IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CITIZENS TO SAVE CALIFORNIA, Assembly Member KEITH RICHMAN, M.D.,

Plaintiffs and Respondents,

v.

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION,

Defendant and Appellant.

C049642

ARNOLD SCHWARZENEGGER, Governor, in his individual capacity; GOVERNOR SCHWARZENEGGER'S CALIFORNIA RECOVERY TEAM; SENATOR JOHN CAMPBELL; RESCUE CALIFORNIA FROM BUDGET DEFICITS; and TAXPAYERS FOR RESPONSIBLE PENSIONS,

Plaintiff/Interveners and Respondents,

v.

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION,

Defendant and Appellant.

Sacramento County Superior Court No. 05AS00555
The Honorable Shelleyanne W.L. Chang

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The connection between ballot measures and the political fortunes of candidates who control ballot measure committees is undeniable. United States Supreme Court authority stretching back nearly 30 years makes clear that

contribution limits may, consistent with the First Amendment, be placed on candidates in order to prevent corruption and the appearance of corruption. Moreover, limitations on activity that is designed to circumvent such valid contribution limits are likewise entirely consistent with the First Amendment. There is no dispute that California's candidate contribution limits are valid under the First Amendment as preventing corruption or the perception of corruption. And there is no valid basis for distinguishing between such contribution limits and the Fair Political Practices Commission ("FPPC") regulation 18530.9 at issue here, which simply applies the existing candidate contribution limits to ballot measure committees controlled by the candidates. The Superior Court's preliminary injunction order prohibiting enforcement of regulation 18530.9 was error.

Candidates may be corrupted, or perceived to be corrupted, by contributions to their ballot measure committees just as they may be corrupted or perceived to be corrupted by contributions received directly. Moreover, unlimited contributions to ballot measure committees controlled by candidates undeniably allow such candidates to circumvent the candidate limitations. Regulation 18530.9 is the lawful and proper response to candidate control of ballot measure committees and to the use of such ballot measure committees to advance the candidates' own political agendas. There is no bar to such use of ballot measure committees, but there is no First Amendment right for candidates to use such committees to avoid contribution limits to which they would otherwise be subject.

The FPPC thus shut (or re-shut) the door on million-dollar contributions to candidates by adopting regulation 18530.9. That door is again wide open as a result of the Superior Court's ruling granting plaintiffs' motion for preliminary injunction. In granting plaintiffs' request for a provisional order, in advance of resolution on the merits, the Superior Court erred in four

primary respects.

First, in concluding that plaintiffs had demonstrated probable success on their claims, the Superior Court erred in failing to evaluate the threshold First Amendment question of whether the challenged contribution limits impact effective advocacy and in then applying too strictly the standard applicable to contribution limits – the "lesser demand of being closely drawn to match a sufficiently important interest." *See McConnell v. FEC*, 540 U.S. 93, 134-136 (2003). The outer contours of this standard may have yet to be established, but the Supreme Court's most recent pronouncement in this area makes clear that regulation 18530.9 is well within its bounds. In *McConnell*, the Supreme Court made clear there was no First Amendment distinction between direct and indirect candidate contributions by declaring that no one seriously questions the constitutionality of a ban on "soft" donations to "candidates and officeholders, their agents, *or entities established or controlled by them.*" *Id.* at 182. Given that regulation 18530.9 at issue here imposes not a *ban* on controlled committee contributions, but merely a limit, the decision in *McConnell* confirms that the regulation here likewise meets the governing standard. Only by misapplying the governing standard did the Superior Court reach its erroneous conclusion that plaintiffs were likely to succeed on their First Amendment claims.

Second, the Superior Court erred in accepting as "irreparable harm" plaintiffs' conclusory allegations that regulation 18530.9 discourages candidates and ballot measure committees from associating, and in failing to recognize the Supreme Court's measure of alleged harm from contribution limits: prevention of effective advocacy. Nobody would argue that there is a First Amendment right to raise money in unlimited amounts just for the sake of raising money; the First Amendment issue arises only if prevention of effective advocacy is implicated. But plaintiffs did not submit evidence as to how much money they needed for effective advocacy, and whether they could meet those needs under

the applicable limits. Even as to the associational aspect of the First Amendment claim, the alleged chill upon association was ostensibly from the fear of *triggering the contribution limits*. If so, answers to the money questions are necessary. How could the First Amendment be implicated if the contribution limits do not impede fundraising enough to prevent effective advocacy and therefore do *not* discourage association? Plaintiffs failed to present evidence as to their alleged harm from the contribution limits, and the Superior Court failed to hold them to their proof.

Third, the Superior Court gave a nod to balancing equities, but erred by giving insufficient weight to the people's First Amendment right to ensure that candidates and officeholders are not inappropriately influenced by large contributors. There was no justification for taking the extraordinary step, in advance of litigation on the merits, of enjoining enforcement of an existing law adopted to protect the integrity of the political process.

Fourth, the Superior Court correctly confirmed the statutory limitations governing declaratory relief challenges to the validity of a regulation, but inexplicably failed to apply them to plaintiffs' constitutional claims. The Legislature has established the procedural and evidentiary conditions under which a facial challenge to a regulation, such as the action here, may proceed by way of a claim for declaratory relief, in advance of any enforcement. The Superior Court erred by accepting plaintiffs' preliminary injunction presentation, although it was not confined within the statutory limitations governing their claims.

The FPPC respectfully requests that this Court reverse the preliminary injunction ruling entered in this matter, and let the case proceed to its conclusion with regulation 18530.9 in force.

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STATEMENT OF THE CASE

On February 8, 2005, plaintiffs Citizens to Save California and Assembly Member Keith Richman, M.D. filed their Complaint for Permanent Injunction and Declaratory Relief, by which they asserted a facial challenge to the validity of California Code of Regulations, title 2, section 18530.9. Clerk's Transcript ("CT") 1-9. That regulation subjects ballot measure committees controlled by state candidates to the corresponding statutory contribution limits applicable to the controlling candidates. On February 10, 2005, plaintiffs filed their motion for preliminary injunction and appeared ex parte to request shortened time on their motion. CT 12-172.

On February 14, 2005, Governor Arnold Schwarzenegger, Governor Schwarzenegger's California Recovery Team, Senator John Campbell, Rescue California from Budget Deficits, and Taxpayers for Responsible Pensions sought leave to intervene as plaintiffs (the FPPC stipulated to this intervention), and filed their respective complaints in intervention and preliminary injunction papers. CT 173-254.[1/]

Shortened time having been granted, the FPPC filed its opposition to the preliminary injunction motions the morning of February 22, 2005. CT 306-438. That same morning, Judge Loren E. McMaster having recused himself, the FPPC filed a peremptory disqualification of Judge Thomas M. Cecil. CT 255-256, 439-444, 474-475. The matter was then assigned to Judge Shelleyanne W.L. Chang for law and motion purposes. CT 472-473.

Also on February 22, 2005, Presiding Judge Michael G. Virga heard arguments as to the ex parte request by California Public Interest Research Group for leave to intervene in support of the challenged regulation. CT 472.

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1. Plaintiffs and intervenor plaintiffs are collectively referred to herein as "plaintiffs."

Following additional briefing and a further hearing on March 4, 2005, Judge Virga denied California Public Interest Research Group's request for leave to intervene on March 9, 2005. CT 967-970.

Judge Chang heard the preliminary injunction motion on March 24, 2005. On the following day, Judge Chang issued her ruling granting the motion for preliminary injunction. Final Ruling on Motion for Preliminary Injunction ("Ruling") (CT 1511-1537). (Judge Chang accepted briefs from California Public Interest Research Group and The Campaign Legal Center as *amicus curiae.* CT 449-467, 482-501.) Following correspondence from the parties addressing the propriety of a preliminary injunction bond in connection with the proposed form of order, on April 18, 2005, Judge Chang issued the preliminary injunction enjoining the FPPC "from administering and/or enforcing Regulation 18530.9." CT 1538-1561. The FPPC filed its Notice of Appeal the following day. CT 1574-1576.

In response to the FPPC's notice that regulation 18530.9 remained in full force and effect during the pendency of the appeal, plaintiffs filed ex parte application papers on April 25, 2005, seeking a temporary restraining order enjoining further "violations" of the preliminary injunction, an order to show cause re "substantial monetary sanctions," and alternatively an order to show cause re contempt. CT 1577-1617. The FPPC filed its opposition to plaintiffs' application that same day. CT 1618-1635.

Following the April 25th ex parte hearing, on May 2, 2005, Judge Chang issued a new order declaring the preliminary injunction to be "currently in full force and effect," and denying plaintiffs' application "without prejudice to Plaintiffs and/or Plaintiff/Intervenors to apply for an Order to Show Cause re: Contempt with a showing of specific violations by the Fair Political Practices Commission" of the preliminary injunction. CT 1640-1641.

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On May 3, 2005, the FPPC filed a petition for writ of supersedeas in this Court seeking to confirm existing operation of the automatic stay of the preliminary injunction order on appeal, and to prevent further Superior Court proceedings enforcing the preliminary injunction pending a determination on the appeal. This Court summarily denied the petition on May 5, 2005. The Superior Court's preliminary injunction is thus presently in effect, and regulation 18530.9 is presently not in force.

STATEMENT OF FACTS

California voters have spoken repeatedly on the subject of limiting campaign contributions to elected state officers and candidates for elective state office, the group of candidates that is subject to the regulation herein challenged. Since 1988, voters have passed no fewer than four separate propositions to enact contribution limits: Propositions 68, 73, 208 and 34. *See* CT 327. The ballot measure materials for Proposition 34, enacted in November 2000, explain that the proposition "establishes limits on contributions to candidates for state elective office." *See* CT 351. Moreover, the text of Proposition 34 prohibits contributions "to any candidate" in excess of the limits prescribed for that office. Gov. Code §§ 85301, 85302.

The FPPC is charged with the effective administration of the Political Reform Act (the "Act"), which includes the provisions of Proposition 34, and which requires that its provisions, including the contribution limits, be "liberally construed to accomplish its purposes." Gov. Code §§ 81003, 83111. Among the express findings and declarations in the Act and in the text of Proposition 34 are: (1) large contributions result in undue influence on candidates; (2) large contributions may corrupt or appear to corrupt candidates for elective office; and (3) Proposition 34 pledged to minimize the corruption and its appearance caused by large contributions by enacting reasonable contribution limits.

Gov. Code § 81001, Sec.1A, Proposition 34; *See* CT 328-329, 338-339.[2/]

The FPPC first considered the regulation at issue in this litigation after the dramatic fundraising activity leading up to the 2003 recall election. In the 2003 recall campaign, numerous candidates set up multiple committees, some to support or oppose the recall of Governor Gray Davis, others to support the election of the specific candidate as a "replacement" for the Governor in the event that he were recalled. Proposition 34 contained express language that exempted the Governor's committee opposing the recall from the limits. Gov. Code § 85315; CT 328. Thus, some of the recall-related committees were subject to Proposition 34's limits, while others were not.

One replacement candidate was Lieutenant Governor Cruz Bustamante, whose campaign committee was subject to limits. Mr. Bustamante opened and controlled a ballot measure committee (not subject to limits) opposing an unrelated measure also on the ballot. This committee raised contributions and produced televised advertisements featuring Mr. Bustamante. This ballot measure campaign was widely regarded in the press as a surrogate for Mr. Bustamante's campaign for Governor. *See* CT 339.

The use of ballot measure committees by candidates to raise funds outside express contribution limits continued after the recall. Following his election, Governor Arnold Schwarzenegger established multiple committees and has raised millions of dollars in campaign contributions utilizing those

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2. Plaintiffs objected to portions of paragraphs 10, 13-16, and 18 of the declaration of Robert M. Stern on various grounds relating to his personal knowledge, his expertise, whether his opinions are "legal" opinions, and the bases for his opinions. CT 714-721. The Superior Court sustained these objections (CT 1536), but such ruling was an abuse of discretion. Mr. Stern's opinions are firmly based on more than 30 years of study and expertise in the field, including dozens of appearances as an expert witness, and any such objections would go to the weight of the testimony, at most, not the admissibility. *See* CT 326-336. The FPPC was entitled to present Mr. Stern's opinion as to the elements of the constitutional analysis.

committees. Governor Schwarzenegger, a plaintiff in this action, raised nearly $30 million in his first year as Governor, almost exclusively into his controlled ballot measure committees. *See* CT 343, 422-436.[3/] Some contributors gave from 40 to 70 times the direct candidate limitation amounts. *See* CT 341-342, 383-392. The Governor indicated that these committees would be his method of governing if the Legislature opposed his political agenda. His chief fundraiser acknowledged that contributors who give to his committees are well known to the Governor. *See* CT 342, 399-404. Fundraising materials are reported to include offers of access to the Governor during events. *See* CT 343, 422-436. Recently, the Governor acknowledged that "it could be" that his fundraising would subject him to criticism for being beholden to special interests. *See* CT 342-343, 405-408. Thus, the Governor concedes, and experts confirm, the fundamental premise underlying the challenged regulation. *See* CT 329.

Even after being elected, a successful candidate remains a "candidate" under the Act. Gov. Code §§ 82007, 84214; Cal. Code of Regs., tit. 2, §§ 18404, 18404.1. To enforce the limits on contributions to "candidates" as intended by the voters, and in keeping with the statutory obligation to liberally construe the Act's provisions, the FPPC in June 2004 adopted the challenged regulation, California Code of Regulations, title 2, section 18530.9, applying Proposition 34's contribution limits to ballot measure committees controlled by candidates who are subject to those limits. The FPPC acted in direct response to the highly-publicized candidate fundraising through controlled ballot

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3. Plaintiffs objected to paragraphs 13-17 of the declaration of C. Scott Tocher, and Exhibits 9-13 attached thereto, to the extent offered for the truth of their contents, and to the extent offered as nonexpert or expert opinion. CT 722-724. The evidence in question was not offered for such purposes, however, but only as evidence of the fostering of the public appearance of corruption. Accordingly, the Superior Court's ruling sustaining such objections (CT 1536) did not exclude such evidence.

measure committees in the 2003 special election. *See* CT 328-330.

STANDARD OF REVIEW

Conclusions of law related to whether plaintiffs are likely to prevail on the merits in this matter are subject to this Court's independent *de novo* review. *See Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 19 Cal. App. 4th 615, 624 (1993). Other aspects of the Superior Court's preliminary injunction order are subject to review under an abuse of discretion standard. *See Robbins v. Superior Court*, 38 Cal. 3d 199, 205 (1985).

I.

THE SUPERIOR COURT ERRED IN FINDING THAT PLAINTIFFS DEMONSTRATED A PROBABILITY OF SUCCESS ON THEIR FIRST AMENDMENT CLAIMS.

A preliminary injunction cannot issue unless it is "reasonably probable that the moving party will prevail on the merits." *San Francisco Newspaper Printing Co., Inc. v. Superior Court*, 170 Cal. App. 3d 438, 442 (1985); Code Civ. Proc. § 526(a)(1). Plaintiffs' claims have no chance of success, and the Superior Court's ruling to the contrary erred in failing to evaluate the threshold First Amendment issue of whether the challenged contribution limits impact effective advocacy and in then applying too strictly the standard applicable to contribution limits.

A. The Regulation Limiting Contributions To Candidates Through Candidate-controlled Ballot Measure Committees Does Not Violate The Governing First Amendment Standards.

The United States Supreme Court has embraced campaign contribution limits on candidates as an important part of the political process and has steadily increased its recognition of the need to prevent candidate circumvention of applicable campaign contribution limits. Contrary to the

suggestion of plaintiffs, the Supreme Court has never recognized any First Amendment right for a ballot measure committee to be controlled by a candidate yet not subject to the campaign contribution limits applicable to that candidate. *It is plaintiffs, not the FPPC, who are trying to chart a new First Amendment course in this matter, and their constitutional claims cannot succeed.*

In its recent defining statement of First Amendment doctrine in this area, the United States Supreme Court surveyed its 27-year progression of decisions approving campaign contribution limits:

> [W]e have recognized that contribution limits, unlike limits on expenditures, entai[l] only a marginal restriction upon the contributor's ability to engage in free communication. . . . At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech *only if they are so low as to preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.*

McConnell v. Federal Election Commission, 540 U.S. 93, 134-135 (2003) (citations and internal quotations omitted) (emphasis added); *see generally*

Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885, 887-894 (2005) (surveying development of current United States Supreme Court contribution limit doctrine.)

Plaintiffs made no attempt to address this governing standard in their preliminary injunction arguments, and the Superior Court unfortunately took plaintiffs' cue and failed to address this threshold element of the analysis, whether the limits inhibit effective advocacy, in granting the preliminary injunction. There is no evidence in the record that the challenged contribution limits would prevent candidates or political committees from amassing the resources necessary for effective advocacy.

As for the associational aspect of a First Amendment challenge to contribution limits, the U.S. Supreme Court explains:

> [C]ontribution limits both leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates, and allow associations to aggregate large sums of money to promote effective advocacy. The overall effect of dollar limits on contributions is merely to require candidates and political committees to raise funds from a greater number of persons. Thus, *a contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest.*

Id. at 136 (citations and internal quotations omitted) (emphasis added).

Specifically, the Supreme Court has left no doubt that California's interest in upholding contribution limits and preventing candidate efforts to circumvent them suffices as a "sufficiently important interest":

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> Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits -- interests in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. We have said that these interests directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. Because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action, contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate.

McConnell, 540 U.S. at 136-137 (citations and internal quotations omitted). Here, plaintiffs did not establish any significant associational interference from raising funds from a larger number of sources, and, in any event, plaintiffs' various points of policy disagreement (CT 707-711, 744-746) with the regulation do not suggest it fails to meet the "lesser demand of being closely drawn" to match the sufficiently important purpose.

Nor can plaintiffs avoid application of these governing standards by arguing that contributions to ballot measure committees are exempt from limitation. To the contrary, the Supreme Court decisions in the contribution limits area reflect steadily increased recognition of the need to prevent candidate corruption, to prevent the appearance of corruption, and to prevent candidate circumvention of applicable campaign contribution limits – such as by candidate control of ballot measure committees.

In its seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court undertook a wide-ranging First Amendment analysis of a variety of federal campaign contribution restrictions, including limits on

amounts of contributions to candidates. The Supreme Court upheld the contribution limits based upon the public's First Amendment interest in preventing corruption or even the appearance of corruption. *Id.* at 28.

In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Supreme Court followed *Buckley* and explained that contribution limits can be justified not just as means to prevent corruption or the appearance of corruption, but also to address "the broader threat from politicians too compliant with the wishes of large contributors;" i.e., to prevent "improper influence." *Id.* at 389. The Supreme Court also held that, given "that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible," extensive evidentiary documentation was not necessary to justify the contribution limits. *Id.* at 391-395.

In *Federal Election Commission v. Colorado Republican Federal Campaign Commission*, 533 U.S. 431 (2001), the Supreme Court addressed the validity of federal provisions imposing limits upon political party expenditures in coordination with candidates. The Supreme Court upheld the limitations, recognizing the need to prevent circumvention of candidate contribution limits through the use of conduits:

> Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors. . . . Whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders. It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets. This party role, accordingly, provides good reason to view limits on

> coordinated spending by parties through the same lens applied to such spending by donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation.

Id. at 451-452.

Finally, in *McConnell,* discussed *supra*, the Supreme Court distilled the governing doctrine (as described above) and applied it in a major decision upholding provisions of the federal Bipartisan Campaign Reform Act of 2002. The Supreme Court expressly confirmed that the interests underlying contribution limits "have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits" (*McConnell,* 540 U.S. at 144) and proceeded to uphold the challenged ban on receipt and solicitation of "soft money" contributions (*id.* at 182-184).[4/]

In the case upon which plaintiffs relied here in making their constitutional argument, the Supreme Court rejected a city ordinance imposing a $250 contribution limit upon local ballot measure committees. *See Citizens Against Rent Control, Inc., v. City of Berkeley*, 454 U.S. 290 (1981). Two points from that decision are crucial to the present case. First, *Citizens Against Rent Control, Inc.* did not address the present issue of permissible limits on contributions to *candidate-controlled* ballot measure committees. *See id.* at 292. Second, the Supreme Court distinguished its decision from its earlier decision in *Buckley* by emphasizing the absence of any question of corruption or appearance of corruption of a *candidate. Id.* at 297. In the case of a candidate-controlled committee, however, as the evidence indicates, a contribution to the ballot measure committee *does* benefit the controlling candidate. CT 329-330. Unlike the facts in *Citizens Against Rent Control, Inc.*,

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4. "Even if . . . access did not secure actual influence, it certainly gave the appearance of such influence." *Id.* at 295; *see* CT 343.

the regulation challenged here *does* address the subjects justifying state limitation of contributions – candidate corruption and appearance of corruption, which is brought about by large contributions and the appearance of sale of access. CT 339, 343.

The contribution limits upon candidate-controlled ballot measure committees in regulation 18530.9 are justified by the important electoral purposes recognized by the Supreme Court, and are within the established governing standards.

B. The Superior Court Erred In Failing To Apply, And In Applying Improperly, The Governing First Amendment Standards.

1. The Superior Court Made No Finding As To Whether The Challenged Contribution Limits Would Impact Effective Advocacy And Whether The First Amendment Is Thus Even Implicated.

The Superior Court erred in leaping straight to the question of whether the regulation is closely drawn to match a sufficiently important interest, without first addressing the threshold question of whether the First Amendment is even implicated: are the contribution limits so low as to prevent candidates and political committees from amassing the resources necessary for effective advocacy? *See* Ruling, pp. 19-20 (CT 1529-1530); *McConnell*, 540 U.S. at 135.

How much money do statewide ballot measure advocates need? How much money can they expect to raise under the applicable contribution limits? Even considering plaintiffs' inadmissible[5/] evidence, there is no explanation or

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5. This failure of proof is independent of plaintiffs' fundamental failure to confine their preliminary injunction presentation to the record prescribed for declaratory relief challenges to regulations. As described in Section IV, *infra*, plaintiffs should have been limited to evidence in the rulemaking file on this declaratory relief challenge. Even impermissibly advocating outside the limited

even claim as to how the regulation prevents effective advocacy. It is undisputed that the regulation allows ballot measure committees not controlled by a candidate to accept contributions without limit. There can be many ballot measure committees – controlled by a candidate or not – that share the same position. Accordingly, even if a particular ballot measure committee is controlled by a candidate and thus subject to the prescribed contribution limits, there remain no limits on the possible size of contributions that may otherwise be made in support of that committee's position. There is no limitation on the overall amount in contributions any one ballot measure committee – controlled by a candidate or not – can collect. Any ballot measure committee can decide not to be controlled by a candidate and remain eligible to receive contributions of unlimited size. Even candidate-controlled ballot measure committees can accept contributions in amounts up to the prescribed limits, and there is no evidence such limits prevent effective advocacy of the candidates' and ballot measure committees' message.

Unless the contribution limit levels and parameters are such as to prevent amassing resources necessary for effective advocacy, the First Amendment analysis proceeds no further. What is it about these limits and any surrounding circumstances that would prevent effective advocacy? It is with these questions that the FPPC challenged plaintiffs in its opposition (CT 319), but plaintiffs provided no explanation in reply. The FPPC's counsel raised them again at the hearing (Reporter's Transcript ("RT") 5:16-8:17, 10:4-11:10), but the Superior Court dismissed them:

> Are you asking – Are you saying that the Court should make a determination as to whether or not there's a First Amendment violation based on how much money the

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record available to them, plaintiffs failed to present the necessary evidence of an impact on effective advocacy from the challenged regulation.

> committee has raised, how much they have and how much . . . . If so, how can the Court get involved in such an assessment? How can I make a determination as to what I think is an appropriate level of money that a ballot measure committee should have? It's dependent on the subject matter of the ballot measure committee.

RT 11:24-12:6. On the record before her, of course, it was impossible to make such a determination, *but such a determination is necessary as part of the First Amendment analysis*.

As the FPPC's counsel explained in response (RT 12:7-28), under *McConnell* plaintiffs' First Amendment argument must necessarily be that they need the challenged regulation to be lifted in order to get higher amounts of money from each contributor *in order to be able to advocate their position effectively*. It is a matter of expert testimony as to the requirements for conducting campaigns, the expense of such activities, and the actual or anticipated effects of the contribution limits on incoming revenues. That is plaintiffs' First Amendment burden at any eventual trial, and that is all the more plaintiffs' burden on their motion for extraordinary provisional relief, in advance of eventual resolution on the merits.

The decision in *California Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1292, 1297-99 (E.D. Cal. 1998) illustrates proper application of this analysis. There, in the course of finding in favor of plaintiffs' claim that California's prior $500 and $250 contribution limits under Proposition 208 were too low to allow candidates to marshal sufficient assets to campaign effectively, the District Court for the Eastern District of California stated:

> Plaintiffs have tendered a wealth of factual and opinion evidence in support of their position. The court has found myriad facts which, taken together, require the court to conclude that on the record made at trial the effect of the

> initiative is not only to significantly reduce a California candidate's ability to deliver his or her message, but in fact to make it impossible for the ordinary candidate to mount an effective campaign for office.

Id. at 1297. For example, the court noted that there are certain limitations on a candidate's ability to reduce campaign costs, "such as the fact that the size of the legislative districts in California precludes so-called retail politics, the cost of advertising in this state, the general lack of media coverage of legislative campaigns, the cost of overhead." *Id.* at 1298.[6] The FPPC is not suggesting that plaintiffs had an obligation to present their full trial presentation in their preliminary injunction papers, but they needed to provide *some* semblance of it. Indeed, aside from volume, it needed to be particularly compelling to justify enjoining enforcement of a state law in advance of ultimate resolution of the litigation.

One additional excerpt from *California Prolife Council* is telling. In rejecting straight-across comparisons with contribution limit amounts approved in prior decisions in other jurisdictions, the court stated that such decisions contrast with the instant record where the court has concluded that the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign. . . . The facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent provisions of the various statutes and ordinances undermines the value of crude comparisons. . . . [E]very jurisdiction is *sui generis*, and thus every campaign contribution limitation must be judged on its own circumstances.

Id. at 1298. Here, the decision was based not just on an improper

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6. In *California Prolife Council*, the court's decision was accompanied by 456 findings of fact. *Id.* at 1286.

"crude comparison" with contribution limits from another jurisdiction with different campaign circumstances, but instead upon a *complete void* as to evaluation of the financial demands of the present campaign circumstances. Such contribution limit interference with effective advocacy cannot be presumed.

In *California Prolife Council*, the court evaluated the resources available to candidates, the campaign costs with which they were faced, and the anticipated effect on revenues from the three-figure contribution limits at issue. Here, plaintiffs presented no evidence to meet their threshold First Amendment burden, and – corresponding to the discussion at the hearing – the Superior Court made no threshold First Amendment finding as to the effect of regulation 18530.9 upon plaintiffs' ability to advocate their positions effectively.

2. The Superior Court Applied Too Strictly The Lesser Level Of First Amendment Review Applicable To Contribution Limits.

Proceeding on the assumption that plaintiffs' claims implicated First Amendment interests, the Superior Court erred further in holding the challenged regulation up to an unwarranted level of scrutiny.[7/]

As set forth above, even contribution limits burdening First Amendment interests are nevertheless valid if they satisfy "the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136. The Superior Court correctly recognized the sufficiency of the interests advanced by adoption of the challenged regulation: "[T]he court is easily persuaded that the prevention of candidate corruption, the appearance of corruption, and/or the circumvention of applicable campaign contribution limits

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7. *See* Hasen, *supra*, at 894-905 (evaluating application of current United States Supreme Court First Amendment doctrine to limitations upon contributions to candidate-controlled ballot measure committees).

are all 'sufficiently important' governmental purposes, and has no quarrel with the FPPC's stated goals." Ruling, p. 20 (CT 1530).

Where the Superior Court veered off of the constitutional track, however, was in failing to recognize that limitations on contributions to candidates via their controlled ballot measure committees are on equal constitutional footing with limitations on direct contributions to the candidates. Contrary to the Superior Court's citation of indirect contribution examples within the scope of the regulation as ostensible justification for granting the preliminary injunction against enforcement (Ruling, pp. 20-21 (CT 1530-1531)), indirect contributions to candidates through their controlled ballot measure committees are subject to limitation even if such contributions do not end up in the candidates' hands. The Superior Court improperly demeaned the importance of limitations on indirect candidate contributions in concluding: "It is difficult to comprehend how such contributions could theoretically foster corruption, the appearance of corruption, or the circumvention of applicable campaign contribution limits." Ruling, p. 21 (CT 1531).

To the contrary, such limitations upon indirect contributions to candidates are essential to a successful contribution limit system. As Senator Warren Rudman stated in his declaration filed in support of the limits on indirect contributions at issue in *McConnell*:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials – Senators who either raised money from the special interest in question or who benefit directly or

> indirectly from their contributions to the Senator's party – to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it – it is perfectly understood by all participants in every such meeting.

CT 1473-1474.[8/]

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8. Plaintiffs objected at the hearing to introduction of the Rudman declaration, in addition to the two additional declarations filed in the *McConnell* case and the Robert M. Stern reply declaration, all offered in response to the evidence and argument presented by plaintiffs for the first time in their reply. RT 8-11, 13-16. The FPPC had objected to plaintiffs' new arguments and evidence presented in their reply and requested leave at a scheduling conference call to file responsive papers in advance of the hearing. CT 920; RT 13-14. Plaintiffs' reply papers had argued for the first time that indirect contributions, as opposed to direct contributions to candidates, are not worthy of regulatory concern. (Plaintiffs' presented this point substantially in the 13-page declaration of Anthony Quinn (CT 755-767), which was not likely prepared in the two days on shortened time in which plaintiffs had to prepare their reply, and which was thus apparently being held by plaintiffs until after the FPPC's opposition was filed.) Plaintiffs had made no such argument in their opening briefs, instead relying upon the proposition that the *Citizens Against Rent Control, Inc.* decision simply foreclosed any contribution limit on ballot measure committees *per se* to support their constitutional claim. The FPPC had provided only minimal argument on the subject in its opposition, given the understanding, at this advanced stage of development of the constitutional jurisprudence, that the importance of addressing indirect, as well as direct, contributions to candidates was well-accepted. At the conference call, the Superior Court declined the FPPC's request to file a response in advance of the hearing but said that the FPPC could respond at the hearing. RT 13-14. Given the nature of the tentative ruling provided by the Superior Court the day before the hearing, it was all the more important to present evidence and argument to rebut the Quinn declaration and confirm the importance of limiting indirect contributions. At the hearing, presented with the FPPC's argument as to the equal importance of limiting indirect candidate contributions, and presented with the FPPC's offer of supporting evidence, the Superior Court backed away from any distinction as to the comparative importance of direct and indirect

As lobbyist Robert Rozen stated in his declaration filed in support of the limits on indirect contributions at issue in *McConnell*:

> Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs raise much of the large soft money contributions. Party chairs do not have that much power because the DNC and the RNC by themselves don't have power to do anything. So people are not giving to be close to the party chairs. The members of Congress and the President are the heart of the national parties. The elected officials are the ones who are really raising the money, either directly or through their agents.

CT 1495.

As Senator Dale Bumpers stated in his declaration filed in support of the limits on indirect contributions at issue in *McConnell*:

> Although some donors give to Members and parties simply because they support a particular party or Member, the lion's share of money is given because people want access. If someone gives money to a party out of friendship with a member, that donor may never ask for anything in return. However, although many people give money with no present intention of asking for anything in return, they know

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limitations upon candidate contributions and foreclosed argument on the point, saying to accept "as a given" that the dangers from contributions to a candidate are no more significant than the dangers from contributions to a committee controlled by a candidate. RT 16. Nonetheless, the Superior Court inexplicably proceeded to adopt the tentative decision, embracing the very distinction the *absence* of which the Superior Court had instructed the parties to accept "as a given." Moreover, the Superior Court denied admission of the very evidence the FPPC had offered on the point. Ruling, p. 26 (CT 1536). This evidentiary ruling was an abuse of discretion and should be overruled.

> if they ever need access they can probably get it. Donations can thus serve as a type of insurance.

CT 1504.

Campaign finance expert Robert Stern confirmed this understanding of the need to limit indirect contributions to candidates, as well as direct:

> In my opinion, having studied this topic for many years, members of the public would discern no difference between a large contribution made to a candidate-controlled ballot measure committee and a candidate's own election committee. In fact, it was exactly this type of oblique fundraising and access connection that led Conress to adopt the "soft-money" restrictions upheld in *McConnell*.

CT 1010.

Once the importance of the negative effects of large indirect contributions is recognized, it is inevitable to conclude that regulation 18530.9 is sufficiently closely drawn to prevent such effects. It is important to recognize that the danger of appearance of corruption includes the danger of access purchased by large contributions. As the Supreme Court observed in *McConnell*:

> [P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence. Many of the deeply disturbing examples of corruption cited by this Court in Buckley to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the appearance of such influence.

McConnell, 540 U.S. at 150 (citations and internal quotations omitted). Correspondingly, the only way to attack the appearance of corruption is necessarily to limit the size of the contributions.

From *Buckley* to *McConnell*, every Supreme Court decision featuring a substantive discussion of contribution limits has, as the Supreme Court recently phrased it, "recognized that contribution limits, unlike limits on expenditures, entail only a marginal restriction upon the contributors' ability to engage in free communication." *McConnell*, 540 U.S. at 134. Because contribution limits do not prevent other forms of association, the court concluded: "Thus a contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Id.* at 136. This is not a strict scrutiny standard.

Indeed, the McConnell decision teaches us that the regulation at issue here is well within the boundaries of what is considered "closely drawn." The federal BCRA statute at issue in *McConnell* prohibited candidate solicitation of unlimited contributions by donors to committees *over which the candidates had no control.* Under that statute, a candidate could accept contributions up to the federally-specified limit, but the candidate was prohibited from asking the contributor to give additional money to others, even *unrelated* committees. In concluding that this broad prohibition, inevitably affecting speech and association, was sufficiently closely drawn, the Supreme Court stated that no one seriously questions the constitutionality of a ban on soft contributions to "candidates and officeholders, their agents, *or entities established or controlled by them." Id.* at 182. The more difficult question in *McConnell,* answered in the affirmative, was whether legislation could reach *beyond* committees controlled by candidates. The Supreme Court accepted as a given that contributions to committees established or controlled by candidates could be

limited and, indeed, banned.

With this template as to application of the "closely drawn" standard, the narrower limitation at issue here, applying only to *controlled* committees, and applying as only a *limitation*, cannot seriously be questioned. Correspondingly, none of the hypothetical illustrations presented by the Superior Court (Ruling, pp. 20-21 (CT 1530-1531)) as justification for its determination that regulation 18530.9 is not sufficiently "closely drawn" would support such determination. If a candidate controls a ballot measure committee's decisions on political issues, but not expenditures, a large contribution to the committee would ordinarily still advance the candidate's political fortunes and could thereby represent corruption, foster the appearance of corruption, or allow the candidate to circumvent the direct candidate contribution limits. A large contribution to a controlled ballot measure committee by a person who has never before contributed directly to the controlling candidate could certainly represent corruption, foster the appearance of corruption, or allow the candidate to circumvent the direct candidate contribution limits. Even a large contribution to a controlled ballot measure committee by a person who does not know of the candidate's connection to the committee could foster the appearance of corruption or allow *the candidate* to circumvent the direct candidate contribution limits. Finally, large contributions to a controlled ballot measure committees that are not expended directly upon the candidate's election expenses (like the soft contributions at issue in *McConnell*) can represent corruption, foster the appearance of corruption, or allow the candidate to circumvent the direct candidate contribution limits. In citing these examples as justification for its decision, the Superior Court simply failed to recognize that limitations on large indirect contributions to candidates are just as important, and just as constitutionally permissible, as limitations on large direct contributions to candidates.

In evaluating a challenged contribution limit, it will always be possible to come up with hypothetical or even real examples of subjectively innocent contributions that may not corrupt a candidate but nonetheless would fall within the scope of the limit in question. Under the governing Supreme Court decisions, and the "lesser demand" that contributions be only "closely drawn," however, such possibility does not render the contribution limit at issue unconstitutional. Large contributions to ballot measure committees controlled by candidates are fairly subject to limitation as a means of eliminating the *appearance* of corruption of such candidates and as a means of eliminating candidates' ability to obtain contributions in amounts in excess of the existing candidate contribution limitations.

Each of the Superior Court's hypothetical instances of limits on possibly "innocent" contributions would have defeated the law in *McConnell* if they were considered to be a basis for claiming a contribution limit law is not "closely drawn." Accordingly, the *McConnell* decision dictates the proper conclusion that regulation 18530.9 is sufficiently closely drawn to accomplish the undeniably important electoral purposes.

Accordingly, the Superior Court erred in finding plaintiffs are likely to succeed on the merits of their claims.[9/]

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9. The FPPC disagrees with the Superior Court's evaluation of the merits of plaintiffs' statutory claims (CT 1517-1529; CT 321-324), but agrees with the Superior Court's ultimate conclusion that any statutory conflict would not warrant entry of a preliminary injunction. *See* CT 1519; CT 321.

II.

THE SUPERIOR COURT ERRED IN FINDING THAT PLAINTIFFS DEMONSTRATED A THREAT OF IRREPARABLE HARM.

A preliminary injunction cannot issue unless there is some threatened great or irreparable injury to a plaintiff from the continuance or commission of some act during the course of the litigation. Code Civ. Proc. § 526(a)(2). The irreparable injury must be more than just a legal dispute. *People ex rel. Gow v. Mitchell Brothers*, 118 Cal. App. 3d 863, 870-71 (1981). Moreover, the threatened harm must be imminent, as opposed to some possibility that the harm may occur in the future. *Korean Philadelphia Presbyterian Church v. California Presbytery*, 77 Cal. App. 4th 1069, 1084 (2000). With respect to a requested injunction against public officers or agencies performing their duties, in particular, the required showing of irreparable injury must be significant. *Tahoe Keys Property Owners Ass. v. State Water Resources Control Board*, 23 Cal. App. 4th 1459, 1471 (1994). Here, plaintiffs presented no evidence of imminent irreparable harm, and the Superior Court erred in presuming such harm based on its erroneous evaluation of plaintiffs' First Amendment claims.

Plaintiffs' argument below (CT 42) overstated the First Amendment interest at stake. As explained above, "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails *only a marginal restriction* upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20 (emphasis added). Plaintiffs offered no evidence of any actual imminent, constitutionally prohibited harm to the First Amendment interest they are advancing. As described in Section I.B.1, *supra*, the applicable question – not answered by plaintiffs – is whether the challenged contribution limits prevent plaintiffs from "effective advocacy" of their positions. *Id.* at 21. Plaintiffs provided no evidence, despite repeated

challenges in the FPPC's arguments, as to how the challenged contribution limits would ostensibly impact their ability to communicate their message, relying instead upon conclusory allegations that speech and association between candidates and ballot measure committees would be chilled.

Such conclusory allegations offered in support of a preliminary injunction motion are insufficient to establish irreparable harm to First Amendment interests. To illustrate, the District Court for the District of Washington rejected such a claim of irreparable harm in another recent campaign finance case involving a challenge to campaign expenditure ratios:

> The Court notes that Plaintiff devotes a mere one page of its Motion to this central question of irreparable harm, apparently relying upon the persuasive power of invoking the First Amendment. The essence of Plaintiff's claim is that the challenged regulations modify the scheme under which Plaintiff can raise and spend funds, which thereby impacts its ability to undertake its political activities. However, the Court finds that Plainitff has failed to make the requisite showing of imminent, irreparable injury. Although it is true that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, [a] litigant must do more than merely *allege* the violation of First Amendment rights". . . . Furthermore, the new rules do not in fact prevent Plaintiff from engaging in whatever political speech it seeks to undertake. While under the new allocation rule, committees such as EMILY's List are required to fund certain types of communications using at least 50 percent federal funds, this does not limit their right to undertake their desired political expression. In considering contribution limits in *Buckley*, the Supreme Court held that "the overall effect of [FECA] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." Indeed, the same rationale is applicable to Plaintiff's present situation; Plaintiff is free to undertake the same political speech as before, but may be required to raise money from a greater number of donors."

Emily's List v. Federal Election Commission, 362 F. Supp. 2d 43, 57-58 (D.D.C. 2005) (citations omitted). Likewise, plaintiffs simply cannot plausibly argue that regulation 18530.9 imminently prevented them from undertaking their desired political expression.

Tellingly, the Superior Court makes manifest the flaw in its First Amendment analysis in finding that "the complainants have demonstrated a reasonable probability of irreparable injury by the loss, or the threatened loss, of their First Amendment freedoms of speech and association" (Ruling, p. 23 (CT 1533)), *but not citing any interference with speech in its imminent irreparable harm analysis.* Nowhere in the Superior Court's discussion of imminent irreparable harm does a purported imminent irreparable interference with *speech* enter the analysis; only purported interference with *association* is addressed. *See* Ruling, pp. 22-25 (CT 1532-1535). If plaintiffs had purportedly demonstrated a reasonable probability of success on their First Amendment freedom of speech claim, why the reluctance to cite this as a basis for a finding of imminent irreparable harm? The answer, of course, is that the Superior Court implicitly recognized – consistent with the Supreme Court doctrine confirming contribution limits entail only a marginal restriction on speech – the impossibility of suggesting the contribution limits prevent plaintiffs from undertaking their desired political expression.

In any event, plaintiffs' claim of interference with its First Amendment freedom of association likewise fails to support any finding of imminent irreparable harm. Like the "marginal" intrusion upon speech,

> contribution limits both leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates, and allow associations to aggregate large sums of money to promote effective advocacy. The overall effect of dollar limits on contributions is merely to require

> candidates and political committees to raise funds from a greater number of persons.

McConnell, 540 U.S. at 136 (citations and internal quotations omitted).

Also, just as with the analysis applicable to contribution limits' effect on freedom of speech, analysis of a claimed interference with the right of association right is likewise grounded in the question of effective advocacy. Contribution limits are inherently about money and possible curtailment of a candidate's receipt of money. Accordingly, any claim that contribution limits intrude upon First Amendment freedoms unavoidably entails an evaluation of their effect upon the flow of money and the sufficiency of money received to accomplish activity protected by the First Amendment.

As a result, the Superior Court's criticism of the "FPPC's focus upon the financial aspects of 'effective advocacy'" is misplaced. *See* Ruling, p. 24 (CT 1534). Indeed, plaintiffs admit that the need for money is at the heart of their associational interest, and the Superior Court's ruling confirms the ostensible "chill" upon plaintiffs' association arises from the fear of *triggering the limits*: "Citizens represents that it desires to, and would, associate with candidates or their agents, but *chooses not to in order to maximize its fundraising potential free from contribution limits*." Ruling, p. 22 (CT 1532) (emphasis added). Plaintiff Richman "is a 'candidate' who would actively engage in supporting and directing a ballot measure committee regarding issues of interest to him, but he *chooses not to do so as not to impair the fundraising potential of the committee*." Ruling, p. 22 (CT 1532) (emphasis added). Intervenor plaintiff Schwarzenegger "desires to employ his own candidate-controlled ballot measure committee 'Governor Schwarzenegger's California Recovery Team' to support and advocate various initiatives as part of his administration, but *chooses not to do so due to the contribution limits imposed under Regulation 18530.9*." Ruling, p. 22 (CT 1532) (emphasis added). Intervenor plaintiffs Campbell, Rescue California from Budget Deficits, and

Taxpayers for Responsible Pensions "all desire to associate *in order to raise funds* and make expenditures to qualify and pass various initiatives, but *choose not to do so in order to avoid the resultant contribution limits* that would be imposed due to Senator Campbell's status as a 'candidate.'" Ruling, pp. 22-23 (CT 1532-1533)(emphasis added).

The Superior Court concluded: "All seven complainants essentially face the same undesirable choice that they contend constitutes the irreparable constitutional injury threatened by Regulation 18530.9. They may associate and champion their political causes, but *severely limit their ability to amass resources essential to effectively advance their political ideas*; or, they may maintain their *full financial potential* in parity with their opponents, but must surrender their ability to meaningfully associate and collaborate in the free exchange of political ideas." Ruling, p. 23 (CT 1533) (emphasis added). This is where the Superior Court glossed over the crucial First Amendment question in the contribution limit imminent irreparable association harm analysis. *See also* Ruling, p. 24 (CT 1534).

Nobody would suggest there is a First Amendment right to amass money simply for the sake of amassing money; the need to amass money *to accomplish effective advocacy* is at the heart of the association interest in contributions. The Superior Court states that the challenged contribution limits force plaintiffs to make an association choice that may "severely limit their ability to amass resources essential to effectively advance their political ideas," but as described *supra*, in Section I.B.1., *plaintiffs presented no evidence of how any reduction in contribution totals under the challenged contribution limits would affect their ability to effectively advance their political ideas.* For example, would plaintiffs have brought their claims here, and would a preliminary injunction have been issued, if the challenged limits were set at one million dollars? What is it about these limits that would prevent effective

advocacy? How could the First Amendment be implicated if the contribution limits do not impede fundraising enough to prevent effective advocacy and therefore do *not* discourage association?

Any suggestion in the Superior Court's analysis (*see, e.g,* Ruling, p. 21 (CT 1531)) that the regulation impermissibly infringes plaintiffs' association interest simply by triggering a contribution limit upon a campaign committee if it is subject to candidate control would thus ignore the effective advocacy underpinnings underlying any First Amendment association challenge to a contribution limit. In any event, any such suggestion would prove too much. Existing California law *already* makes a contribution limit distinction between candidate-controlled and non-controlled committees in the context of candidate support committees (*see* Gov. Code §§ 85301-85302[10]), and such distinction has *already* received the Supreme Court's First Amendment blessing. *See Buckley v. Valeo*, 424 U.S. 1, 28-36 (1976) (upholding difference between federal contribution limits applicable to candidate-controlled committees and non-controlled committees).

Plaintiffs failed to present evidence of any cognizable imminent irreparable First Amendment harm, and it was thus error to grant the preliminary injunction.

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10. Section 85301 limits contributions to candidate-controlled committees. Section 85302 and 85303 establish limits on all other committees not controlled by candidates, but who contribute to state candidates, including political party committees. In other words, the Act as a whole contemplates the application of contribution limits to any person contributing to state candidates, if that person cumulates contributions up to a particular threshold. It would defeat the purpose of the Act to allow total circumvention of these laws by permitting state candidates simply to establish ballot measure committees to which over-the-limit contributions could be redirected.

III.

THE SUPERIOR COURT ERRED IN FINDING THAT THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFFS' FAVOR.

A motion for preliminary injunction cannot be granted unless the court concludes that the balance of equities weighs in the moving party's favor. *IT Corp v. County of Imperial*, 35 Cal. 3d 63, 69-70 (1983). Having vastly overrated the ostensible intrusion upon plaintiffs' First Amendment speech and association interests as described in the preceding sections, the Superior Court's comparison of the competing harms and equities (*see* Ruling, pp. 23-24 (CT 1533-1534)) was inherently flawed. The balance of equities, in fact, weighs strongly in favor of the regulation.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). In an analogous context involving an injunction against enforcement of the California Automobile Franchise Act, Justice Rehnquist explained: "[A]ssuming the State eventually prevails on the merits and the injunction is lifted, it is not at all clear that the New Motor Vehicle Board will have the authority to examine the propriety of all [the dealership relocations in the interim] or to force those relocated dealerships to stop doing business." *Id.* Likewise, here, it is not at all clear that the FPPC would have the authority to require the candidate-controlled ballot measure committees to return the excess contributions if the FPPC eventually prevails on the merits. Plaintiffs declined to estimate the anticipated increase in campaign contribution receipts arising from entry of the preliminary injunction, and the Superior Court declined to set a bond in such amount. CT 1538-1561.

To some extent, the damage to the public interest has already been done in regard to the current campaign season, but initiative signature gathering

and fundraising is ongoing even after last week's special election. The public interest in an election process devoid of corruption, the appearance of corruption, and circumvention of candidate contribution limits is no less important going forward than it was at the time the preliminary injunction was entered. The continued appearance of candidate obligation to million-dollar donors, or worse, will continue to work an irreparable harm upon the People of California in upcoming elections unless the preliminary injunction is reversed.

IV.

THE SUPERIOR COURT ERRED IN ADMITTING EVIDENCE OUTSIDE OF THE LIMITED RECORD PRESCRIBED FOR DECLARATORY RELIEF CHALLENGES TO REGULATIONS.

Plaintiffs did not confine their motion presentation below within the statutory limitations governing declaratory relief challenges to the validity of a regulation. The Superior Court erred in only partially recognizing the statutory limitation.

"Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." Gov. Code § 11350. Although plaintiffs do not expressly refer to section 11350 in their complaints, it is the only authority for the declaratory relief they seek; Code of Civil Procedure section 1060 provides no authority for declaratory relief with respect to a challenged regulation. *See Los Angeles v. State Dept. of Public Health*, 158 Cal. App. 2d 425, 443 (1958) (precursor to § 11350 effectively amended § 1060 to add the validity of an administrative regulation to the list of available subjects for declaratory relief).

As a result, plaintiffs' declaratory relief claim is subject to the procedural constraints set forth in section 11350, foremost of which is the limited body of evidence that a court may consider in evaluating a plaintiff's

claim. On a claim under section 11350:

> [A] court may only consider the following evidence:
>
> (1) The rulemaking file prepared under Section11347.3.
>
> (2) The written statement prepared pursuant to subdivision (b) of Section 11346.1.
>
> (3) An item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission.
>
> (4) Any evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter [i.e., whether it is an 'underground regulation'].

Gov. Code § 11350(d). Plaintiffs' motion impermissibly stepped outside the evidentiary record that the Legislature has prescribed for declaratory relief challenges to the validity of a regulation, and the FPPC objected to the introduction of all such outside evidence.[11/]

Accordingly, the Superior Court properly found "that Government Code section 11350(d) does limit the evidentiary record on the declaratory relief challenges to the statutory validity of Regulation 18530.9." Ruling, p. 11 (CT 1521).

Nor, as the Superior Court properly found, could plaintiffs avoid the effect of section 11350 by falling back upon the "injunctive relief" aspects of

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11. Only Exhibits C, D, and E attached to the original Plaintiffs' Request for Judicial Notice and Exhibit C attached to the intervenor plaintiffs' original Request for Judicial Notice were properly admissible. CT 918-919. For the purpose of a complete response, and for the benefit of giving the Superior Court the full context of plaintiffs' claims, the FPPC proceeded below to rebut plaintiffs' arguments ostensibly supported by the impermissible outside evidence. The FPPC's own outside evidence in this regard was offered provisionally, and without waiver of the objections made. CT 325.

their complaints. In response to plaintiffs attempt to do so, the FPPC argued correctly below that plaintiffs' request for injunctive relief is ancillary to their claims for declaratory relief. CT 919. That is, if plaintiffs were to challenge the regulation by a method *other than declaratory relief*, they would need to allege (and, for the purposes of a preliminary injunction motion, demonstrate) the existence of an actual dispute. Cf. *Tushner v. Griesinger*, 171 Cal. App. 2d 599, 603-606 (1959) (declaratory relief action must be brought before enforcement of regulation begins). In other words, the declaratory relief procedure allows a plaintiff to seek an advance court determination - such as plaintiffs' present *facial* challenge - in appropriate circumstances without meeting the ordinary standards for the existence of a case or controversy. In the absence of an enforcement proceeding, plaintiffs cannot resort to an ostensibly independent claim for injunctive relief as purported justification for going outside the confines of the prescribed evidentiary record. Plaintiffs need their declaratory relief claim to justify their presence in court at all, on their facial challenge. If plaintiffs desire an advance ruling on the validity of the regulation, they must comply with the procedural limitations applicable to such an action.

Accordingly, the Superior Court correctly found: "Plaintiffs' claim for injunctive relief is ancillary and dependent upon their declaratory relief claims, so it adds no independent bases for review." Ruling, p. 11 (CT 1521).

Where the Superior Court erred, though, was in limiting its ruling only to plaintiffs' *statutory* challenges and proceeding inexplicably to state: "However, the record is not similarly limited on plaintiffs' constitutional challenges alleging actual or threatened impairment of protected freedoms." Ruling, p. 11 (CT 1521). Plaintiffs had not argued for any such distinction, and the Superior Court provided no explanation and cited no authority for the distinction drawn.

To the contrary, section 11350 is the exclusive authority for bringing a declaratory relief claim of any kind to challenge the validity of a regulation. By the authority of that section, a regulation may be declared invalid based on certain specified rulemaking failures "[i]n addition to *any other ground that may exist*" – i.e., such as plaintiffs' alleged constitutional grounds. As described above, prior to enactment of the predecessor to section 11350, there was no authority for a claim for declaratory relief challenging the validity of a regulation. The Legislature has established which claims may be the subject of advance claims for declaratory relief, and has specified the procedural and evidentiary conditions under which such advance claims may be brought. Section 11350 sets forth the exclusive authority for *all* of plaintiffs' claims, and its procedural and evidentiary conditions apply.[12/]

Plaintiffs sought an advance ruling on the regulation in question before any enforcement action proceeded, but they were apparently not willing to limit their preliminary injunction presentation to the narrow record established by the Legislature for such advance challenges. Even leaving aside the substantive failings of plaintiffs' motion, this procedural defect alone was sufficient to defeat plaintiffs' motion.

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12. There is no authority for any suggestion that the gravity of a constitutional challenge, as opposed to a statutory challenge, would justify the distinction drawn here by the Superior Court. Any such argument would prove too much, threatening application of any rules of evidence and procedure.

CONCLUSION

For these reasons, the FPPC respectfully requests that this Court reverse the preliminary injunction order of the Superior Court, and thereby restore the effectiveness of the candidate contribution limits applicable to candidate-controlled ballot measure committees pending ultimate resolution of this matter.

Dated: November 14, 2005

Respectfully submitted,

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LOUIS R. MAURO
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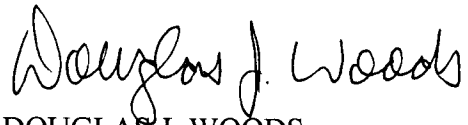
Supervising Deputy Attorney General



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Deputy Attorney General

Attorneys for Defendant and Appellant
California Fair Political Practices
Commission

CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 14(c))

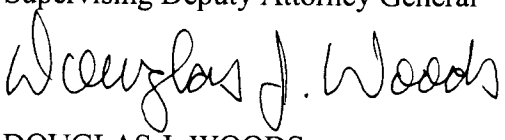
I hereby certify that:

Pursuant to California Rules of Court, Rule 14(c), in reliance upon the word count feature of the software used, I certify that the attached **APPELLANTS OPENING BRIEF** uses 13 point Times New Roman font and contains 10,940 words.

Dated: November 14, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General



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DECLARATION OF SERVICE
(C.C.P. §§ 1011, 1012, 1012.5, 1013)

Case Name: ***Citizens to Save California, et al. v. Cal. FPPC***
Case No. **C049642**
Lower Court Case No. **Sacramento County Superior Court Case No.: 05AS00555**

I declare: I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I. Street, Sacramento, California.

On November 14, 2005, I served the attached

APPELLANT'S OPENING BRIEF

in said cause, by placing a true copy thereof enclosed in a sealed envelope and served as follows:

XX United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox in the City of Sacramento, California, after the close of the day's business

___ California Overnight Service (Overnight Courier)

___ Facsimile at the following Number:

___ Personal Service, via Capitol Couriers, at the below address(es):

to the parties addressed as follows:

James R. Parrinello, Esq. ***(1 copy)***
Christopher E. Skinnell
Nielsen, Merksamer, Parrinello, Mueller & Naylor LLP
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The Honorable Shelleyanne W.L. Chang
Sacramento County Superior Court
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Sacramento, CA 95814-1398

Supreme Court
California Supreme Court ***(4 copies)***
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on November 14, 2005.

CYNTHIA FULKERSON