

# KAUFMAN LEGAL GROUP

A PROFESSIONAL CORPORATION

November 16, 2022

## VIA E-MAIL

Chair Miadich and Commissioners Baker,  
Gómez, Wilson, and Wood  
Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811  
CommAsst@fppc.ca.gov

**Re: Comment Letter Re: Agenda Item 10 – In Re Kendrick Opinion**

Dear Chair Miadich and Commissioners:

Our firm, along with our client the California Labor Federation (“Federation”), wishes to express our concerns regarding the FPPC staff’s proposal for implementation of SB 1439. Specifically, the Staff’s proposed retroactive application of the provisions of SB 1439 go against the Commission’s prior history of implementing the Levine Act – the same Government Code section amended by SB 1439. Moreover, the proposal renders SB 1439 an impermissible ex post facto law that can result in criminal penalties, and creates serious practical and logistical implementation problems. Staff’s memo does not sufficiently address these concerns. We, therefore, urge the Commission to reject the proposed approach and only apply the provisions of SB 1439 prospectively.

The Commission has previously faced the choice of whether to apply the provisions of the Levine Act retroactively. When initially considering the implementation of the Levine Act in 1983, the Commission chose to adopt a regulation that did not apply the provisions of Government Code Section 84308 retroactively. This was consistent with the fact that the Levine Act did not specifically provide for its provisions to be retroactive. Similarly, SB 1439 does not contain any provisions that support a retroactive application. Given the potential serious consequences and problems that will no doubt arise from retroactive application, the Commission should act in accordance with its own prior precedent on the very same subject, and have it apply only prospectively.

Further, as you are well aware, violations of the Political Reform Act can have criminal, civil and administrative consequences. As such, the potential ex post facto application of the Levine Act has the potential to cause great harm. Great care should be taken before a law is applied retroactively. Specifically, the United States Constitution, at Article I, section 10, prohibits such laws, as does the California State Constitution, at Article I, section 9. Any law that applies to

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events occurring before its enactment and which disadvantages the offender either by altering the definition of criminal conduct or increasing the punishment for the crime is prohibited as ex post facto. (*See People v. Rojas* 237 (2015) Cal.App.4th 1298.) Adoption of the Staff's recommendation opens the door to improper ex post facto application of the provisions of SB 1439, as it would create future penalties based past activities – that were legal for both donors and elected officials at the time they occurred prior to January 1, 2023.

Retroactive implementation will also create significant practical and logistical problems. First, as we already know from experience with the prior version of Section 84308, infrastructure mechanisms must be created within government entities to track and flag contributions for potential conflicts of interest. All local government entities receive innumerable applications for licenses, permits, contracts and other entitlements for use the vast majority of which are not known to public officials before they come to them for a vote. Thus, to avoid conflicts of interest, a tracking system must be put in place to identify and avoid them. Implementing this system can take time. The best policy choice for the Commission is to allow time for this to develop and avoid conflicts. Retroactive application of SB 1439 would not allow for a reasonable transition period.

Lastly, the Staff's comments in the memorandum supporting the Opinion recommendation do not fully cover the potential problems that exist regarding refunding contributions to cure any conflicts that may arise. If a candidate's committee is closed, then refunds may not be issued to contributors. Further, many local jurisdictions have rules regarding post-election fundraising that would prohibit raising additional campaign funds to allow for a contribution reimbursement to occur. Public officials, even those tracking SB 1439 through the Legislature, had no knowledge in 2022 that contributions received would create conflicts of interest until Staff's proposed *Kendrick* opinion was made public. Thus, they were unable to make informed decisions regarding acceptance of these contributions and closure of their committees.

The FPPC should reject staff's recommendation that the provisions of SB 1439 be applied retroactively. There is nothing in the legislation that requires it. Retroactive application goes against Commission precedent, public policy, and violates the Federal and State Constitutions.

We thank you for your consideration of the concerns outlined in this letter.

Sincerely,



Stephen J. Kaufman