

**NATIONAL ASSOCIATION FOR EQUAL JUSTICE IN AMERICA  
(NAEJA)**



April 8, 2016



*California State Senate*

**Honorable Ben Allen**

**Chair, Elections and Constitutional Amendments Committee**

State Capitol, Room 2203

Sacramento, California 95814

OFFICERS

Royce Esters  
President (CEO)

Sylvia Penman  
Secretary

Frank Millholland  
Chief Financial Officer

**RE: Discussion in opposition to SB 816 (Hill)**

Dear Chair Ben Allen,

SB 816 (Hill) discriminates against small contributors. These are generally people of color, low-to-middle income taxpayers, or women with limited funds and public access to the political process. Contribution limits in this measure would be the lowest in the nation. Restrictions placed on small contributors are so onerous they impede the ability of small contributors to participate in the political process, as well as the Board of Equalization's administrative hearing process, without risk of violating this law and with greater complication than other similarly positioned contributors.

Accordingly, we find that this measure has three major constitutional, fairness, and equity flaws:

1. *The bill violates the Constitution.* In *Randall v. Sorrell, 548 U.S. 230 (2006)*, the Supreme Court found that Vermont's limits on contributions were so restrictive as to violate the First Amendment. The Court held that the contribution limits in the Vermont law were lower than those upheld in *Buckley v. Valeo, 424 U.S.1 (1976)* or in any other Supreme Court decision, that they were the lowest in the country, and that they were not indexed to keep pace with inflation. SB 816 is a far more egregious violation of political free speech, in that it reduces the contribution limit to one cent from the current Kopp Act restriction of \$249 – already the lowest contribution limit in the nation for statewide elected officials – without valid cause. This is also a direct violation of the equal protection to which every citizen and elected official is entitled.

2. *The bill violates the Equal Protection Clause.* The bill will effectively establish a formidable fundraising barrier for any individual entering into a campaign for a Board of Equalization seat without a pre-established network of donors, thereby further burdening any candidate who is not already an office holder. In the Supreme Court case of *Davis v. Federal Election Commission, 554 U.S. 724 (2008)*, Justice Samuel Alito noted that the court had never upheld the constitutionality of a law imposing different contribution limits for candidates competing against one another.

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Chair, Senator Ben Allen  
Page 2 of 4  
April 8, 2016

Accordingly, SB 816 violates due process, equal protection, and political free speech in that it fails to place the same contribution restrictions on all candidates and contributors, e.g., for judgeships or Senate and Assembly seats – even those who may later transfer those funds to a campaign committee for a Board of Equalization seat.

Under the [Civil Rights Act of 1866](#), SB 816 violates the “due process” clause and equal protection provisions of the Fifth and the Fourteenth Amendments, which guarantee equal rights to all citizens, and that no class should be singled out. SB 816 does not treat all California elected officials or the citizens who contribute to them equally, but singles out BOE members and their contributors only, with no justification or compelling reasons.

3. *The bill again violates the Constitution.* The bill unreasonably burdens contributors and Board members and proposes to implement a law that impedes the rights of citizens to participate in the political process. This violates the equal protection clause of the U.S. Constitution by assuming contributions to members of the Board and the State Controller influence their votes, while much larger contributions to legislators (who have been periodically accused of violating a variety of laws) are left unregulated, as though there is no influence of legislators’ votes.

In support of this action, the measure erroneously presumes that the adjudication duties of the members of the Board of Equalization are not significantly different from that of judges. However, in accordance with Government Code sections 15609-15609.5, the decisions of the BOE do not have the finality of a court or other adjudicatory agency, as the BOE is an “administrative” adjudicatory body, exempt from the Administrative Procedures Act, whose decisions are subject to a de novo appeal by a taxpayer to any California superior court. The decisions of judges, legislators, other constitutional officers, and many commissioners are far more precedential and impactful than those of the BOE. Yet, even judges have a relatively relaxed contribution cap and are allowed to accept up to \$1,500 from any party or lawyer in a proceeding that is before the court, in contrast to the provisions of this bill.

The other erroneous assumption behind this measure is a recycled news story carrying a false perception by one BNA reporter that members of the Board are able to aggregate contributions of \$249 and avoid the conflict of interest provisions in the Quentin L. Kopp Act, which assumption is legally and factually wrong. As advised by the Fair Political Practices Commission, the current Quentin Kopp Act requires all contributions to a Board member from a party or participant and his/her agent to be aggregated in order to determine whether the total contribution is \$250 or more within one year of the case being heard. As such, the rationales behind this measure are false.

Chair, Senator Ben Allen  
Page 3 of 4  
April 8, 2016

In *McCutcheon v. Federal Election Commission* 134 S. Ct. 1434 (2014), the Supreme Court found public interest must be more than the mere perception of political corruption. Even in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Court found that any “perception” must be factually supported, and was evidenced there by (1) scientific opinion polls measuring public perception of corruption, and (2) by forty years of survey data of public attitudes toward corruption in government.

In addition, per *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court reversed McConnell, stating, “This Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” Justice Kennedy wrote in the majority opinion, “That speakers [contributors] may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.” Justice Kennedy stated that they were not persuaded by the rationale for distinguishing between the wealth of individuals and corporations; nor were they sympathetic to the anti-corruption argument.

*Herein is a summary of the key questions asked in the Senate Governmental Organization Committee hearing for SB 816 held on March 30, 2016, and the factual responses.*

Would this bill increase the possibility that taxpayers may try to “game the system”?

The author presumes that Board members can just return the contributions. Throughout the years however, taxpayers and their representatives have occasionally sought to conflict members out at the \$249 level, resulting in the use of a common term known as “Kopping Out” for such activity. Members also may possibly use this “Kopping Out” strategy to disqualify themselves and avoid making difficult decisions. By setting the contribution cap at “any amount,” it will be extremely easy to game the system and accomplish these objectives. A simple cup of coffee, a nominal donation, and other in-kind contributions which are difficult to return would easily increase the disqualification and resultant non-participation of Board members in controversial cases and potentially disrupt the administrative adjudicatory process. .

What would be involved in administering the provisions of this bill?

The author responded, “Any cost to administer would likely be insignificant,” since it only applies to adjudicatory matters before the Board. In reality, this measure increases by 100-fold the number of taxpayers who would be required to have their contributions reported, and that the BOE will need to track and disclose. A contribution cap of “any amount” – even one cent or a minimal in-kind contribution from all parties, participants, or their agents –

Chair, Senator Ben Allen  
Page 4 of 4  
April 8, 2016

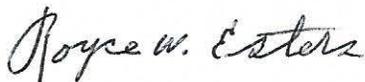
is in contrast to BOE's current workload of managing contributions of \$250 or more. Since the Board oversees the tax disputes of almost all individual taxpayers and businesses, this bill creates a whole new class of contributors – in effect, everyone who contributes even the smallest amount to a member of the Board – and thereby requires the implementation of a significantly expanded reporting, filing, and disclosure system. In addition, there will be programming costs related to the creation of an on-line, fillable contribution disclosure form for ease of compliance, and tracking and updating the BOE's website with contributions disclosed before any potential adjudicatory proceeding.

Will this measure establish a “public policy precedent” that contributions of any amount influence the votes of legislators and other elected officials?

The author said no. However, advocates for this measure, such as Common Cause and retired Judge Quentin Kopp, are clear on their goals. Judge Kopp stated unequivocally and affirmatively: “I won't use the word corrupt, but I will use the word venal. Too often votes are cast for purposes which don't involve the merits or demerits of the bill. And contributions influence votes, there's no question about it.” See [Common Cause: Gifts, Influence, and Power](#), summarizing a study by that organization that supports this quote.

We agree with the courts and other studies that campaign contributions do not necessarily influence the votes of elected officials, and the perception or appearance of influence does not make it so. Study after study support that most elected officials, including members of the BOE, base their votes on their party line, the law, the facts, and their personal value system. However, if the sponsor and author of SB 816 (Hill) are correct regarding their rationale for establishing this public policy – that contributions influence the vote of elected officials – then in order to assure equal protection, freedom of speech, and due process equally to all citizens, this measure should not only regulate the members of the Board of Equalization and State Controller, but should be amended to include judges, commissioners, all constitutional officers, and the legislature.

Sincerely,



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President/CEO  
National Association for Equal Justice In America

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