Nos. 10-55322, 10-55324, 10-55434

United States Court of Appeals for the Ninth Circuit

Phil Thalheimer; Associated Builders & Contractors PAC Sponsored by Associated Builders & Contractors, Inc. San Diego Chapter; Lincoln Club of San Diego County; Republican Party of San Diego; and **John Nienstedt, Sr.,**

Appellees / Cross Appellants

v.

City of San Diego,

Appellant / Cross Appellee

Appeal from the U.S. District Court, Southern District of California
The Honorable Irma E. Gonzalez
Case No. 3:09-cv-2862-IEG-WMC

Appellees' / Cross Appellants' Petition for Rehearing En Banc

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Federal Rules of Appellate Procedure Rule 35(B) Statement

Appellees/Cross-Appellants ("Appellees") seek en banc rehearing and reversal of Part III.A.2 of the Panel Decision,[1] which upheld the ban on contributions to candidates more than 12 months before the primary (the "temporal contribution ban"), and also Part III.A.3.a, which upheld the ban on contributions by non-individuals at any time (the "entity contribution ban").

The decision to uphold the temporal contribution ban conflicts with the Supreme Court's rule that political speech bans are not permissible. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Randall v. Sorrell*, 548 U.S. 230 (2006). It also conflicts with the Supreme Court and Ninth Circuit rule that Government must demonstrate its interest in its law. *Citizens United*, 130 S. Ct. 876; *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2006) ("*WRTL II*"); *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647 (9th Cir. 2007); *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003); *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir.2000).

The entity contribution ban decision likewise conflicts with Supreme Court precedent that political speech bans are not permissible. *Citizens*, 130 S. Ct. 876;

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[1] *Thalheimer v. City of San Diego*, Nos. 10-55322, 10-55324, 10-55434, __F.3d.__, slip op. (9th Cir. June 9, 2011). Circuit Judge Wardlaw wrote the Panel Decision. Circuit Judge Fletcher and Senior District Judge Timlin, sitting by designation, joined the Decision.

Randall, 548 U.S. 230. It also conflicts with the Supreme Court's rule that speech restrictions may not be based on speakers' identities. *Citizens*, 130 S. Ct. 876; *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Who may engage in political speech and association by making contributions, and when they may do so, implicates core protections of the First Amendment and so are questions of exceptional importance. Consideration by the full Court is necessary to answer these questions, to secure uniformity of the Ninth Circuit's decisions, and to resolve the conflict the Panel Decision created with the Supreme Court.

Argument

I. The Panel Decision Upholding the Temporal Contribution Ban Conflicts with Both Supreme Court and Ninth Circuit Precedent.

A. The Panel Decision Conflicts With The Supreme Court's Rule That Political Speech Bans Are Impermissible Under Any Level of Scrutiny.

Contributions are political speech. *See, e.g.*, *Randall*, 548 U.S. at 246 (contribution limits implicate the freedoms of political expression and association); *Buckley*, 424 U.S. at 14-15 (1976) (same); *see also Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) (contributions are "a very significant form of political expression"). The Court has sometimes referred to contributions as "symbolic" speech and "general expression[s] of support." *Buckley*, 424 U.S. at 21. And it has explained that contributions "lie closer to the edges than to the core of political expression." *FEC v. Beaumont*, 539 U.S. 146, 149 (2003). But the Court has

always recognized that contributions have expressive as well as associational value.

Citizens United ruled that bans on political speech are subject to strict scrutiny, 130 S. Ct. at 898, which they must fail, *id*. at 911. Under *Citizens United*'s holding, the temporal contribution ban—which bans the political speech arising from contributions—is subject to strict scrutiny and unconstitutional. *See id*. at 898 ("[l]aws that burden political speech are subject to strict scrutiny"); *id*. at 911 ("[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy"); *id*. ("bans on speech . . . are asymmetrical to preventing quid pro quo corruption"). The Panel was wrong to conclude otherwise.

The Panel rejected the Appellees' argument that strict scrutiny applied to the temporal contribution ban, citing *Beaumont*, 539 U.S. 146, for the proposition that it is subject to the "closely drawn" scrutiny traditionally used to evaluate contribution limits. *Thalheimer*, slip op. at 30 n.4.[2] Even if that were so, the ban would still fail scrutiny because bans are "asymmetrical to preventing quid pro quo corruption," *Citizens United*, 130 S. Ct. at 911, which is the only constitutionally cognizable

[2]The Supreme Court has ruled that contribution *limits* may be constitutional if they are "closely drawn" to a "sufficiently important interest." *See, e.g.*, *Buckley*, 424 U.S. at 25. Limits impose only "marginal restriction[s] upon the contributor's ability to engage in free communication[,]" *id*. at 20, and still "permit the symbolic expression of support evidenced by a contribution[,]" *id*. at 21. But bans do not permit even symbolic expression or association. Appellees assert that contribution bans are therefore severe burdens on political speech and so should be subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898.

interest in restricting political speech, *id*. at 901 and 909. The temporal contribution ban cannot be "closely drawn" to the City's "sufficiently important interest" in preventing corruption any more than it can be "narrowly tailored" to the City's "compelling interest." Its asymmetry to the anticorruption interest prevents it from being properly tailored no matter the level of scrutiny.

The *Randall* Court foreshadowed *Citizens United*'s ruling when, applying closely drawn scrutiny, it held that as contribution limits approach zero they become "too low and too strict to survive First Amendment scrutiny." 548 U.S. at 248 and 262. At issue in *Randall* was the constitutionality of contribution limits ranging from $200 to $400. *Id*. at 238. The Court held that such extremely low limits are unconstitutional because they "burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance." *Id*. at 262. If severely low contribution *limits* are impermissible, *id*., contribution *bans* are also.

The Panel did not rely on *Citizens United* or *Randall*. Instead, it followed Fourth and Sixth Circuit decisions upholding temporal speech bans. *Thalheimer,* slip op. at 27-29. But those decisions were prior to *Randall* and *Citizens United*. The Panel should have followed the Supreme Court's rulings on contribution limits and political speech bans. En Banc review and reversal is necessary to bring the Ninth Circuit into conformity with the Supreme Court's rule that political speech bans are unconstitutional.

B. The Panel Decision Conflicts with the Supreme Court's and Ninth Circuit's Rule That Government Must Prove Its Interest in Its Law.

Because the Panel did not require the City to offer proof that the temporal contribution ban was needed, the Panel Decision creates conflict with the many Ninth Circuit and Supreme Court decisions requiring Government to *prove* its interest in laws that burden First Amendment rights.

In the Ninth Circuit, "the party seeking to restrict protected speech has the burden of justifying that restriction." *Lim*, 217 F.3d at 1054 (9th Cir.2000). *See also Citizens for Clean Gov't*, 474 F.3d at 653 (it is reversible error for a district court to find an anticorruption interest where the government has not presented evidence of such); *Jacobus*, 338 F.3d at 1109 (contribution limits may be sustained only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."). The Supreme Court likewise requires that Government put forward evidence proving its interest in restricting speech and association rights. For instance, *Citizens United* ruled that Government must "prove" its political speech restrictions satisfy scrutiny. 130 S. Ct. at 898. *WRTL-II* ruled the same. 551 U.S. at 464. Similarly, *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377 (2000), ruled that contribution limits may only be sustained "if the Government demonstrated" they satisfied scrutiny. *Id*. at 387-88. *Buckley* ruled the same. 424 U.S. at 25. So the City must prove that its speech-burdening law

satisfies scrutiny in order for it to be constitutional.

The City has a $500 contribution limit to curb quid pro quo corruption, which is not before this Court. *Id*. at 7. In *California Pro-life Council v. Scully*, 989 F.Supp. 1282, 1296 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999), the Ninth Circuit affirmed a district court's ruling that when Government manifests its judgment that its regular contribution limit curbs corruption, a more restrictive limit is not closely drawn to the anticorruption interest and so fails scrutiny. *Id*. at 1296. Here, the City manifested its judgment that contributions up to $500 do not corrupt. Its more restrictive, temporal contribution ban cannot be closely drawn unless the City offers evidence that contributions made more than a year before the primary are so very corrupting that its $500 contribution limit cannot curb the corruption they cause.

But the City offered *no* evidence that early contributions are especially corrupting, which the Panel acknowledged. *Thalheimer*, slip op. at 29 n.3. Instead, the City relied on its unsupported opinion that "off-year contributions are more likely linked to business the donor has before the city, thus creating the appearance of quid pro quo 'corruption by the sale of influence.'" *Thalheimer*, slip op. at 23.[3] But

[3]"[C]orruption by the sale of influence" is not a valid interest for political speech limits. *Citizens United* ruled the only interest in restricting political speech is the interest in curbing quid pro quo corruption associated with *large* contributions. 130 S. Ct. at 901, 909. The Court rejected all other interests, *id*. at 903-12, including any interest in preventing influence, *id*. at 910. To the extent the Panel relied on a theory of influence to uphold the temporal contribution ban, it erred and is in conflict with *Citizens United*.

unsupported opinions and "hypothetical situations not derived from any record evidence or governmental findings"are not sufficient to undergird laws depriving citizens of First Amendment rights. *Citizens for Clean Gov't*, 474 F.3d at 653-54. Without evidence that the temporal contribution ban is needed, Ninth Circuit and Supreme Court precedent required the Panel to find it unconstitutional.

Instead, the Panel accepted the City's unsupported assertion that contributions more than a year before the primary are likely to be given for quid pro quo purposes. But there are many reasons contributors and candidates might prefer early contributions. For instance, contributors might want to associate early with their preferred candidates to let other San Diegans know which candidates they support, thereby generating early excitement for their candidates. They also may want to make early contributions to help their candidates raise seed money or establish early name recognition.[4] This is especially important for challenger candidates who run against established incumbents. Candidates may also want to solicit contributions early in order to determine whether they will be able to raise the needed funds to mount an effective campaign.

The Panel, however, accepted the City's unsupported assertion that early

[4]The Panel Decision noted that "Emily's List" takes its name from the aphorism that "Early Money Is Like Yeast" because it "makes the dough rise." *Thalheimer*, slip op. at 23-24. Making early contributions to help one's preferred candidate "rise" to the top, however, is not evidence of corruption.

contributions are especially corrupting. *Thalheimer*, slip op. at 24. It did not require the City to prove its interest in the law because, the Panel said, *Citizens for Clean Gov't* does not control. *Id*.[5] The Panel suggested Government had to prove its interest in *Citizens* only because it was an appeal of a final decision, not a preliminary injunction. *Id*. But elsewhere the Panel recognized that "the burden of proof at the preliminary injunction phase tracks the burden of proof at trial." *Id*. at 10 (*citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). The Panel properly ruled that "in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer*, slip op. at 11. So it cannot be that the City must meet a burden for final adjudication but not for preliminary injunction. The Government bears the burden of proving political speech restrictions satisfy scrutiny at each stage of the litigation. The Panel was wrong to suggest otherwise.

The Panel also tried to help the City meet its burden, writing that its "own case law contains a vivid illustration of corruption in San Diego municipal government involving campaign contributions timed to coincide with the donors' particular

[5]The Panel Decision did not address the other Ninth Circuit decisions the Appellees cited for the proposition that Government must prove its interest in its law.

business before the city council." *Id*. In support, the Panel cited *U.S. v. Inzunza*, 638 F.3d 1006 (9th Cir. 2011), which affirmed the conviction of a former San Diego City Council member on charges stemming from a bribery scandal. *Thalheimer*, slip op. at 29 n.3. But *Inzunza* does not prove a special corruption problem caused by early contributions. It is not even clear from *Inzunza* that any of the bribes were made more than a year before the primary. Some, though, were made close to the general election itself. *See Inzunza*, 638 F.3d at 1010-11 (noting that some of the bribes were made in February 2002, and the candidate won the November 2002 election).

All *Inzunza* demonstrates is that some may try to use contributions for quid pro quos. It does not show that early contributions are more likely to be quid pro quo attempts, which is what the City needed to prove to justify its law. Because the City already limits contributions to $500 to curb corruption, and offered no proof that early contributions are especially corrupting so that the additional, more restrictive temporal contribution ban is necessary, the Panel should have found the temporal contribution ban likely unconstitutional under the rule of *Lim*, *Citizens for Clean Gov't*, *Jacobus* and *California Pro-life Council*.

The Panel's acceptance of the City's unsupported, unwarranted opinion that early contributions are especially corrupting conflicts with the Supreme Court and Ninth Circuit rule that Government must prove its interest in its law. Similarly, the Panel Decision's choice to uphold the temporal contribution ban conflicts with the

Supreme Court's rule that political speech bans are unconstitutional under any level of scrutiny. This Court should grant the Appellees' Petition for En Banc Rehearing to address this conflict and settle the confusion in the law it creates.

II. The Panel Decision Upholding the Entity Contribution Ban Conflicts with Supreme Court Precedent.

A. The Panel Decision Conflicts with the Supreme Court's Rule That Political Speech Bans Are Impermissible Under Any Level of Scrutiny.

The Panel Decision upholding the entity contribution ban conflicts with the Supreme Court's rule that bans on political speech are impermissible under any level of scrutiny. *See infra* at Part I.A. The First Amendment tolerates properly tailored contribution *limits* precisely because limits impose only "marginal restriction[s] upon the contributor's ability to engage in free communication[,]" *Buckley*, 424 U.S. at 20, while still "permit[ing] the symbolic expression of support evidenced by a contribution[,]" *id*. at 21. Limits also allow contributors to associate with candidates by means of making contributions. *Id*. at 22. But bans eliminate all political speech and association occurring with contributions. Such bans are impermissible under any level of scrutiny. *Citizens United*, 130 S. Ct. at 898 and 911 (political speech bans are unconstitutional under strict scrutiny); *Randall*, 548 U.S. at 248 and 262 (contribution limits that are "too low" are unconstitutional under closely drawn scrutiny).

Beaumont, 539 U.S. 146, which held that nonprofit advocacy corporations need

not be given an exemption from the federal ban on direct corporate contributions,[6] assumed the PAC-option allowed corporations to make contributions through PACs.[7] *Id*. at 162-63. The Court therefore said the "ban" on direct corporate contributions was not a ban, but rather a limit, which it upheld under closely drawn scrutiny. *Id*. at 162. The Court found the PAC-option significant, explaining it "allows corporate political participation . . . ." *Id*. at 163. This comports with *Buckley*'s rule that contribution limits are permissible because limits allow for association and symbolic speech through limited contributions. 424 U.S. at 21-22.

The City's entity ban, however, is not like the federal ban at issue in *Beaumont* because there is no PAC-option in San Diego municipal elections. *Thalheimer*, slip op. at 32. The City bans *all* entity contributions to candidates and has not left open any avenue for entity association and symbolic speech through even limited contributions. Under Supreme Court precedent the Panel should have struck the entity

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[6] *Beaumont* held the First Amendment does not require nonprofit corporations be exempted from corporate contribution limits. The Court did not consider whether the limits themselves were constitutional. *Beaumont*, 539 U.S. at 149 ("We hold that applying the prohibition to nonprofit advocacy corporations is consistent with the First Amendment."); *see also id*. at 151 (noting the court below held Section 441b(a) unconstitutional as applied to nonprofit corporations, and the FEC presented only that question in its cert petition). The Court assumed, without deciding, the constitutionality of the federal ban. But that assumption is dicta.

[7] The Appellees believe the Court's assumption was wrong, or at least is invalid after *Citizens United*, which held that (1) PACs cannot speak for corporations because they are separate entities and (2) a requirement that corporations speak through PACs is a ban on corporate political speech. *Citizens United*, 130 S. Ct. at 897-98.

ban no matter what scrutiny it applied. *Citizens United*, 130 S. Ct. at 911 (political speech bans are impermissible under strict scrutiny); *Randall*, 548 U.S. at 248 and 262 (contribution bans are impermissible under closely drawn scrutiny).

Instead, the Panel wrongly upheld the entity ban under the mistaken assumption that, because the City allows entities to exercise their First Amendment right to make unlimited independent expenditures, it may forbid them to exercise their First Amendment right to make contributions. *Thalheimer*, slip op. at 33-34. But the Constitution does not permit Government to condition the exercise of one constitutional right on the surrender of another. *See, e.g.*, *Simmons v. United States*, 390 U.S. 377, 394 (1968) (ruling it is "intolerable that one constitutional right should have to be surrendered in order to assert another" and striking down the so-called "choice" as an unconstitutional condition).

The Panel's upholding of the entity contribution ban cannot be reconciled with the rule of *Citizens United* and *Randall* that contribution bans are impermissible. This Court should grant en banc review and reverse this mistaken decision, thereby bringing the Ninth Circuit into conformity with the Supreme Court.

B. The Entity Ban Decision Conflicts with Precedent That Speech Restrictions May Not Be Based on the Identity of the Speaker.

The Supreme Court's rule is that speech restrictions based on the speaker's identity are impermissible. Government may not "distinguish[] among different

speakers, allowing speech by some but not others." *Citizens United*, 130 S. Ct. at 898. Nor may Government limit the political speech of disfavored speakers, *id*. at 899, including "those that have taken on the corporate form[,]" *id*. at 908. Rather, "[t]he First Amendment protects speech and speaker, and the ideas that flow from each." *Id*. at 907. This rule followed *Bellotti*, which held that political speech that could not be regulated if made by an individual cannot be regulated simply because the speaker is a corporation. 435 U.S. at 776 (1978).

In contradiction to the Supreme Court's rule, the Panel upheld the entity contribution ban, which bans contributions on no other basis than the non-individual identity of the speakers. It would be impermissible to ban *individual* contributions. *Randall*, 548 U.S. at 248 and 262 (ruling that as contribution limits for individuals approach zero, they become "too low" and "too severe" to survive scrutiny and so are unconstitutional). Under *Citizens United* and *Bellotti*, it must also be impermissible to ban *entity* contributions on the basis of their identity as non-individuals.

The Panel, however, mistakenly thought the entity contribution ban is permissible because it does not "target particular speakers" but "draws a functional line between individual donors and all non-individuals." *Thalheimer*, slip op. at 34. But this is what courts call "a distinction without a difference." Courts refuse to recognize such 'distinctions' when the practical effect deprives litigants of rights. *See, e.g.*, *Doody v. Ryan*, __F.3d__, 2011 WL 1663551 at *37 (9th Cir. 2011) (where

Miranda warning was inadequate, the fact the officer spoke it rather than wrote it is "a distinction without a difference"); *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1031 (9th Cir. 2010) (where State used its negotiating power to impermissibly demand payment of gaming funds, whether the demand was characterized as a non-negotiable condition for obtaining the gaming license or a tax upon gaming revenue was "a distinction without a difference").

In this case, whether the entity contribution ban "targets particular speakers" or "draws a functional line" between speakers, the effect is the same: entities are prohibited from making contributions on the sole basis of their identity. The First Amendment will not tolerate this, *Citizens United*, 130 S. Ct. at 899, "whatever one calls it[,]" *Rincon Band*, 602 F.3d at 1031.

The Federal District Court for the Eastern District of Virginia recently recognized this principle when it held unconstitutional the federal ban on direct corporate contributions. *U.S. v. Danielczyk*, __F. Supp.__, 2011 WL 2161794 (E.D. Vir. 2011), *pet. rh'g denied*, 2011 WL 2268063, *notice of appeal filed but not yet docketed.* The court explained that the "logic" of *Citizens United* "is inescapable." *Id.* at *18. "If human beings can make direct campaign contributions within FECA's limits without risking *quid pro quo* corruption or its appearance, and if, in *Citizens United*'s interpretation of *Bellotti*, corporations and human beings are entitled to equal political speech rights, then corporations must also be able to contribute within

FECA's limits." *Id*. Similarly, the rule of *Citizens United* and *Bellotti* compels a finding that the entity contribution ban is unconstitutional because it discriminates against non-individual speakers on the basis of their identity as entities. The First Amendment cannot tolerate this. *Citizens United*, 130 S. Ct. at 899. This Court should therefore grant en banc rehearing and reverse the Panel's decision.

Conclusion

The Panel Decision upholding the temporal contribution ban and the entity contribution ban conflicts with both Supreme Court and Ninth Circuit precedent. Consideration by the full Court is necessary to secure uniformity of the Court's decisions, to resolve the conflict with the Supreme Court, to cure the confusion in the law created by the Panel Decision, and to answer questions of exceptional importance for which national uniformity is needed—namely, *who* may make contributions to candidates, and *when* may they do so. This Court should therefore grant the Appellees' Petition for En Banc Review and reverse the Panel Decision.

June 23, 2011

Respectfully Submitted,

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Certificate of Service

I hereby certify that the foregoing document was served on counsel for all parties and amici. It was served electronically on June 23, 2011, upon the following counsel via the Ninth Circuit Court of Appeals' electronic filing system:

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Notice was mailed on June 23, 2011 by first class mail, postage pre-paid, to:

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s/Joe La Rue
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