided by two
10 additional principles. First, the language of the individual provisions, including section 85301, must be
11 interpreted in harmony with the subject matter and general purposes of Proposition 34 as a whole. (See,
12 e.g., *Watson* at p. 1069, citing *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1018.)
13 Second, the court must be guided by the “common, popular” meaning normally given to particular
14 terms, and eschew narrow or “technical” interpretations. (*Ibid.*)

15
16 In enacting Proposition 34, the voters found and declared that “large contributions may corrupt
17 or appear to corrupt candidates for elective office.”³ (PI’s RJN, Exh. F.) The purpose of the candidate
18 contribution limits was to “minimize the potentially corrupting influence and appearance of corruption
19 caused by large contributions.” (*Ibid.*) The problem to be addressed was made clear in the Ballot
20 Argument In Favor: “Currently there are no limits on what politicians can collect and spend to get
21 elected to state office. California is still the wild west when it comes to campaign fundraising. Six-
22 figure campaign contributions are routine. Proposition 34 finally sets enforceable limits and puts voters
23 back in charge of California’s political process.” (*Ibid.*)
24
25

26 ³ In addition to the actual language of Proposition 34, the court may also consider statements contained in the
27 official ballot pamphlet materials. (*State of California v. Superior Court* (1962) 208 Cal.App.2d 659, 664.)
28 Copies of those materials are attached as Exhibit F to Plaintiff’s Request For Judicial Notice (“PI’s RJN”).

1 At the “heart” of the Proposition 34 are the contribution limits set out in sections 85301 and
2 85302. Those sections broadly prohibit a person (or small contributor committee) from making a
3 contribution “to any candidate” in excess of the limits, and also prohibit a candidate from accepting such
4 a contribution. As both the ballot pamphlet materials and the plain language of the statute make clear
5 then, the clear purpose of the voters in adopting these restrictions was to stem the flow of all large
6 contributions to candidates, irrespective of the source or intended use of the contribution.
7

8 Plaintiffs argue that only contributions that to the candidate’s *campaign* committee are limited.
9 But the statutory language contains no such qualifier, and such a limitation is inconsistent with the
10 common sense understanding that a large contribution is given to obtain access and influence no matter
11 what the money is actually used for. It is also inconsistent with the very definition of “contribution” –
12 any payment made “unless it is clear from the surrounding circumstances that it is not made for political
13 purposes.” (Gov. Code, § 82015.) No such showing could be made with respect to the millions of
14 dollars being solicited in connection with the various measures that are being submitted to the voters.
15

16 Plaintiffs argue that the absence of a specific reference to ballot measure committees in either the
17 statute or the official ballot pamphlet materials precludes the FPPC’s interpretation. However, the
18 FPPC’s duty is to implement the “intent, not the literal language” of the Act. (*Watson* at p. 1076.) The
19 statute’s silence on a specific point does not deprive the FPPC from acting to further its purposes as long
20 as its regulatory decision is reasonable. (See *Californians for Political Reform, supra*, at p. 484.)
21

22 The clear and unequivocal purpose of Proposition 34 was to limit large contributions both
23 because they distort the political process and because they give rise to at least the appearance of undue
24 influence. The FPPC’s equally clear responsibility is to carry out the intent of the voters.

25 In contrast to the FPPC’s interpretation, plaintiffs’ view would essentially “gut” the contribution
26 limits by inviting any and all candidates to open controlled ballot measure committees that would allow
27 completely unregulated fundraising. And, where the candidate creates a “general purpose” committee –
28

1 one that need not be tied to a particular ballot measure or even a particular election cycle – that
2 candidate can re-create the old “warchests” thought to have been eliminated by Proposition 34.
3 Unlimited fundraising would be permitted throughout the election cycle. Indeed, Plaintiff’s view would
4 return campaign finance regulation to the pre-Proposition 34 world.

5
6 **2. The FPPC’s Interpretation of Section 85301 Does Not Conflict with Section
7 85303(c).**

8 Plaintiffs assert that Regulation 18530.9 conflicts with section 85303(c) of the Act. The
9 latter section states that contributions limits do not apply to contributions to committees “provided the
10 contributions are used for purposes other than making contributions to candidates for elective office.”
11 The entire structure of section 85303 makes clear that it pertains to “committees” other than candidate-
12 controlled committees. For example, subsections (a) and (b) which concern contributions to party
13 committees, and committees “other than” party committees, would make no sense if the term
14 “committee” in those subsections included candidate-controlled committees. And subsection (c) itself,
15 if read literally to include candidate-controlled committees, would render the contribution limits of
16 sections 85301 and 85302 meaningless to the extent it states that “nothing in this chapter shall limit a
17 person’s contribution to a . . . committee.” Rather, section 85303 separates “committees” into
18 “candidate” committees and committees that are “independent” of candidates and regulates the latter
19 insofar as they make contributions to candidates. In this bifurcated view of committees, candidate-
20 controlled ballot measure committees are clearly “candidate” committees.⁴
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26 ⁴ In fact, the Bauer Advice Letter relied upon by Plaintiffs interprets the term “candidate” consistently with
27 Regulation 18530.9. Although it re-affirmed that contribution limits did not apply to candidate-controlled ballot
28 “candidate” included the latter candidate’s controlled ballot measure committee.

1 **3. The FPPC’s Interpretation of Section 85301 Is Reasonable In Light of**
2 **Evidence That Candidates Were Using These Committees to Circumvent**
3 **Contribution Limits.**

4 Plaintiffs suggest that the FPPC is precluded from adopting Regulation 18530.9 because it had
5 previously taken a different view. This argument has been rejected by the courts. (*NLRB v. Iron*
6 *Workers* (1978) 434 U.S. 335, 351; *Californians for Political Reform, supra*, at p.488, citing *Henning v.*
7 *Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269-70.) An agency is not bound by an interpretation
8 or guideline where it becomes apparent from experience that changes are required to keep pace with
9 present conditions.” (*Jets Servs., Inc. v. Hoffman* (M.D. Fla. 1976) 420 F.Supp. 1300, 1308.) Any other
10 rule would deny the agency “the necessary discretionary flexibility to act in its field of expertise.” (*Ibid.*)

11 These principles are particularly applicable here because the FPPC’s interpretation of section
12 85301 was clearly informed by its recent experiences with candidate-controlled committees. The FPPC
13 was faced with the potential circumvention of three important provisions of Proposition 34. First and
14 foremost, of course, was potential circumvention of the contribution limits. The experience in each of
15 the three elections conducted since November 2002, when contributions limits went into effect for
16 statewide officers, illustrates that in each of those elections, candidates solicited, accepted and directed
17 the very “six figure contributions” that Proposition 34 was enacted to prevent. Indeed, if the purpose of
18 the contribution limits in Proposition 34 was to stop “six figure” contributions, the “California Recovery
19 Team” – a ballot measure committee controlled by Governor Schwarzenegger -- is a textbook example
20 of “circumvention” of those provisions. The California Recovery Team received not one or two, but
21 *fifty contributions of \$100,000 or more.* All together, that committee raised \$18.7 million.⁵

22 Contributions were precisely the type of contributions that the voters intended to prohibit through
23 Proposition 34, including \$1.5 million from Ameriquest Capital Corporation; over \$1 million from
24 _____

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28 ⁵ This data is available through the Secretary of State’s website at <http://cal-access.ss.ca.gov/>.

1 Acceptance Corp.; \$750,000 from the head of Univision; \$500,000 from developer Alex Spanos
2 personally; \$250,000 from Mr. Spanos' company; and a large number of \$200-250,000 contributions
3 from other businesses.⁶

4 Schwarzenegger's other "controlled" committees ("Californians For A Balanced Budget" and
5 "Committee For Fair Share Gaming") showed a similarly dispiriting pattern of limit-busting
6 contributions. In many instances, these contributions were raised by inviting the would-be contributors
7 to "private dinners" with the Governor. For example, Propositions 57 and 58 concerned the recovery
8 bonds and budget reforms that Governor Schwarzenegger believed were necessary to help the State get
9 through an economic crisis in 2004. These measures would require California to sell a large number of
10 bonds. The economic recovery team invited a number of New York bond traders to a "private dinner"
11 with the Governor. The invitation indicated that, for \$500,000 the donor could be a "chairman" of the
12 California Recovery Team.⁷

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14
15 Indeed, observers have drawn worrisome connections between the large contributions given to
16 the Governor's various controlled committees and policy decisions made at the state level that appear to
17 directly – and favorably – impact those businesses of those contributors.⁸ Whether one concludes that
18 these inferences are correct or not, one cannot deny that the "private" meetings and meals coupled with
19 large contributions by those who are closely regulated by the state lead to at least the appearance that
20 large contributors have access to the Governor which the average voter could never have.

21
22 In addition, as stated above, "general purpose" committees are not confined to a particular
23 measure or particular election, they can essentially exist into perpetuity and allow the
24 candidate/officeholder to continue to raise unlimited money throughout his or her term of office in a

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26 ⁶ As Judge McMaster remarked in *Johnson v. Bustamante*, "any worthwhile campaign consultant would make
27 sure that their candidates were involved in a ballot measure in order to avoid [contribution limits]."

⁷ L.A. Times (February 5, 2004).

28 ⁸ See, e.g., www.consumerwatchdog.org detailing several perceived connections.

1 manner that circumvents Government Code Section 85316. That section prohibits officeholders from
2 continuing to engage in fundraising after their election, except to the limited extent necessary to retire
3 any debt. The clear intent is to take officeholders out of the fundraising business during their time in
4 office. Allowing an officeholder to engage in unlimited fundraising to his or her own general purpose
5 committee – which, by definition, is not tied to a particular election or a particular measure – is an
6 invitation to all officeholders to open general purpose committees. In this way, they could circumvent
7 section 85316 and solicit unlimited funds which could be used for travel, consultants, advertising, etc.,
8 as long as all of this was tied in some way to a qualified (or even potential) ballot issue. Indeed, such a
9 rule puts any officeholder who does not do so at a serious disadvantage, as the prohibitions of section
10 85316 have all but eliminated officeholder accounts to pay for precisely those things.

11
12 Finally, the plaintiff’s distinction between the “candidate” and a candidate-controlled committee
13 could also be used to circumvent another of Proposition 34’s goals – the prohibition on contributions by
14 lobbyists to candidate whom they are registered to lobby. (Gov. Code, § 85702.) What good is such a
15 restriction if, instead of giving directly to the candidate’s campaign committee, the same lobbyist can
16 give the same six figure contribution to a general purpose committee controlled by the candidate?
17

18 In light of this experience, the FPPC had only one choice – to revise its interpretation of section
19 85301. If it had failed to do so, the measures adopted by the voters would be eviscerated by the
20 candidate-controlled ballot measure committee “loophole.” Instead, the FPPC’s current interpretation
21 assures that voters “get what they enacted, not more, not less.” (*Robert L. v. Superior Ct.* (2003) 30
22 Cal.4th 894, 909.)
23

24 **B. THERE ARE NO CONSTITUTIONAL BARRIERS TO THE FPPC’S**
25 **INTERPRETATION**

26 Although Regulation 18530.9 clearly furthers the intent of Proposition 34, Plaintiffs and
27 plaintiff/intervenors have argued that a limitation on contributions to a candidate-controlled ballot
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1 measure committee is nonetheless unconstitutional because such a limitation violates their rights of free
2 speech and association. In fact, such a limitation falls well within the range of regulated activity already
3 approved by the United States Supreme Court.

4 **1. The Regulation Need Only Meet A Very Deferential Standard of Review**

5 Beginning with *Buckley v. Valeo* (1976) 424 U.S. 1, the courts have indicated that limits on
6 contributions to candidates constitute only a “marginal restriction” on an individual’s ability to
7 communicate support and are therefore subject to something less than the “strict” scrutiny standard that
8 has been applied to limits on expenditures. (*Id.* at p. 21.) Over the years since *Buckley*, this standard
9 has systematically been lowered, not only to reflect a more deferential standard, but also to reflect a
10 lower level of proof necessary to sustain such regulation. For example, in *Nixon v. Shrink Missouri*
11 *Government PAC* (2000) 528 U.S. 377, 388, the Supreme Court noted that the government’s interest
12 need only be “sufficiently important” and that narrow tailoring was not required. The Court also
13 lowered the state’s evidentiary burden by observing that the “quantum of empirical evidence needed to
14 satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and
15 plausibility of the justification raised.” (*Id.* at p. 391.)

16 Moreover, although the lower standard of scrutiny was once thought to pertain only to direct
17 candidate contributions, that area of the law has also evolved. For instance, in *Federal Election*
18 *Commission v. Colorado Republican Federal Campaign Committee* (2001) 533 U.S. 431, the Court
19 upheld limits on coordinated expenditures made by political parties in support of their candidates, noting
20 that “whether they like it or not, [the parties] act as agents for spending on behalf of those who seek to
21 produce obligated officeholders.” (*Id.* at p. 451-452.) And, the recent decision in *McConnell v. Federal*
22 *Election Commission* makes clear that limitations may constitutionally be imposed on virtually any
23 person or entity that could be used as a vehicle or “conduit” for allowing unregulated money to be used
24 by a candidate or any committee controlled by a candidate.

1 Of course, most recently, the Supreme Court made it clear in the *McConnell* case that public
2 confidence in the electoral system is, in itself, an important goal and that measures may be justified by
3 the need to preserve and enhance such public confidence. (See, e.g., *McConnell*, *supra*, at p. 136-137.)
4 Plaintiffs and intervenor/plaintiffs have argued that the *McConnell* decision is not relevant to this issue
5 because that decision did not focus on ballot measure committees or candidate control of those
6 committees. While that is technically correct, it is only part of the picture.
7

8 In a very real sense, the entire first half of the *McConnell* decision (over 50 pages) is about the
9 government’s ability to regulate not only direct contributions to candidates, but to candidate solicitations
10 on behalf of organizations that might be “controlled by” the candidates (e.g., 501(c) groups or 527
11 groups), as well as organizations that might be as “conduits” for contributions that exceed the limits
12 (e.g., various party committees). Both discussions are relevant to candidate-controlled ballot measure
13 committees.
14

15 Limits on contributions to federal candidates have existed for approximately thirty years
16 pursuant to the Federal Election Campaign Act. Over time, the Federal Election Commission had
17 interpreted FECA to allow candidates to raise funds outside the limits (“soft money”) where the money
18 was to be used for certain purposes considered by the FEC to be unrelated to federal elections. In 2002,
19 frustrated with the systematic circumvention of those limits brought about by the FEC’s perceived
20 refusal to correctly interpret FECA, Congress enacted the Bipartisan Campaign Reform Act (2 U.S.C. §
21 441i, et. seq.) (“BCRA”).
22

23 Section 323(e) of BCRA was intended to get federal candidates and officeholders out of the “soft
24 money” business by making it absolutely clear that federal officeholders could not “solicit, receive,
25 direct, transfer or spend” any funds unless those funds complied with the limitations of FECA. Notably,
26 federal candidates are subject to the same limitations even if raising money for state candidates.
27 Candidate solicitation for other groups is also statutorily limited. The Supreme Court observed:
28

1 No party seriously questions the constitutionality of § 323(e)'s general ban on
2 donations of soft money made directly to federal candidates and officeholders, their
3 agents, *or entities established or controlled by them*. Even on the narrowest reading of
4 *Buckley*, a regulation restricting donations to a federal candidate, *regardless of the ends*
5 *to which those funds are ultimately put*, qualifies as a contribution limit subject to less
6 vigorous scrutiny. Such contributions have only marginal speech and associational value,
7 but at the same time pose a substantial threat of corruption. . .

8 Section 323(e)'s restrictions on solicitations are also justified as valid anti-
9 circumvention measures. *Large soft money donations at a candidate's or officeholder's*
10 *behest give rise to all of the same corruption concerns posed by contributions made*
11 *directly to the candidate or officeholder. Though the candidate may not ultimately*
12 *control how the funds are spent, the value of the contribution to the candidate or*
13 *officeholder is evident from the fact of the solicitation itself. (Id. at p. 75 [emphasis*
14 *added].)*

15 In other words, the Court viewed it as almost self-evident that *direct* solicitation of funds in
16 excess of the limits by a candidate triggered the most fundamental concerns discussed in *Buckley*. And,
17 the Court approved unquestionably draconian restrictions on political party committees by virtue of the
18 role they played as "agents" for large contributors seeking to produce obligated officeholders. Here,
19 Plaintiffs' view of candidate-controlled committees would simply eliminate the "middleman" role and
20 allow the contributors to go directly to the candidate. If contributions to the "middleman" can be
21 regulated, how can it possibly be unlawful to restrict contributions to the candidate's own controlled
22 committee? The short answer is that it is not.

23 As stated at the outset, the limitation on contributions to candidate-controlled ballot measure
24 committees is an extremely modest limitation on "free speech" in connection with ballot measures.
25 Contrary to Plaintiffs' assertions, it does not limit either the candidate's right to associate with a
26 particular measure – in a multitude of ways – nor the candidate's right to raise funds, provided they are
27 raised in accordance with the law. Nor does the limitation limit the rights of third persons to support or
28 oppose measures – even with unlimited funds. It limits their right to do so only by using a candidate as
the vehicle for their support.

1 **IV. CONCLUSION**

2 Plaintiffs cannot show a likelihood of prevailing, as the limitation on contributions to candidate-
3 controlled ballot measure committees is not only a reasonable, but a critical, interpretation of the
4 provisions of Proposition 34. Equally importantly, they cannot show irreparable harm as there is no
5 infringement of First Amendment rights and the public interest strongly favors maintenance of the
6 existing regulation. The request for preliminary injunction should be denied.
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9 Dated: February 22, 2005

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