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VIA ELECTRONIC MAIL ONLY

Chair Miadich, Commissioners Baker, Cardenas, Wilson & Wood
ATTN: David Bainbridge, Esq.
California Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: Comment Letter on Opinion O-21-001

Dear Chair Miadich and Commissioners:

We provide this comment on behalf of the California Political Attorneys Association ("CPAA") related to the Commission's consideration of Opinion O-21-001, regarding whether contributions given before January 1, 2021 should be aggregated with contributions given after that date for the purposes of calculating contribution limits under AB 571. First, we want to thank the Chair and Commissioners for your consideration of this important matter, and to thank staff for its hard work deciphering the various legal issues at play. These open discussions are important for the Commission, the regulated community and the public at large. We certainly appreciate the opportunity to have them in this forum.

CPAA of course supports Alternative Draft Two, and – given that staff has largely incorporated the legal arguments we previously raised – we wish only to provide a brief comment regarding the final point of Alternative Draft Two in an effort to assist the Commission in its consideration of the opinion. Please note that the following comments are meant to provide contextual comment only, and that we do not believe any specific amendments are required of Alternative Draft Two. Simply put, we wish to clarify that the constitutional issues raised in Section D of Alternative Draft Two are much more than a "policy argument," and that there is a very real possibility that retroactively incorporating contributions made and received prior to 2021 will result in prohibiting individuals from engaging in constitutionally protected activity.

As the Commission noted at last month's meeting, Supervisors typically serve four-year terms. As a result, Supervisors seeking re-election in 2022 were mostly elected in 2018. Supervisors with foresight, and in counties for which AB 571 applies limits, raised money shortly after their 2018 election from their most ardent supporters. There are several relevant

situations which raise constitutional concerns as these 2022 supervisorial elections begin in earnest. (Please note that 2022 candidates have not yet pulled nomination papers, but may have opened committees as early as 2018.) For example, an individual may have given $5,000 in December 2018 or January 2019; both are moments in time before AB 571 was even introduced. If that individual contributor wished to contribute $100 today, then she would be prohibited from doing so under Alternative Draft One. Moreover, if that individual already contributed $100 – for instance to attend a campaign dinner on January 2, 2021 – after AB 571 was effective, but before the FPPC had provided advice on the subject, then she would evidently have violated the law, and would have no idea that she is currently subject to FPPC enforcement. (It is our understanding that the FPPC first provided advice on this subject on January 14, 2021.) Both of these scenarios demonstrate the constitutional problems associated with retroactively incorporating past behavior into the current application of AB 571, and the importance of following the plain language of the statute, as set forth in Section A of Alternative Draft Two – namely that Alternative Draft One prohibits constitutionally-protected activity, and does so in a way which may implicate individuals who contributed money before the FPPC provided any guidance on the matter.

Presumably referencing such issues, Draft Alternative Two includes a quote from the US Supreme Court in McCutcheon v. FEC (2014) 572 US 185. (Alternative Draft Two, page 5 ["the First Amendment requires the Court to 'err on the side of protecting political speech rather than supressing it.'"].) That quote is drawn from a discussion regarding appropriate line-drawing in the context of permissible contributions. The McCutcheon Court in that portion of the opinion is declaring that the First Amendment restricts the government's capacity to institute contribution limits – and specifically to prohibit certain contributions – unless it can demonstrate that the laws are sufficiently tailored to the "corruption interest" – namely that such contributions give rise to *quid pro quo* corruption or its appearance. (See McCutcheon at 206-210.) Specifically with respect to the quote included in Alternative Draft Two, the McCutcheon Court declared in the context of the former federal aggregate limits that a contribution given within base limits cannot be said to be corrupting based on wholly unrelated activity, such as contributions given to other candidates, and that any doubt regarding the interpretation of laws prohibiting contributions must be resolved in favor of a contributor. (McCutcheon at 209; see also, Alternative Draft Two, page 5.) The same rationale should apply here.

Certainly, as of January 1, 2021, the Legislature has determined that contributions to local officials in excess of $4,900 implicate the corruption interest. CPAA agrees with Alternative Draft Two, which states that contributions given on or after January 1, 2021 are subject to a $4,900 per election limit. However the Legislature had not made that declaration in December 2018 or January 2019. At that time, there was no law even proposed which might justify a state interest in preventing corruption or its appearance. According to AB 571's specific language the Legislature had not even made that determination as of December 2020. (Cal. Govt. Code section 85301(d)(2) ["This subdivision shall become operative on January 1, 2021."].) And so – as the McCutcheon Court determined in the case of federal aggregate limits – it would be a violation of an individual's First Amendment rights to prohibit under such a law an individual's contribution now based on wholly unrelated activity which occurred before the law was in effect – perhaps even before AB 571 was introduced.

CPAA does not argue that AB 571's limits do not apply. It simply argues that the limits do not apply to activity which occurred perhaps years before AB 571 was effective. Nor does CPAA argue that Alternative Draft One criminalizes activity which occurred prior to 2021. However Alternative Draft One does act as an outright prohibition on constitutionally protected activity based on the retroactive incorporation of prior activity, and – with respect to the second example of a $100 contribution given on January 2, 2021 – could render illegal activity which a contributor had no reason to believe might be illegal.

Thank you again for the Commission's consideration and discussion of this important matter, and for staff's efforts in presenting two strong drafts which capture the complex legal issues.

Respectfully submitted,

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