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August 6, 2020

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Chair, Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

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Re: Proposed Rule to Prohibit Campaign Endorsements and Contributions

“If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”

- John Stuart Mill

On behalf of a substantial number of Elected District Attorneys across California, the following written comment is submitted in response to the State Bar’s hearing on whether Elected District Attorneys or candidates for District Attorney should be prohibited from seeking endorsements or financial contributions from law enforcement unions.

The undersigned is a member in good standing of the California State Bar, has practiced campaign, election and constitutional law exclusively since 1980. I have represented numerous clients in litigation involving campaign finance and redistricting matters before federal and state courts, including the California Supreme Court and the United States Supreme Court. In 2010, I served as Co-Chair of Fair Political Practices Commission Chair Dan Schnur’s Task Force on Campaign Finance Reform. I have served as a member of the American Bar Association’s Standing Committee on Election Law (2015-2018) and currently serve as the Chair of the Advisory Committee of the Standing Committee. My views reflect those of my clients and do not represent the views of the Standing Committee.

I. The Proposed Rule Is Unconstitutional

A. Campaign Endorsements and Contributions are Protected by the First Amendment.

On June 1, 2020, the proponents of this rule change sent a letter to the State Bar asking them to prohibit “elected prosecutors-or prosecutors seeking election” from accepting endorsements or contributions from police unions. They claim there is a conflict of interest or appearance one, as District Attorneys work daily with law enforcement officers. Per their statement, “[p]rosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proposed rule is patently unconstitutional and prohibited by the First Amendment. As the California Supreme Court stated in *Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946:

“Political contributions involve an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I section 2 of the California Constitution.”

In *Woodland Hills*, the court rejected the notion that elected city council members must be recused from voting on a development issue because developers had donated to the council members’ campaigns. In rejecting this claim, the Court went on to state,

“To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and association freedoms.”

Furthermore, while individual counties may, by state law or local ordinance, put campaign limits on direct contributions to candidates, there is no authority to limit what proportion of a candidate’s total contributions may be obtained from any individual, group or association. Any reliance on *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 556 U.S. 868 is misplaced. In that case, a party to a case *pending* in front of an appellate judge, donated \$3 million to the judge’s election campaign, equating to 300% more than the judge’s campaign committee had raised. The Supreme Court found that, given the disproportionately large donation, the judge should have *recused* himself. Nothing about the decision establishes that judges-or prosecutors-can be *prohibited* from accepting donations.¹

¹ The State Bar’s Committee on Professional Responsibility and Conduct posed several questions related to amount and percentage of contributions received. There is no legal authority for the government to impose a “proportionality” standard to the amount of contributions allowed.

B. The proposed rule is unconstitutional because it is content based

The proposed Rule of Professional Conduct prohibiting prosecutors from accepting political or financial support from police and “law enforcement” unions is not only violative of the First Amendment’s protection of freedom of speech through campaign expenditures, but constitutes an impermissible content-based restraint on speech as well.

The United States Supreme Court has long held that the First Amendment protects political and ideological speech, including campaign financing. *See West Virginia State Board of Education W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 642.; also, *NAACP v. Button* (1963) 371 U.S. 415, 428-429; *Citizens United v. FEC* (2010) 558 U.S. 310. As the Supreme Court stated in *Citizens United* at page 898:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *See Buckley v. Valeo* (1976) 424 U.S. 1, at 14-15, 96 S.Ct. 612 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.* (1989) 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (quoting *Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35); see *Buckley, supra*, at 14, 96 S.Ct. 612 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”). For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. 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.”

The proposed rule imposes restrictions on contributions and support from one particular group or presumed category of organizations based not on a legal conflict but on a disagreement with, and more pointedly, a disdain for, a particular philosophy. (See also Part III, *infra*, pp. 7-13.) The pretext for this proposed rule is to ensure and preserve the integrity of the legal profession and the role of the District Attorney in its oversight of police agencies. The real purpose of this proposed rule is to further an agenda designed to stifle and silence opposing viewpoints. This is antithetical to healthy political discourse.

The proposed rule is, by design, content based in its clear attempt to suppress the political speech of candidates supported by law enforcement unions. There can be little doubt that this effort is politically driven to silence and attempt to unseat District Attorneys who are supported by law enforcement.

II. Law enforcement endorsements and contributions do not create a conflict for a District Attorney.

The proponents claim that endorsements and contributions should be prohibited because there is a conflict or appearance of a conflict of interest since District Attorneys work daily with law enforcement officers. As they state, “Prosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proponents fail to delineate what they mean by “law enforcement unions.” For instance, does this proposed rule ban *all* endorsements or contributions, irrespective of whether the union represents officers from the same jurisdiction as the individual Elected District Attorney? For instance, will this proposed rule prohibit:

- The Sacramento County or San Diego County District Attorney from seeking endorsements or contributions from the Los Angeles Police Protective League?
- The San Luis Obispo County District Attorney candidate from seeking the endorsement of the Hayward Police Officers Association (POA)? What if the Hayward POA gives endorsements but does not have a PAC to give financial contributions? Is the candidate still prohibited under this proposed rule?
- The candidate for Los Angeles County District Attorney from accepting endorsements from the Alameda Deputy Sheriffs Association?
- The Fresno County District Attorney from accepting contributions from the Riverside Police Officers Association?
- Elected District Attorneys or candidates for district attorney from receiving endorsements and/or contributions from law enforcement unions that represent officers from statewide agencies and have little or nothing to do with local prosecutions?²

² For instance, the California State Law Enforcement Association (CSLEA) represents DMV, Alcohol Beverage and Control, Fish and Wildlife, Fire Marshalls, DOJ criminalists, 911 dispatchers, and Bureau of Automotive Repair.

These questions are particularly relevant since the proponents' claim of conflict arises because District Attorneys "work closely" with these officers and evaluate whether some of these officers have committed crimes. Yet, this argument fails for several reasons:

- District Attorneys are bound by their prosecutorial ethics in making charging decisions. Those decisions are based upon the facts and the law.
- District Attorneys have in fact charged police officers with crimes when the facts and law support the prosecution. Just a few examples of such crimes include³:
 - Murder
 - Los Angeles Police Officer Stephanie Lazarus convicted of murder of Sherri Rasmussen
 - San Diego Sheriff's Deputy Aaron Russell: pending murder charges for an officer-involved fatal shooting
 - Riverside Sheriff Deputy Oscar Rodriguez: pending murder charges for an officer-involved fatal shooting
 - Rape
 - Sacramento Police Officer Darrell Rosen convicted of rape committed on duty; sentenced to state prison.
 - West Sacramento Police Officer convicted of multiple counts of rape while on duty; sentenced to 205 years to life
 - Excessive Force
 - Elk Grove Police Officer currently pending felony charges for excessive force (*People v. Bryan Schmidt*)
 - Placer County: in 2018, three correctional deputies were prosecuted and convicted of excessive force
 - Los Angeles: LAPD Officer Frank Hernandez currently pending charges of felony assault under color of authority (Case No. BA487734)
 - Public Integrity
 - El Dorado Deputy Sheriffs Association President Donald Atkinson convicted of embezzling over \$400,000 from the DSA; Atkinson was sentenced to 5 years in prison
- Endorsements and contributions by law enforcement unions outside the District Attorney's jurisdiction have a First Amendment right to do so⁴
- Officer-involved use of force cases represent a tiny fraction of all cases reviewed by a District Attorney

³ These examples are just a fraction of crimes prosecuted by District Attorneys against police officers in California. If the State Bar wants more information on the number and types of cases involving police officers, I can provide that upon request.

⁴ For instance, in the 2018 Election, the Sacramento District Attorney received over 80% of her law enforcement contributions either from statewide unions or those from associations outside Sacramento County.

To further demonstrate the absurdity of the claimed “conflict” as the reason to adopt the rule are the following questions:

- Should District Attorneys be prohibited from accepting endorsements or donations from Crime Victims associations? After all, by the very nature of their jobs, “work closely” with crime victims.
- Should District Attorneys be prohibited from accepting donations from criminal defense attorneys? After all, by the very nature of their jobs, “work closely” with defense attorneys.
- Should District Attorneys be prohibited from accepting endorsements or donations from Real Estate Associations? After all, District Attorneys often investigate and prosecute real estate cases.
- Should District Attorneys be prohibited from accepting endorsements or donations from Insurance Associations? After all, District Attorneys often investigate and prosecute insurance fraud cases.

There can be little doubt that one of the underlying reasons for this proposed rule is the baseless claim that District Attorneys cannot fairly review use of force cases. However, these cases represent a miniscule number of cases reviewed each year by a District Attorney. In mid-large counties, thousands of cases are reviewed each year by a District Attorney’s Office for charging decisions. The number of use of force cases is less than 1%. For instance:

- In 2019, the Sacramento District Attorney’s Office reviewed approximately 33,000 cases for charging decisions. Of these 33,000 cases, only *six* fatal use of force cases were submitted for review. This represents .018% of all cases.
- The Riverside District Attorney’s Office reviews approximately 122,000 cases per year. In 2018, 173 of these cases involved use of force or police misconduct. This represents .014% of all cases.
- The Los Angeles District Attorney’s Office reviews approximately 65,000-70,000 felony cases per year. Of these, approximately 95-115 cases involve use of force. This represents .017% of all cases.

Even with this overly broad attempt to restrict the First Amendment right to accept endorsements and contributions, there is no authority to outright *prohibit* such constitutionally protected actions. (See, *Woodland Hills Residents Association, Inc., supra.*) In fact, in 2018, several months prior to the June elections, California Attorney General Xavier Becerra found that “the mere fact of a campaign endorsement and financial contributions to a campaign does not create a conflict of interest for a district attorney.” In his analysis, the Attorney General went on to state, “Case law makes clear that a conflict of interest stems from the district attorney’s perspective, not the public’s perception, and is rooted in the ability of a district attorney to wield discretion in a way to ensure that the defendant will receive a fair trial.” (Attorney General’s Letter attached.)

Furthermore, there are adequate protections in place to ensure the fair administration of justice and addressing either actual or perceived conflicts of interest. This includes the State Bar's Rules of Professional Conduct, the American Bar Association's Standards for Criminal Justice, and Penal Code section 1424 authorizing recusal of the District Attorney.

Finally, it cannot be understated that the Attorney General has the Constitutional authority to review any case, including decisions regarding allegations of police misconduct. It is unclear if this proposed rule would apply to the Attorney General. Whether or not it applies, the inherent authority of the Attorney General authorizes him or her to step in where there is an actual or perceived conflict. Given the Constitutional rights implicated by this proposed rule, the current safeguards are adequate to ensure impartiality in decisions being made by district attorneys.

III. The proposed rule applies only to some, not all.

Glaringly omitted from the proposed rule is any prohibition on any other organization or group posing an equally compelling conflict from providing similar contributions, endorsements or independent expenditures. Yet even more alarming is the absence of any analysis into other such organizations and their contributions and expenditures. Logic dictates and fairness demands that *any* group or organization with such a perceived conflict significant enough to warrant a prescription on contributions, independent expenditures and endorsements would be faithfully vetted and critically examined. The conspicuous absence of any such analysis provides clarity into the true motivation behind this proposed solution.

Engaging in a holistic and comprehensive examination of potential conflicts makes it readily apparent that there are a number of organizations whose contributions to and endorsements of the campaigns of District Attorney candidates would rise to the same level of conflict as with police unions that warrant this drastic proposal.

This effort to suppress the First Amendment rights of candidates supported by law enforcement unions is evidenced by the fact that the proponents are supported by individuals and organizations that promote anti-law enforcement agendas. No such attempt to limit contributions from groups who support the proponents demonstrates the glaring hypocrisy of this proposal.

Moreover, a one-sided ban on the contributions on one side also runs up against two issues: (1) violation of equal protection of the laws under the First and Fourteenth Amendments, which is related to but somewhat different than the prohibition on content-based regulation of speech (*Buckley v Valeo, supra*, 424 U.S. at 48-49; *McConnell v FEC*, (2003) 540 U.S. 93, 227, and *Davis v. FEC* (2008) 554 US 724, 741-742) ["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."]), and (2) ignores the constitutional prohibition against limitations on independent expenditures by the very organizations the proposed rule purports to prohibit. (*Citizens United, supra*; and *Long Beach Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).)

A review of the proponents' financial supporters, advocates and own endorsers reveals they are on the "political payroll" of those who support these agendas. These agendas include the prosecution of police officers irrespective of the facts or law.

Examples of these agenda driven groups include:

- George Soros and his network of foundations that he financially supports, including:
 - Open Society Foundations
 - California Justice and Public Safety PAC
 - Tides Foundation
 - Fair and Just Prosecution
 - Color of Change
 - ACLU (\$50 million in grants awarded in 2014)
 - The Justice Collaborative
- Shaun King, Real Justice PAC/Black Lives Matter

In the recent 2018 election cycle, Soros and his network of foundations and supporters poured nearly \$3 million into California candidates who support his platforms. These include races in San Diego, Sacramento, and Alameda counties.

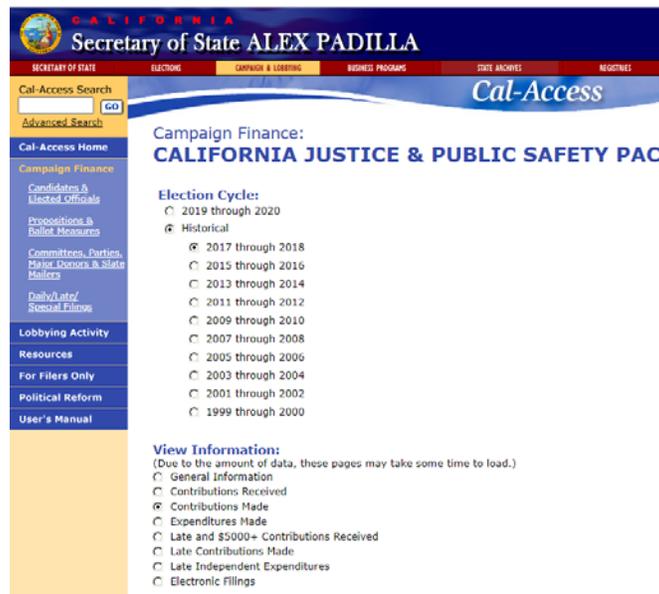
Similarly, Shaun King's Real Justice PAC has poured large amounts of money into candidates who support his progressive agendas. This organization actively recruits and endorses progressive candidates to defeat sitting District Attorneys who do not share his agendas. (<https://realjusticepac.org/>) It is also well-known that Shaun King, who has a social media following of millions of people, has made false accusations against police officers. In fact, in 2018 he falsely accused a Texas Trooper of kidnapping and rape on his various social media platforms. His twitter post, including naming the trooper, was as follows:



These accusations were later proven false by bodycam videos and a confession by the woman who made the false allegation.

The candidates endorsed and supported by these groups often made campaign promises to “prosecute killer” cops,⁵ and often citing cases that had been found justified by the sitting District Attorney.⁶

A brief review of the Secretary of State’s campaign finance reports demonstrates the volume of money funneled into these races by Soros funded super PACs:



⁵ Examples of campaign mailers include:



⁶ Many District Attorney’s Offices post the police use of force reports online detailing the facts and legal analysis of each incident. Often, anti-law enforcement groups demand that police officers be prosecuted for murder. In these demands, these groups often make false claims about the true facts of these incidents.

Who did the committee give contributions to, and how much?					
DOWNLOAD THESE RESULTS: MICROSOFT EXCEL					
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
05/29/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$218,215.44
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$209,055.00
05/08/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/11/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/03/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$194,884.00
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$124,035.79
05/19/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$121,250.00
05/23/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,968.05
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$111,781.00
05/29/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,781.00
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$108,963.30
05/08/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$101,475.00
05/04/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$101,377.12
05/03/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$77,648.48
05/14/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$75,676.22
05/21/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$73,424.11
05/01/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$66,196.84
05/07/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$65,163.69
05/30/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$64,931.95
05/20/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$64,035.53

<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1402586&view=contributions&session=2017>

For instance, in San Diego county, Soros funneled \$2 million in his effort to unseat District Attorney Summer Stephan. The shocking amounts donated include the following: Outside of California, Soros has poured many more millions into “Soros-minded” candidates. This includes over \$1,000,000 to Philadelphia District Attorney Larry Krasner. Prior to being elected, Krasner was a criminal defense attorney with a reputation for having suing police officers 75 times. (<https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html>)

Several articles document the amount of money being funneled to these candidates, either directly or indirectly, as well as who is supporting them.

- <http://contracostaherald.com/05271801cch/>
- <https://www.politico.com/states/california/story/2019/11/07/california-da-race-a-major-test-for-criminal-justice-reform-movement-1226372>
- <https://apnews.com/0aa7d76876c24be7a8a9d4cab737342b/Big-money-Soros-contributions-change-prosecutor-campaigns>

Furthermore, a brief review of the Secretary of State’s campaign finance reports demonstrates the volume of money funneled into these races by Shaun King’s Real Justice PAC:

Secretary of State ALEX PADILLA

SECRETARY OF STATE ELECTIONS CAMPAIGN & LITIGATION BUSINESS PROGRAMS STATE ARCHIVES REGISTRIES

Cal-Access Search GO

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Campaign Finance

Candidates & Elected Officials

Propositions & Ballot Measures

Committees, Parties, Major Donors & State Mailers

Daily/late/ Special Filings

Lobbying Activity

Resources

For Filers Only

Political Reform

User's Manual

Campaign Finance:
REAL JUSTICE PAC (FED PAC ID #C00632554)

Election Cycle:
 2019 through 2020
 Historical

View Information:
 (Due to the amount of data, these pages may take some time to load.)
 General Information
 Contributions Received
 Contributions Made
 Expenditures Made
 Late and \$5000+ Contributions Received
 Late Contributions Made
 Late Independent Expenditures
 Electronic Filings

Who did the committee give contributions to, and how much?

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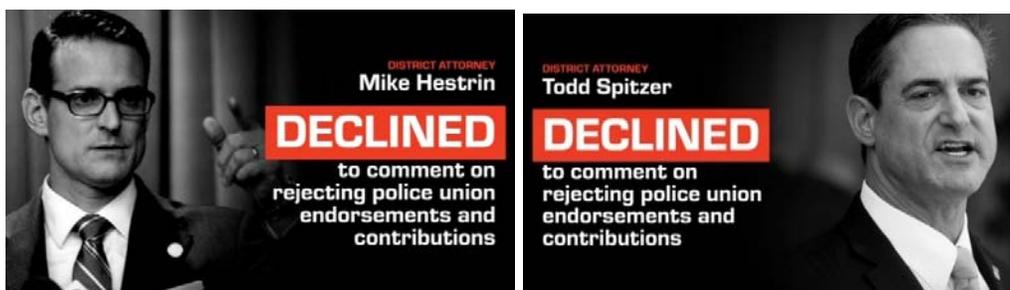
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
02/03/2020	RUN, GEORGE, RUN: GEORGE GASCON FOR LA DA 2020		SUPPORT	MONETARY	\$250,000.00
02/19/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$35,000.00
02/13/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$13,375.00
12/09/2019	GASCON, GEORGE	OTHER	SUPPORT	MONETARY	\$4,666.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/25/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/15/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
04/29/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
06/08/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
03/10/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$3,333.00
01/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,632.72
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,532.44
03/02/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,263.90
05/29/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,150.46
03/18/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,754.40
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,633.48
06/30/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,302.14
02/12/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,272.48
03/05/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,114.78
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$750.00
06/29/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$600.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$577.32
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$560.40
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$511.29
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$491.87
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$231.04
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$209.14
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$144.72
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$142.69
03/19/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$74.84
02/28/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$58.33
02/28/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$58.33
06/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$58.28
02/12/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$50.00
02/12/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$50.00
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$32.34
03/03/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$29.25
03/03/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$29.25
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$22.62
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$15.44
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$5.56

<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1404289&view=contributions>

To further demonstrate the viewpoint driven effort underway in this proposed rule is the fact that within just weeks of the proponents' June 1, 2020 letter, the Soros funded Justice Collaborative emailed Elected District Attorneys across California, demanding they "reject police union contributions and endorsements" and aggressively threatening: "**We will be publishing whether you respond "yes," "no," or "declined to answer" by Tuesday, July 7th.**"

This email was followed a week later with a threat to publish non-compliance: "When [The Appeal](#) publishes the final list of responses, they will use the attached graphic."





Perhaps most ironic is the Justice Collaborative’s statement in their email, “Campaign endorsements and contributions send a message to constituents. They tell voters that a candidate aligns with the values and interests of the donor.”

The irony is that this very email demonstrates the core values of the First Amendment and the fundamental protection of political and ideological speech. As poignantly stated in *Citizens United*, “speech is the essential mechanism of democracy” ... and “For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.”

Revealing all these viewpoint driven candidates begs the obvious question: Should these candidates and Elected District Attorneys be prohibited from accepting endorsements and contributions from these groups, or let alone any other group that “aligns with the values and interests” of the candidate? As divided the values may be among the candidates, the answer to the obvious question is clear: The First Amendment wins.

IV. Conclusion

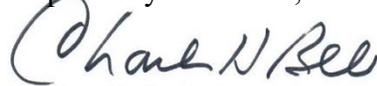
It is as logically incongruous as it is intellectually disingenuous to assert that law enforcement contributions and endorsements to a District Attorney candidate create an intolerable conflict yet a contribution by an organization requiring a District Attorney candidate to decide to prosecute or not to prosecute a case in conformity with its stated beliefs and mission does not.

The proponents ignore the natural and logical extension of the purpose of the very rule they suggest. If this particular perceived conflict is so egregious as to warrant this proposed remedy, *all* contributions from any organization presenting a perceived conflict should also be prohibited. Moreover, the prohibition on contributions should be extended to *any* lawyer seeking to hold an elected office in order to preserve the integrity of the profession.

Fundamental to our democracy is the notion that the government cannot regulate speech based on its content or viewpoint. Content-based restrictions on speech are presumptively invalid and the United States Supreme Court and the California Supreme Court have held that campaign donations are protected political speech and that a donation in and of itself does not give rise to a conflict of interest. Likewise, California’s Attorney General reached the same conclusion in 2018.

The proponents' proposed rule is unconstitutional, content driven and politically motivated to silence District Attorneys and candidates who are supported by law enforcement. It is a flawed attempt to stifle opposing viewpoints and chill political discourse. There is no conflict of interest that would authorize a *prohibition* on endorsements and contributions. This proposed rule violates the fundamental principles of democracy and should be wholly rejected.

Respectfully submitted,

A handwritten signature in black ink that reads "Charles H. Bell". The signature is written in a cursive style with a large initial "C".

Charles H. Bell, Jr.

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



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RECEIVED

MAR 05 2018

ANNE MARIE SCHUBERT
District Attorney

February 28, 2018

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
901 G Street
Sacramento, CA 95814

RE: Conflict of Interest Analysis – Campaign Contributions

Dear Mr. Blazina:

In your letter, dated February 5, 2018, you asked whether campaign endorsements and contributions from an individual or an organization present a conflict that bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant. Your questions focused on an officer-involved-shooting case in which an officer being prosecuted was a member of a labor union that had endorsed and financially contributed to the district attorney's campaign. The short answer to these questions is that there is no conflict.

Under Penal Code section 1424, recusal of a district attorney's office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if the district attorney's office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*)).

Published cases in which a disabling conflict has been found are few and generally fall into the following three categories: an employee of the district attorney's office is a crime victim (see *People v. Conner* (1983) 34 Cal.3d 141, *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277; *People v. Jenan* (2006) 140 Cal.App.4th 782); the district attorney represented the defendant previously (*People v. Lepe* (1985) 164 Cal.App.3d 685); or the district attorney's

office received money for investigative costs from a victim (see *People v. Eubanks* (1996) 14 Cal.4th 580). As stated in *Parmar*, "...*Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar, supra*, 86 Cal.App.4th at p. 795.)

In many instances, cases with conflicts of interest can be handled by a district attorney's office after an ethical wall has been established around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) That focus on fair adjudication of a case is borne out by the fact that failure to recuse a district attorney's office can be harmless on appeal when the district attorney's office "did not infringe upon defendants' state or federal rights to due process of law." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66.) An ethical wall ensures that a defendant receives a fair trial.

The few published cases ordering recusal, as well as courts' acceptance of ethical walls in lieu of recusal, demonstrate that recusal is a disfavored remedy that appellate courts have cautioned should be exercised with "particular caution." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 821-822.) The policy reasons for this position were set out in *Lopez*:

'when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.'

(*Id.*, at p. 822, quoting *Younger v. Superior Court* (1978) 86 Cal.App.3d 180.)

As to whether political contributions create a conflict of interest, it was claimed in another case that city council members should have been disqualified from voting on a subdivision map because developers had donated to the council members' campaigns. The Supreme Court stated, "Political contribution involves an exercise of fundamental freedom

protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946.) “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” (*Ibid.*) The Court further found that law governing disclosure of campaign contributions “provides for disclosure of campaign contributions by recipients of contributions rather than disqualification of recipients from acting in matters in which the contributor is interested.” (*Ibid.*)

While the act precludes an elected official from participating in a decision in which he has ‘a financial interest’ (Gov. Code, § 87100), it expressly excludes from definition of ‘financial interest’ the receipt of campaign contributions. (Gov. Code, §§ 87103, subd. (c), 82030, subd. (b). Thus, the Political Reform Act -- dealing comprehensively with problems of campaign contribution and conflict of interest -- does not prevent a city council member from acting upon a matter involving the contributor.

(*Id.*, at pp. 946-947; see also *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 129 S.Ct. 2252, 2263 [“exceptional case” where campaign contributions required recusal of a judge]. Disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 FN 12.)

Accordingly, the mere fact of campaign endorsements and financial contributions to a campaign does not create a conflict of interest for a district attorney. Case law makes clear that a conflict of interest stems from the district attorney’s perspective, not the public’s perception, and is rooted in the ability of a district attorney to wield discretion in a way to ensure that the defendant will receive a fair trial. The factual hypotheticals posed in your letter do not suggest that the District Attorney could not be fair to defendants who had either individually, or as part of an organization, endorsed or contributed financially to the District Attorney’s re-election campaign.

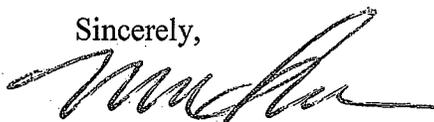
Your final question is, even if there was no legal conflict disabling the district attorney, would the Attorney General’s Office conduct a review of an officer-involved shooting simply to avoid an appearance of conflict? Sound policy counsels otherwise. The primary duty for enforcement of law in a particular county rests with the local district attorney, who is elected by the citizens of that county. Significant good cause is called for to warrant departure from the standard of Penal Code section 1424.

Additionally, the Attorney General’s unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously.

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
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Thank you for your letter. And, of course, you are always welcome to call me if you have questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Farrell', written in a cursive style.

MICHAEL P. FARRELL
Senior Assistant Attorney General

For XAVIER BECERRA
Attorney General