SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME JUDGE	March 14, 2014, 1:30 p.m. HON. ALLEN SUMNER	DEPT. NO CLERK	42 M. GARCIA
CHARLES R. "CHUCK" REED, et al., Plaintiffs and Petitioners, v. FAIR POLITICAL PRACTICES COMMISSION, et al., Defendant and Respondent.		Case No.: 34-2013-80001709	
Nature of Proceedings:	Petition for Writ of Mandate		

Following is the court's tentative decision granting the petition for writ of mandate and related request for declaratory and injunctive relief, scheduled for hearing March 14, 2014, at 1:30 p.m. in Department 42.

INTRODUCTION

Petitioners are Charles Reed, Mayor of San Jose, a committee formed by Reed to support candidates or measures in San Jose, and the committee's treasurer. Respondent Fair Political Practices Commission ("FPPC") concluded Petitioners violated a state law prohibiting the committee from making contributions to other committees, and fined them $1.

Relying primarily on the United States Supreme Court's recent decision in *Citizens United v. FEC* (2010) 558 U.S. 310, Petitioners contend the law at issue unconstitutionally limits rights protected by the First Amendment. They seek a writ of mandate directing FPPC to vacate its decision, a declaration the law is unconstitutional on its face, and an injunction prohibiting FPPC from enforcing it in a manner inconsistent with the First Amendment.

As explained below, the petition and requests for declaratory and injunctive relief are granted.

BACKGROUND

The facts were stipulated by the parties.

Reed was first elected in 2006, and re-elected in 2010. He will be termed out of office in December 2014, and has no plans to run for another public office. (Fact 1.)

In September 2009, Reed established a committee to support his re-election campaign. That committee was terminated on December 31, 2010, after Reed was re-elected. (Fact 2.)

In August 2010, Reed established a separate "ballot measure committee," formed primarily to support or oppose a single ballot measure. (Gov. Code §§ 82047.5, subd. (b).)[1] In July 2012, Reed's ballot measure committee became a "city general purpose committee," formed to support or oppose candidates or measures voted on in only one city. (§ 82027.5, subd. (d).) The court refers to this as the "Reed Committee." Its purpose is to support fiscal reform initiatives and fiscally responsible candidates in San Jose. Reed controls the Reed Committee and decides how its money will be spent. (Facts 3, 4.)

In September 2012, the San Jose Reform Committee Supporting Rose Herrera for City Council 2012 was established to make independent expenditures to support Rose Herrera for the San Jose City Council in the November 2012 election. The court refers to this as the "Herrera IE Committee." (Facts 6, 8.)

Independent expenditures are expenditures made "in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . but which is not made to or at the behest of the affected candidate . . . ." (§ 82031.) Independent expenditures are not made in cooperation, consultation, concert or coordination with the affected candidate, or at the candidate's request, direction or suggestion. (§ 85500, subd. (b).) The Herrera IE Committee is thus entirely independent of Herrera herself.

In September 2012, the Reed Committee contributed $100,000 to the Herrera IE Committee. (Fact 9.)

FPPC accused Reed and the Reed Committee of violating section 85501, which states:

> A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.

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[1] Unless otherwise noted, all further references are to the Government Code.

After an expedited hearing, FPPC upheld the accusation and imposed a $1 fine.[2] This action followed.

DISCUSSION

1. Reed was a "candidate" at the time of the contribution

Reed first makes a statutory argument he is not a "candidate." This argument fails.

Again, section 85501 applies to a "controlled committee of a ***candidate***." (Emphasis added.) Reed argues the Reed Committee is not a controlled committee ***of a candidate***, because he was no longer a candidate at the time of the contribution.[3] If the Reed Committee was not a controlled committee of a candidate, then section 85501 is inapplicable. The court finds FPPC correctly determined Reed is a "candidate."

Reed argues he was an ***officeholder***, not a ***candidate***, at the time of the contribution because he was well into his last term as mayor and had no plans to run for another public office. Reed argues the term ***candidate*** is limited to individuals seeking office, not individuals currently in office. As support, Reed cites "common understanding" of those two terms, as well as dictionary definitions. The court need not resort to common understanding or the dictionary to define the term candidate. The term has been defined by the Legislature.

Section 82007 defines a candidate as "an individual who is listed on the ballot." (§ 82007.) Reed does not dispute he was a candidate when he ran for reelection in 2010. (See, e.g., Pet. ¶¶ 13-16.) Section 82007 goes on to provide: "An individual who becomes a candidate ***shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214*** . . . ." (§ 82007 [emphasis added].)

Section 84214, in turn, provides "candidates shall terminate their filing obligation pursuant to regulations adopted by [FPPC] . . . ." Read together, sections 82007 and 84214 evidence the Legislature's intent candidates retain their status as candidates until their filing obligations are terminated.

FPPC's regulations provide a candidate's filing obligations are terminated as follows:

> Pursuant to Government Code Section 82007, a candidate . . . is obligated to file campaign statements . . . until his or her status as a candidate is terminated. . . . .

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[2] The fine was nominal because FPPC concluded the violation was inadvertent, and Reed made a good faith attempt to comply with the law.

[3] Reed acknowledges he controls the Reed Committee. (See Pet. ¶¶ 19-21.) The issue is whether he is a "candidate."

> The filing obligations of a candidate . . . who has one or more controlled committees terminate when the individual has terminated all his or her controlled committee(s) ***and*** has left office.

(Tit. 2, § 18404, subd. (d)(1) [emphasis added].) It is undisputed Reed had two controlled committees while he was running for mayor – his re-election committee and the Reed Committee. (Pet. ¶¶ 13, 16, 20.) Although Reed terminated the re-election committee at the end of 2010, this regulation provides he still had filing obligations ***until he left office***. He retains his status as a candidate until then as well.

2. Section 85501 is unconstitutional

Reed argues section 85501 violates the First Amendment's prohibition against laws abridging freedom of speech. It does.

A. Standard of review

The standard of review here is complicated because this case involves two separate statutory prohibitions, both implicating First Amendment rights.

Although not discussed by either party, section 85501 prohibits candidate-controlled committees from doing two separate things: (1) making independent ***expenditures*** to support or oppose other candidates; and (2) ***contributing*** to another committee that will, in turn, use the funds to make independent expenditures to support or oppose other candidates.

Reed was only fined for violating the ban on contributions. However, he states the Reed Committee also wants to make independent expenditures in support of, or opposition to, candidates in upcoming elections. (Pet. ¶ 64.) He thus brings a facial challenge to the constitutionality of the law as a whole. (Pet. ¶ 83.) Because Reed challenges both aspects of section 85501, this case presents two separate questions: Is the ban on independent expenditures constitutional? Is the ban on contributions to other committees constitutional?

Reed is correct that section 85501's ban on ***independent expenditures*** is subject to strict scrutiny. To survive strict scrutiny, FPPC must show the law is narrowly tailored to further a compelling governmental interest. (*Citizens United v. FEC* (2010) 558 U.S. 310, 340; *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1117.)

FPPC is likely correct that section 85501's ban on ***contributions*** is subject to a lower degree of scrutiny.[4] Under this test, FPPC must show the law is "closely drawn" to

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[4] FPPC is "likely" correct because it is not clear whether the different standard of review traditionally applied to contribution limits survived the Supreme Court's *Citizens United* decision, or whether contribution limits are now also subject to strict scrutiny. As the Court acknowledged, *Citizens United* involved only an expenditure limit. None of the parties suggested the Court should reconsider whether

further a "sufficiently important interest." (*Buckley v. Valero* (1976) 424 U.S. 1, 25; *McConnell v. FEC* (2003) 540 U.S. 93, 134, 136; *Thalheimer*, *supra*, 645 F.3d at 1117-18.)

The standard of review is further complicated because Reed brings a facial challenge to the constitutionality of a statute based on First Amendment grounds. FPPC cites the general rule a facial challenge must be rejected unless the statute is unconstitutional in all circumstances. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084-85.) There is an exception, however, where the facial challenge is based on First Amendment grounds. In First Amendment cases courts apply what is known as the overbreadth doctrine. The statute is invalid in ***all*** its applications (i.e., facially invalid) if it is invalid in ***any*** of them. (*People v. Hsu* (2000) 82 Cal. App. 4th 976, 982; *People v. Rodriguez* (1998) 66 Cal. App. 4th 157, 167.)

FPPC also cites the general rule statutes are presumed constitutional and must be upheld unless their unconstitutionality is clear. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-11.) Again, there is an exception where the statute affects First Amendment rights. Such a statute "is not clothed with the usual presumption of constitutionality which most legislation enjoys." (*Ghafari v. Mun. Court for San Francisco Judicial Dist.* (1978) 87 Cal. App. 3d 255, 265; see also *U.D. Registry, Inc. v. State of California* (2006) 144 Cal. App. 4th 405, 418 [when government restricts speech the usual presumption of constitutionality is reversed, and the government must bears the burden of rebutting that presumption].)

Accordingly, if section 85501 burdens rights protected by the First Amendment, FPPC must show the burdens are justified by either a "compelling" or a "sufficiently important" governmental interest, ***and*** the law is "narrowly tailored" or "closely drawn" to protect those rights.

B. The ban on independent expenditures is unconstitutional

Reed's argument section 85501 is unconstitutional is based almost entirely on the United States Supreme Court's recent decision in *Citizens United*. In *Citizens United*, the Supreme Court struck down a federal law prohibiting corporations from making independent expenditures advocating the election or defeat of a candidate in federal elections. (*Citizens United*, *supra*, 558 U.S. at 320; 2 U.S.C. § 441b.) Citizens United, a nonprofit corporation, produced a film critical of Hilary Clinton, then a Democratic presidential candidate. It wanted to make the film available on cable television but feared this would violate the law prohibiting corporations from making independent expenditures advocating the defeat of a candidate. Citizens United argued the law

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contributions limits should be subjected to more rigorous scrutiny. (*Citizens United*, *supra*, 588 U.S. at 359; see also *Long Beach Area Chamber of Commerce v. City of Long Beach* (9th Cir. 2010) 603 F.3d 684, 691, fn. 4 [noting Supreme Court has not yet explicitly discarded "closely drawn scrutiny" standard].)

The court assumes the lower standard for limits on contributions survives, concluding FPPC's argument fails regardless of the standard.

abridged its freedom of speech in violation of the First Amendment. The Supreme Court agreed.

The Supreme Court began its analysis by noting a ban on expenditures is a ban on ***speech***. (*Citizens United*, *supra*, 558 U.S. at 339.) That holding went back almost 40 years, to *Buckley v. Valero* (1976) 424 U.S. 1, where the Supreme Court held restrictions on expenditures are tantamount to "quantity restrictions" on political speech:

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effects political speech.

(*Buckley*, *supra*, 424 U.S. at 19.) A ban on independent expenditures "is thus a ban on speech" itself. (*Citizens United*, *supra*, 558 U.S. at 339.) Applying the Supreme Court's analysis to this case, it is clear section 85501's ban on independent expenditures is a ban on speech.

The Supreme Court next discussed the type of speech at issue – political speech about the qualifications of candidates for political office. Quoting *Buckley*, the Court noted "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." (*Citizens United*, *supra*, 558 U.S. at 340.) The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." (*Id*. at 339.)

As in *Citizens United*, here section 85501 limits speech about the qualifications of candidates. Applying the Supreme Court's analysis, the court finds section 85501's ban applies to speech at the heart of the First Amendment's protections.

The Supreme Court next outlined the appropriate standard of review: "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (*Citizens United*, *supra*, 558 U.S. at 340.) Section 85501's ban on expenditures is thus subject to strict scrutiny.

In *Citizens United*, the government argued two compelling interests justified the ban on corporate expenditures: (1) preventing distortion of the political process, and (2) preventing corruption.

The first interest – called the anti-distortion interest – was completely rejected by the Court. The anti-distortion interest recognizes the critical role money plays in politics.

It seeks to temper the influence of those with access to money, thereby increasing the influence of those without such access. The government argued the law sought to prevent corporations from obtaining an unfair advantage in the political marketplace by using their superior economic resources. The Supreme Court rejected the premise government has a legitimate interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." (*Citizens United*, *supra*, 558 U.S. at 350; see also *Buckley*, *supra*, 424 U.S. at 48 ["the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"].) The Court held the First Amendment prohibits government from limiting political speech based on either the identity of the speaker or the size of the speaker's bank account. (*Citizens United*, *supra*, 558 U.S. at 340, 350.) *Citizens United* sounded the death knell for the argument limits on independent expenditure are necessary to prevent distortion of the political process. FPPC, understandably, does not make that argument here.

The government's second proffered interest was preventing corruption. Returning once again to *Buckley*, the Court agreed preventing corruption, or the appearance thereof, could justify some restrictions on speech. (*Id*. at 356.) It noted, however, "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption," or "dollars for political favors." (*Id*. at 359.) Cases subsequent to *Buckley* held *quid pro quo* corruption is not limited to outright bribery, but includes "the broader threat from politicians too compliant with the wishes of large contributors." (See, e.g., *Nixon v. Shrink Missouri Government PAC* (2000) 528 U.S. 377, 389.)

In *Buckley*, the Court upheld limits on ***contributions*** to candidates as a means of preventing *quid pro quo* corruption or the appearance thereof. However, the Court in *Buckley* simultaneously struck down a companion law limiting independent ***expenditures*** on behalf of candidates. Although it agreed preventing corruption is a compelling governmental interest, the Court found that interest could not justify limits on ***independent expenditures***, which by definition are neither controlled by nor coordinated with the candidate. The Court concluded there is far less potential to corrupt: "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." (*Buckley*, *supra*, 424 at 47.)

After *Buckley*, at least one case left open the possibility the government might yet be able to show independent expenditures could lead to corruption. (*First Nat'l Bank v. Bellotti* (1978) 435 U.S. 765, 788, fn. 26 ["Congress might well be able to demonstrate the existence of a danger of real or appearance corruption in independent expenditures by corporations to influence candidate elections."].) In *Citizens United*, however, the Court rejected that possibility: "we now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption." (*Citizens United*, *supra*, 588 U.S. at 357.) Lest the message be unclear, the Court repeated it: "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." (*Id*. at

360.) Because government had ***no*** interest that would justify limiting independent expenditures, the Court held the law imposing those limits was unconstitutional. (*Id*. at 365.)

Here, section 85501 imposes a ***complete ban*** on independent expenditures to support or oppose political candidates. Like the government in *Citizens United*, FPPC argues the ban on expenditures is necessary to prevent corruption and the appearance thereof. Because the Supreme Court held independent expenditures do not give rise to corruption, the court finds section 85501's complete ban on independent expenditures is an unconstitutional restriction on core political speech. (*Citizens United*, *supra*, 588 U.S. at 365; see also *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d at 1109, 1118 [preventing corruption or its appearance is simply unavailing in the context of restrictions on independent expenditures.]; *Long Beach Area Chamber of Commerce v. City of Long Beach* (9th Cir. 2010) 603 F.3d 684, 695 [noting "long and growing line of Supreme Court cases concluding limits on independent expenditures are unconstitutional."]; *Speechnow.org v. Federal Election Commission* (D.C. Cir. 2010) 599 F.3d 686, 693 [following *Citizens United*, "the government has ***no*** anti-corruption interest in limiting independent expenditures"] [emphasis in original].)

B. The ban on <u>contributions</u> is unconstitutional

Reed spends little time discussing contributions, insisting section 85501 is solely a ban on independent expenditures. (Reply at 2:25.) However, the Supreme Court recognizes ***spending*** money to support or oppose candidates is different from ***contributing*** money to another organization that will, in turn, spend the money to support or oppose candidates. (See, e.g., *Buckley*, *supra*, 424 U.S. at 21 ["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."].)

Like independent expenditures, political contributions are a form of speech protected by the First Amendment. (*Buckley*, *supra*, 424 U.S. at 18.) By giving money to a political organization, the contributor expresses support for the organization's goals. (*Id*. at 20-21.) Contributions, however, are a different form of speech than political expenditures. As the Supreme Court explained in *Buckley*:

> [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***. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. 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***.

(*Id*. 20-21 [emphasis added].) Because limits on contributions impose less of a burden on speech than expenditure limits, they are not reviewed under strict scrutiny. Instead, the Court used a less exacting standard requiring the government to demonstrate only that the limits are "closely drawn" to further a "sufficiently important" government interest. (*Id*. at 25.)

Regardless of what standard of review applies, Reed argues *Citizens United*'s analysis of expenditure bans effectively controls section 85501's contribution ban as well. In *Citizens United*, the Court held independent expenditures simply do not lead to, or create the appearance of, corruption. (*Citizens United*, *supra*, 558 U.S. at 357, 360.) If independent expenditures raise no corruption concerns, then neither do contributions to a committee that makes only independent expenditures. Accordingly, section 85501's ban on contributions to committees making independent expenditure fails regardless of the level of scrutiny that applies. (See, e.g., *SpeechNow.org v. FEC* (D.C. Cir. 2010) 599 F.3d 686, 695 ["*SpeechNow*"].)

The District of Columbia Circuit's decision in *SpeechNow* is persuasive. SpeechNow was a political committee formed to make independent expenditures to support candidates sharing its views on the First Amendment. It challenged provisions in the Federal Election Campaign Act limiting contributions to political committees. SpeechNow argued these contribution limits violated the First Amendment in two ways. First, preventing SpeechNow from accepting contributions in excess of those limits. Second, preventing contributors from making contributions to SpeechNow exceeding those limits. Reed is essentially making the second argument – section 85501 prevents the Reed Committee from making contributions to an independent expenditure committee.

The Circuit Court agreed with both of SpeechNow's arguments. It first acknowledged contribution limits do not encroach upon First Amendment interests to as great a degree as expenditure limits. Nonetheless, limits on contributions "do implicate fundamental First Amendment rights." (*SpeechNow*, *supra*, 599 F.3d at 692.) As a result, "When the government attempts to regulate the financing of political campaigns and express advocacy through contribution limits . . . it must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights." (*Id*.) While the Supreme Court recognized government's interest in preventing corruption, the Court in *Citizens United* held "the government has ***no*** anti-corruption interest in limiting independent expenditures." (*Id*. at 693 [emphasis in original].)

Because SpeechNow was an independent expenditure committee, the government had no interest in limiting contributions to it. As the Circuit Court then explained:

> This simplifies the task of weighing the First Amendment interests implicated by contributions to SpeechNow against the government's interest in limiting such contributions. As we have observed in other contexts, "something . . . outweighs nothing every time."

(*Id*. at 695.)

Although not binding, the court finds this analysis persuasive. Like the law challenged in *SpeechNow*, section 85501 prohibits contributions to a committee formed for the purpose of making independent expenditures to support or oppose other candidates. Because the government has no anti-corruption interest in limiting contributions to independent expenditure committees, it follows FPPC cannot justify a complete ban.

FPPC disagrees. But none of its arguments persuades.

First, FPPC asserts section 85501 "is not a ban on speech." (Opp. at 10:6.) This argument fails aborning. The Supreme Court has repeatedly held political contributions and political expenditures are both forms of speech protected by the First Amendment. (*Buckley*; *Citizens United*.) Moreover, section 85501 completely bans certain contributions and expenditures; it is not simply a limitation. Section 85501 thus completely bans certain types of political speech.

Next, FPPC argues this case is distinguishable because section 85501 only prohibits ***candidate-controlled committees*** from making contributions. This is true. But FPPC fails to explain why this is a distinction with a difference: why is candidate-controlled speech entitled to less protection?

The Supreme Court explained the First Amendment prohibits government from "distinguishing among different speakers, allowing speech by some but not others." (*Citizens United*, *supra*, 588 U.S. at 340.) Moreover, individuals do not give up their First Amendment rights when they seek public office: "The ***candidate***, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election ***and the election of other candidates***." (*Buckley*, *supra*, 424 U.S. at 2 [emphasis added].) The First Amendment also protects the right of political entities controlled by candidates to advocate their vision of good government. (See, e.g., *Colo. Republican Fed. Campaign Comm. v. FEC* (1996) 518 U.S. 604, 615-16 [political parties have "core" rights protected by First Amendment to express their members' views about "the philosophical and governmental matters that bind them together" and to "convince others" of those views].)

FPPC argues the ban on contributions by candidate-controlled committees is necessary to prevent circumventing the limit on contributions to candidates themselves. FPPC notes California limits contributions to candidates. (See, e.g., § 85301.) The City of San Jose has similar contribution limits. As discussed above, such limits were upheld by the Supreme Court in *Buckley* given government's strong interest in preventing the corrupting influence, or appearance, that large contributions are made in exchange for the candidate's support of measures the contributor favors. According to FPPC, California imposes ***no limits*** on contributions to candidate controlled committees. FPPC thus argues section 85501 is necessary to prevent candidates from circumventing the limits on contributions to themselves.

This argument is persuasive in the abstract. If it is permissible to limit contributions made directly to candidates, it should be permissible to limit contributions made to candidate-controlled committees. In either case government would have a strong interest in preventing corruption. (See, e.g., *McConnell v. FEC* (2003) 540 U.S. 93, 143-154 [if government may constitutionally limit contributions directly to a candidate, it may prevent circumvention of these limits by limiting contributions to national and state political committees].)[5] The government's interest would be just as strong where the contribution is made to a candidate-controlled committee as it would be where a contribution is made directly to a candidate.[6]

The problem is FPPC's argument focuses on the ***wrong*** contributions. Section 85501 does not limit contributions ***to*** candidate-controlled committees. Rather, it bans contributions ***from*** candidate-controlled committees. Section 85591 thus does not address the evil FPPC seeks to prevent. Candidate-controlled committees are allowed to accept unlimited contributions. The question is whether government may ban those committees from then contributing to other committees which make independent expenditures. Following *Citizens United*, the answer is no.

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[5] Reed argues the anti-circumvention rationale does not survive *Citizens United*. After *Citizens United*, the ***only*** governmental interest justifying a ban on political contributions political expenditures is preventing corruption. The *Citizens United* majority, however, never mentions anti-circumvention, which prior cases held was a form of the anti-corruption argument. (*McConnell*, *supra*, 540 U.S. at 144 ["[A]ll Members of the Court agree that circumvention is a valid theory of corruption"], quoting *FEC v. Colorado Republican Fed. Campaign Comm.* (2001) 533 U.S. 431, 456.) The court therefore assumes government may still justify some restrictions on speech to prevent circumvention of valid contribution limits. (See, e.g., *Thalheimer*, *supra*, 645 F.3d at 1125 ["there is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest"].)

[6] This scenario is the basis of the two FEC opinions cited by FPPC. In one, the FEC opined a committee controlled by a Senator could not receive unlimited contributions for financing independent expenditures, where the law limited contributions made directly to the Senator. The FEC opinion, however, looked only at whether the candidate-controlled committee could receive unlimited contributions. Here the question is not whether the Reed Committee can ***receive*** unlimited contributions. Under California law, it apparently can. The question is how the Reed Committee can ***spend*** its money on political speech.

FPPC argues section 85501's ban on contributions is a narrowly tailored way to minimize the risk of *quid pro quo* corruption.[7] It is not. The problem with FPPC's argument is the failure to identify who is offering *quid*, in exchange for whose *quo*. FPPC's rationale fails under every possible scenario.

For example, FPPC states the largest contributor to the Reed Committee was a Chamber of Commerce PAC. It contributed $64,000. Is the evil the appearance the Chamber hoped to buy Reed's support for measures the Chamber favors? If so, section 85501 leaves this evil unaddressed because it does not regulate the Chamber's contribution to the Reed Committee.[8]

Or, is the evil the appearance the Chamber contributed money hoping to buy Herrera's support? According to *Citizens United*, no. The Chamber, via the Reed Committee, contributed to a committee making independent expenditures supporting Herrera's election. Because the Herrera IE Committee is independent of Herrera, the danger the contribution was given in exchange for her support is alleviated. (See *Buckley*, *supra*, 424 U.S. at 47 ["The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."].) Moreover, because Reed controls how the Reed Committee spends its money, the Chamber would have no way of assuring its contribution would ultimately be used to support Herrera. In other words, the chain between the Chamber and Herrera is too attenuated to support an inference of *quid pro quo* corruption. (See, e.g., *Long Beach Area Chamber of Commerce*, *supra*, 603 F.3d at 696 ["the need for contribution limitations to combat corruption or the appearance thereof tends to decrease as the link between the candidate and the regulated entity becomes more attenuated."].)

Is the evil the appearance Reed himself is hoping to buy Herrera's support? This appears what FPPC is most concerned about. It worries an elected official like Reed could make a contribution to "***curry favor*** with a candidate running for election to the same public body in anticipation of an important matter being voted on by the body."

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[7] The court notes this was ***not*** a justification given to the voters when they were asked to adopt Proposition 34 in 2000, adding section 85501 to the Government Code. The voters were told the ban was necessary to stop "political sneak attacks": "In no-limits California, candidates flush with cash can swoop into other races and spend hundreds of thousands of dollars at the last minute to elect their friends. Proposition 34 stops these political sneak attacks." (Official Voter Information Guide, Nov. 7, 2000, General Election, p. 16.)

[8] It is also far from clear the Chamber's contribution to the Reed Committee gives rise to an appearance it is trying to influence ***Reed***. As the Third District Court of Appeal noted in *Citizens to Save California v. California Fair Political Practices Commission* (2006) 145 Cal.App.4th 736, contributing to a candidate-controlled committee is not equivalent to contributing to a candidate. The general appearance of contributing to a candidate-controlled committee is support for the committee's goals, not for the candidate. (*Id*. at 753.) In other words, the Chamber's contribution to the Reed Committee is an expression of support for the Reed Committee's goal of supporting fiscal reform initiatives and fiscally responsible candidates. It is not necessarily an expression of support for Reed.

(Opp. at 15:19-21 [emphasis added].) In other words, core political speech may be limited to prevent a mayor from attempting to buy the support of a city council member.

Is preventing this appearance a sufficient government interest to ***limit*** contributions from one candidate to another? Perhaps.[9] Even so, here FPPC must show a ***total ban*** on such contributions is necessary. It does not.

Again, the Reed Committee did not contribute directly to Herrera or a committee she controlled. Nor does section 85501 address contributions to candidates or their controlled committees. Instead, it prohibits contributions to committees that in turn make independent expenditures. But following *Citizens United*, independent expenditures "do not lead to, or create the appearance of, quid pro quo corruption." (*Citizens United*, *supra*, 558 U.S. at 360.) FPPC fails to explain why contributions made by a candidate-controlled committee changes the analysis.

In 1992 the Ninth Circuit struck down California's prior law ***banning*** inter-candidate transfers. (*Service Employees International Union v. Kopp* (9th Cir. 1992) 955 F.2d 1312 ("*SEIU*"). There too the government argued the ban was necessary to prevent corruption, or the appearance of corruption, by "political power brokers." (*Id*. at 1323.) The Ninth Circuit assumed, without deciding, this was an important state interest. However, the Court found the complete ban on such transfers was not closely drawn and therefore abridged First Amendment rights. The Court explained:

> The potential for corruption stems not from campaign contributions *per se* but from large campaign contributions. [Cite.] The inter-candidate transfer ban prohibits small contributions . . . as well as large contributions. We hold, therefore, that the inter-candidate transfer ban is unconstitutional because it fails the 'rigorous' test used in *Buckley*.

(*Id*.)

Section 85501 imposes a similar complete ban on contributions by candidate-controlled committees. And FPPC similarly argues a total ban is necessary to prevent corruption by political power brokers. But FPPC fails to address the Court's question in *SEIU*: Why is a total ban necessary? Is it a narrowly tailored limit addressing the asserted concern?

Moreover, it is not at all clear government has an interest in preventing one candidate from simply ***currying favor*** with another. As the Supreme Court explained in *Citizens United*, "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid*

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[9] California law currently limits a candidate or a candidate-controlled committee to contributing not more than $4,100 to another candidate. (§ 85305.)

pro quo corruption" or "dollars for political favors." (*Citizens United*, *supra*, 588 U.S. at 359.) The Court noted the anti-corruption rationale has not been extended to support the notion money can also buy "generic favoritism or influence." (*Id.*) Such an extension would "at odds with standard First Amendment analysis because it is unbounded and susceptible to no limiting principle." (*Id.*) As the Supreme Court explained:

> Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

(*Citizens United*, *supra*, 588 U.S. at 359, quoting *McConnell*, *supra*, 540 U.S. at 297.) Favoritism and influence "are not corruption." (*Citizens United*, supra, 588 U.S. at 359, 360.)

Finally, the court notes FPPC's complete lack of evidence suggesting any actual corruption caused by contributions made by candidate-controlled committees. The FPPC's administrative record does not document a single instance where contributions between candidates resulted in *quid pro quo* corruption. (See, e.g., *Colorado Republican Federal Campaign Comm. v. FEC* (1996) 518 U.S. 604, 618 [government needs at least ***some*** evidence to justify limits on political speech]; *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 644 [when government defends limitation on speech as means to prevent harms, it "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."].)

In short, the interest proffered by FPPC is not sufficient to justify section 85501's complete ban on contributions from a candidate-controlled committee to an independent expenditure committee. There is no showing section 85501 furthers a sufficiently important government interest or that it is closely drawn in addressing that interest.

CONCLUSION

The ability to communicate freely about candidates for political office and the issues in an election lies at the heart of the First Amendment's protections. Section 85501 completely prohibits candidate-controlled committees from engaging in protected political speech. It prohibits candidate-controlled committees from independent expenditures supporting or opposing candidates, or contributing to others so they may make such communications. FPPC's argues the ban is needed to prevent *quid pro quo* corruption. However, this threat is minimized because the only communications are

made independent of the candidate supported. The Supreme Court held such independent expenditures do not give rise to corruption or its appearance. Therefore, FPPC's argument is insufficient to justify section 85501's total ban on speech. Accordingly, the court finds section 85501 is unconstitutional on its face, and grants the petition for writ of mandate and related request for declaratory and injunctive relief.

The tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. In the event this tentative ruling becomes the final ruling of the court, counsel for the prevailing party is directed to prepare a formal judgment and writ, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3,670; Sac. County Superior Court Local Rule 2.04.)

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.