Docket No. 10-55322 (L), 10-55324, 10-55434

In the

United States Court of Appeals

For the

Ninth Circuit

PHIL THALHEIMER, ASSOCIATED BUILDERS & CONTRACTORS PAC,
Sponsored by Associated Builders and Contractors, Inc., San Diego Chapter,
LINCOLN CLUB OF SAN DIEGO COUNTY,
REPUBLICAN PARTY OF SAN DIEGO COUNTY and JOHN NIENSTEDT, SR.,

Plaintiffs-Appellees / Cross-Appellants,

v.

CITY OF SAN DIEGO,

Defendant-Appellant / Cross-Appellee.

Appeal from a Decision of the United States District Court for the Southern District of California, No. 09-CV-02862 · Honorable Irma E. Gonzalez

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Introduction

Cross-appellants and appellees ("the Coalition") challenge laws that burden and chill their political speech and association. Such laws are constitutional *only* when the government demonstrates that they are properly tailored to constitutionally cognizable interests. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000). Under a correct application of this standard and relevant law, the Coalition is likely to succeed as a matter of law on the merits as to each of its challenges, and so a preliminary injunction should have issued. Because the district court either failed to apply the proper law, or else applied it in an illogical or implausible way, the district court erred, and failed to preliminarily enjoin two provisions of San Diego law at issue in this appeal—the contribution window[1] and the entity contribution ban.[2]

Argument

I. The Coalition Offered All The Argument Necessary For This Court To Rule In Their Favor.

The appellant and cross-appellee ("the City") mistakenly suggest that the

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[1]San Diego Municipal Election Campaign Control Ordinance ("ECCO") Section 27.2938, which bans solicitation or acceptance of contributions prior to 12 months before the primary election.

[2]ECCO § Section 27.2951, which bans candidates soliciting and accepting contributions from non-individuals.

Coalition did not argue enough for this Court to reach the merits of its appeal. Specifically, the City alleges that the Coalition did not argue that the district court erred when it found the balance of hardships favored the City. The City also incorrectly argues that the Coalition failed to present sufficient facts to demonstrate a chill and burden on its speech and association rights. The City's arguments are wrong, and do not change the fact that the district court erred by denying the preliminary injunction.

A. The Coalition Asserted Everything Necessary For This Court To Find Error As To The Balance Of Hardships.

The City claims that the Coalition failed to argue that the district court abused its discretion when it found, as to the challenge to the contribution window and the entity contribution ban, that the balance of hardships favored the City. (Appellant's Resp. at 8-9, 21-22.) Yet, as the City acknowledges (*id*. at 9-10), the Coalition asserted in its opening brief that the district court erred by not properly applying the *Winter* preliminary injunction standards—one of which is the balance of hardships. And, as the City also acknowledges (*id*. at 9, 22), the Coalition further asserted that because the district court erred in applying the *Winter* standards and various precedential decisions, it erroneously found that the Coalition was unlikely to succeed on the merits. That is all the Coalition needed to argue in order for this Court to consider the merits of its appeal as it relates to the

balance of hardships test, because in the Ninth Circuit, success on the merits in a First Amendment claim necessitates a finding that the balance of hardships tips toward the plaintiff and away from the government.

The rule of this Court is clear: "the fact that a case raises serious First Amendment questions ***compels*** a finding that ... the balance of hardships tips sharply in [the plaintiffs'] favor." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (emphasis added).[3] The Ninth Circuit, as well as the district courts within it, have consistently applied this rule. *See, e.g.*, *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (plaintiffs demonstrated likelihood of success on the merits and thereby demonstrated that the balance of hardships tipped in their favor); *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (same);

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[3]*Sammartano* applied the Ninth Circuit's then-current "sliding scale" for preliminary injunctions, under which "[p]reliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." 303 F.3d at 965. The Supreme Court rejected the "possibility of irreparable harm" standard in *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008), holding that plaintiffs must show actual likelihood of irreparable harm to qualify for a preliminary injunction. *Id*. at 375. However, nothing in *Winter*'s holding upset the Ninth Circuit's rule that in First Amendment cases a plaintiff's showing of likelihood of success on the merits causes the balance of hardships to favor the plaintiff.

San Diego Minutemen v. California Business Transp. and Housing, 570 F.Supp.2d 1229, 1255 (S.D. Cal. 2008) (same); *Behymer-Smith ex rel. Behymer v. Coral Academy of Science*, 427 F.Supp.2d 969, 974 (D. Nev. 2006) (same). This reasoning is consistent with the Supreme Court's recognition that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (same); *Sammartano*, 303 F.3d at 973 (holding that "[u]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.") (quotations and citations omitted).

Thus, when plaintiffs demonstrate likelihood of success on the merits, they correspondingly demonstrate a likelihood of irreparable harm—and, this causes the balance of hardships to tip toward them. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 and 1138 n.16 (9th Cir. 2009) (post-*Winter* decision explaining that the balance of hardships requirement for First Amendment preliminary injunction motions is directly related to whether the plaintiffs have established likelihood of success on the merits, such that they are likely to suffer irreparable harm absent an injunction). *Irreparable* harm is harm that, by definition, can never be made right.

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Id*. at 1138. Thus, Ninth Circuit precedent "clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim." *Klein v. City of San Clemente*, 584 R.3d 1196, 1208 (9th Cir. 2009).[4]

The district court followed the Ninth Circuit's rule that, where plaintiffs were likely to succeed on the merits on a First Amendment claim, they were also likely to suffer irreparable harm and so the balance of hardships tipped their direction. (The Coalition's Supplemental Excerpts of Record ("SER") 23-26.) The court noted that for all the Coalition's claims, the harm asserted by the Coalition

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[4]The *Klein* Court's statement may be understatement. The Coalition is unaware of *any* case in which this Court—or any court in this Circuit, for that matter—has declined to grant preliminary injunctive relief when the plaintiffs were likely to succeed on the merits of their First Amendment challenge. In every case of which the Coalition is aware, a finding of likelihood of success as to a First Amendment challenge was accompanied by a finding that the plaintiffs were likely to suffer irreparable harm, that the balance of hardships tipped toward the plaintiffs, and that it was in the public interest to grant the injunction.

In First Amendment cases, this Court has only found that the balance of hardships tips away from the plaintiffs in First Amendment preliminary injunction challenges when the plaintiffs failed to demonstrate that they were likely to succeed on the merits. *See, e.g.*, *Paramount Land Co. LP v. California Pistachio Com'n*, 491 F.3d 1003, 1012 (9th Cir. 2007) (finding that balance of hardships tipped toward defendants where the plaintiffs had not established likelihood of success); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (same). So long as the plaintiffs demonstrate likelihood of success, balance of harms seems to always tip toward them, too.

was the infringement of their constitutional rights, while the harm asserted by the City was the potential disruption to their campaign finance system before an election. (SER 25.) The court further recognized that where the Coalition established likelihood of success on the merits, the balance of hardships would favor them. (*Id*. 25-26.) Indeed, the court found that the balance of hardships favored the Coalition *every* time it found the Coalition was likely to succeed on the merits, because the court recognized that the Coalition's interest in exercising its First Amendment rights was greater than the City's interest in preserving its likely-unconstitutional campaign finance regime. (*Id*.) Thus, had the court not erred but found that the Coalition was likely to succeed on the merits as to the contribution window and entity contribution ban, it would have found that the balance of hardships favored the Coalition as to those provisions, too.[5]

The City is thus mistaken when it asserts that the Coalition offered no argument that the court below abused its discretion when it found that the balance of hardships tipped toward the City. The Coalition's balance of hardships

[5]The court found that the balance of hardships favored the City as to the contribution window and entity contribution ban because the only harm the Coalition alleged was the irreparable injury caused by the infringement of their First Amendment freedoms. (SER 25-26.) Since the court erroneously found the Coalition was not likely to succeed on the merits, the court correspondingly found that the Coalition was not harmed by the challenged law. Because of this erroneous finding, the balance of hardships necessarily favored the City. (*Id*.)

argument is bound up with their assertion that the court abused its discretion in finding that the Coalition was unlikely to prevail on the merits of its challenge to the contribution window and the entity contribution ban. A finding that the court abused its discretion with regard to success on the merits "compels" a finding that the court likewise abused its discretion with regard to the balance of hardships.

B. The Coalition Demonstrated Burden And Chill.

Contra to the City's claim (Appellant's Resp. at 31), the Coalition presented sufficient evidence of chill and burden. The members of the Coalition want to engage in political speech and association[6]—the type of expressive activity that is at the very *core* of the First Amendment. *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *Randall v. Sorrell*, 548 U.S. 230, 266 (2006) (Thomas, J., concurring). Yet, the City's law bans them from doing so. The City suggests that this is not a serious burden, or that the Coalition's speech is somehow unworthy of protection

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[6]Specifically, Phil Thalheimer "wants to solicit and accept contributions to his campaign now, and would do so," and also wants to "spend some of the contributions . . . now. . . . He would do so, but for" the challenged contribution window banning soliciting or receiving contributions more than a year before the primary election. Mr. Thalheimer also "wants to solicit, accept and spend contributions from . . . organizational entities, and would do so, but for" the entity contribution ban. (SER 116, ¶¶ 81, 82.)

John Nienstedt, meanwhile, "wants to contribute financially to the candidate(s) of his choice now," rather than wait until a year before the primary, as the contribution window requires. "He would do so, but for" the entity contribution window. (SER 116, ¶ 83.)

at the preliminary injunction stage (Appellant's Resp. at 31). But, as the *Citizens United* Court said, "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010).

Because the Coalition put forward evidence in their verified complaint that their political speech and association was burdened and chilled by the City's law, the City must demonstrate that its law is properly tailored to a constitutionally cognizable interest. *Id*. *See also Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464 (2006) (government must prove its interest in laws burdening First Amendment, and that the law is properly tailored to that interest); *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (same); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) (same). That the district court did not require this of the City, but rather ruled in the City's favor in the absence of any evidence that the City's law was properly tailored to a constitutionally cognizable interest, is reversible error. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007) (holding that it is reversible error for a district court to find an anticorruption interest where the government has not presented evidence of such). *See also Jacobus v. Alaska*, 338 F.3d 1095, 1109 (9th Cir. 2003) (holding that 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 Coalition therefore asserted in its opening brief all that is necessary for this Court to reach the merits of its appeal. It argued that, had the court below properly applied the *Winter* preliminary injunction standard, it would have ruled in the Coalition's favor. (Appellees' Br. at 25-26.) That by itself addresses the City's mistaken suggestion that the Coalition did not argue that the court abused its discretion by finding that, with regard to the entity contribution ban and the contribution window, the balance of hardships tipped toward the City. But, the Coalition did more: it further asserted that the court below misapplied precedent, or applied it in an illogical or implausible way, and so failed to find that the Coalition was likely to succeed on the merits. (Appellees' Br., *passim*.) Such a finding would have necessarily resulted in a finding that the balance of hardships favored the Coalition. (*See supra* at 2-7.) The Coalition argued all it needed to argue, and the City is wrong to suggest otherwise.

II. Even If A Heightened Preliminary Injunction Standard Applied, The Coalition Met It; So The District Court Erred By Not Enjoining The Entity Contribution Ban And Contribution Window.

The City also incorrectly suggests that the Coalition must meet some additional burden in their preliminary injunction challenge beyond the four *Winter* factors, because the Coalition sought to change the status quo. (Appellant's Resp. at 22.) This is incorrect. Even if there is a heightened burden for those who would

change the status quo, it is inapplicable here, since the Coalition did not seek to change the status quo. It is the City that has changed the status quo with its law infringing First Amendment freedoms. The Coalition sought to preserve the status quo against the City's suppression of it. Nevertheless, even if the Coalition must meet a heightened preliminary injunction standard, they fully met it.

As explained in the Coalition's opening brief (Appellees' Br. at 33-40), in the First Amendment context the status quo is the First Amendment itself: "Congress shall make no law abridging the freedom of speech." It is the City that altered the status quo when it infringed the First Amendment by restricting political speech and association. A preliminary injunction against such laws would not alter the status quo, but preserve the status quo of "no law" against the City's attempt to subvert it.[7] Thus, even if the Ninth Circuit recognizes a heightened preliminary injunction standard where the status quo would be altered,[8] such

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[7]As explained in the Coalition's opening brief (Appellees' Br. at 33-40), injunctions that alter the status quo are called "mandatory" injunctions, because they compel someone to do something. On the other hand, injunctions that compel someone to *not* do something are called "prohibitory." Mandatory injunctions are capable of altering the status quo, while prohibitory injunctions are not. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). The Coalition asked the court to enjoin enforcement of law—that is, to *prohibit* the City from enforcing law. Thus, the Coalition requested a prohibitory injunction, which does not alter the status quo, but preserves it.

[8]The district court concluded that the Ninth Circuit does not recognize such a standard. (SER 31.)

would not apply in this case where the Coalition seeks not to alter the status quo, but preserve it.

Even if a heightened standard did apply, the Coalition has met it. *Anderson v. U.S.*, 612 F.2d 1112 (9th Cir. 1979), the case cited by the City for the proposition that a heightened preliminary injunction standard should apply (Appellants' Br. at 32), states that injunctions that alter the status quo "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Id*. at 1115. The Coalition met that standard in its injunction request, because, as the City acknowledges (Appellant's Resp. at 23), the Coalition averred that the entity contribution ban and contribution window threaten their First Amendment freedoms. (SER 115-116, 122-23). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *Yahoo!, Inc.* 433 F.3d 1199 at 1234. *Irreparable* injury is very serious injury indeed, because it can never be undone. Nor can such harm be made right through the payment of monetary damages. *Stormans, Inc.*, 586 F.3d at 1138. Thus, even if *Anderson* requires a heightened standard for injunctions that alter the status quo, and even if this were such an injunction, the Coalition satisfied the heightened standard. The City is incorrect to suggest otherwise.

III. The Entity Contribution Ban Is An Impermissible Ban That Cannot Satisfy Scrutiny, And The District Court Erred By Not Enjoining It.

A. The Entity Contribution Ban Is A Total Ban On Entity Contributions.

The City states that the Coalition is wrong to argue that the entity contribution ban, which completely prohibits contributions from entities to candidates, is a complete ban on entity First Amendment activity, since entities may engage in other types of speech and association. (Appellant's Resp. at 18.) The City, however, misunderstands the Coalition's argument, which is that the City has completely banned one *type* of entity political speech and associational activity; namely, entity contributions to candidates. That the City allows *other* types of entity expressive activity does not alter the fact that the City completely bans *this* type of entity expressive activity. If the government seeks to ban expressive activity, such as the entity contribution ban does, it must demonstrate that its ban is properly tailored to a constitutionally cognizable interest; otherwise, its ban is unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Nixon*, 528 U.S. at 387–88.

In contrast to the First Amendment's requirement, the City argues that, because the City allows entities to make unlimited independent expenditures, it is of no consequence that the City bans entity contributions to candidates (Appellant's Resp. at 18). This argument is unavailing. Because the City seeks to

completely ban entity contributions, it was obligated to demonstrate for the court below that its ban was closely drawn to a sufficiently important interest. Because it did not do so, the district court erred when it found it unlikely that the Coalition would prevail on the merits, and this Court should reverse the district court's decision. *Citizens for Clean Gov't*, 474 F.3d at 653.

B. The Entity Contribution Ban Is Impermissible Under Supreme Court Precedent.

Contrary to the City's assertions (Appellant's Resp. at 17-19), the fact that the City does not allow entities to contribute to candidates through PAC-like organizations is fatal to the entity contribution ban. The City wrongly asserts that the Supreme Court's *Beaumont* decision, which upheld a ban on direct corporate contributions, did not depend on the law's allowance for corporate contributions through PACs. (Appellant's Resp. at 18.) However, that is *precisely* what *Beaumont* turned on.[9]

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[9] *Beaumont*'s reasoning, as well as its decision, was discredited by *Citizens United*. In *Citizens United*, the Court explained that a PAC is a separate entity from a corporation, and so cannot speak for a corporation. 130 S.Ct. at 897. Yet *Beaumont* based its decision to uphold a corporate contribution ban on the PAC exemption, which *Beaumont* wrongly concluded allowed for corporate expressive activity. It also found three interests in banning corporate contributions, two of which were invalided by *Citizens United* while the third was discredited. *Compare Beaumont*, 539 U.S. at 154 (antidistortion and protect shareholders interests) *with Citizens United*, 130 S.Ct. at 903-908 (invalidating antidistortion interest) and *id.* at 911 (invalidating protect shareholders interest). *Compare also Beaumont*, 539 U.S. at 155 (the anticircumvention interest) *with Citizens United*, 130 S.Ct. at 912

Beaumont concerned a challenge by an advocacy corporation to the federal prohibition against direct corporate contributions to candidates. *FEC v. Beaumont*, 539 U.S. 146, 149 (2003). The Court began its opinion by noting that even though the federal statute made it unlawful for corporations to directly contribute to candidates, "[t]he prohibition does not, however, forbid the establishment, administration, and solicitation of contributions to a separate segregated fund [i.e., a PAC] to be utilized for political purposes." *Id*. The Court then explained that "the law leaves them [i.e., PACs] free to make contributions as well as other expenditures in connection with federal elections." *Id*. This was constitutionally significant; for the PAC exemption "permits some participation of unions and corporations in the federal electoral process" and "lets the Government regulate campaign activity through registration and disclosure, . . . *without jeopardizing the associational rights of advocacy organizations' members*." *Id*. at 162-63 (emphasis added). Such would not be the case, the Court implied, if the PAC exemption did *not* exist; then, the right of advocacy corporations' members to

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(rejecting the anticircumvention interest as underinclusive, because "speakers find ways to circumvent campaign finance laws."). *Beaumont*'s decision thus rests on rejected and discredited reasoning, and its conclusion that PACs' expressive activity allows "corporate political participation," *id*. at 163, has been invalidated by *Citizens United*. The Coalition asserts that *Beaumont* should be reconsidered and overruled.

However, even under *Beaumont*, the City's entity contribution ban still fails scrutiny and should be held unconstitutional.

associate with candidates *would be* jeopardized. But, since the challenged law still "allows corporate political participation" because it allowed corporations to make contributions through PACs, it did not amount to a complete ban on corporate contributions. *Id*. at 162-63.

A requirement that corporations make contributions through PACs was therefore not any greater than a restriction on corporations' solicitation of funds for their PACs upheld in *Fed. Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982). *Beaumont*, 539 U.S. at 163. There was therefore no reason "to reach a different conclusion" than the *National Right To Work* Court had reached: the ban on direct contributions was constitutional, because the PAC exemption still "allows corporate political participation" and did not amount to a complete ban on corporate contributions. *Id*. at 162-63.

Thus, the *Beaumont* decision upholding a ban on direct corporate contributions turned on the fact that the law allowed corporate PACs to make contributions. But, the entity contribution ban allows for *no* PAC exemption. There is *no* opportunity for entities to make contributions to San Diego candidates. The district court erred when it failed to recognize that fact. Instead, it applied *Beaumont* to the entity contribution ban in an implausible way. The district court found *Beaumont*'s reliance on the anticircumvention interest controlling (SER 23), without recognizing that *Beaumont* upheld the corporate contribution ban only

because corporations' PACs could make contributions in their stead.

The district court also erred when it declined to follow the teaching of the *Citizens United* Court that, even where the government may have an interest in limiting First Amendment activity, a complete ban "during the critical preelection period is *not* a permissible remedy." *Citizens United*, 130 S.Ct. at 911 (emphasis added). As this Court recently recognized, "'it is our law and our tradition that more speech, not less, is the governing rule' under the First Amendment. 'More speech' often means 'more money.'" *Long Beach Area Chamber of Commerce v. City of Long Beach*, __ F.3d __, 2010 WL 1729710 at *1 (9th Cir. 2010) (*quoting Citizens United*, 130 S.Ct. at 911). The entity contribution ban is thus "not a permissible remedy," and does not accord with "our law and our tradition."

If the City has an interest in preventing real or apparent quid pro quo corruption associated with entity contributions to candidates (Appellant's Resp. at 11), the permissible remedy is a contribution limit that eliminates large contributions that can give rise to corruption. *See, e.g.*, *Citizens United*, 130 S.Ct. at 901 ("large contributions 'could be given to secure a political quid pro quo'") (*quoting Buckley*, 424 U.S. at 26); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138 (2003) ("large financial contributions" can lead to corruption and its appearance); *Nixon*, 528 U.S. at 393 ("large contributions" can corrupt and create an appearance of corruption). Even the City concedes that their interest is limited

to restricting *large* contributions. (Appellant's Resp. at 11.) The permissible remedy is thus a reasonable contribution *limit*, not a complete contribution ban.

Similarly, if, as the City argues, it has an interest in preventing circumvention of valid contribution limits (Appellant's Resp. at 10-19), the permissible remedy under *Beaumont* is to require those entities that want to make contributions up to the regular contribution limits through PACs. Such a remedy would prevent the "sham entities" the City worries will circumvent its contribution limits. (*Id*. at 11.) And, if *Beaumont* were overruled, and it was held that corporations may make contributions from their general funds to candidates—as the Coalition suggests should happen[10]—the permissible remedy for the City's anticircumvention interest is reasonable disclosure, not an impermissible ban. The Supreme Court has recognized that "disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities . . . and do not prevent anyone from speaking[.]" *Citizens United*, 130 S.Ct. at 914 (quotations and citations omitted). Disclosure is "less restrictive," and therefore better, than restrictions on expressive activity. *Id*. at 915. Requiring entities that make contributions to disclose what persons created them will allow the City to prevent circumvention and so satisfy its anticircumvention interest. Banning entity

[10] *See supra* n.9.

contributions, as the entity ban does, is not a permissible remedy to the City's anticircumvention interest, because it does not only prevent circumvention, but rather prevents the entities themselves from engaging in protected First Amendment activity.[11]

There is a further problem with the City's assertion of its supposed-anticircumvention interest: by the City's own admission, the potential for circumvention is not certain enough to uphold the entity contribution ban. The City speaks in its briefing of "a potential onslaught of sham entity contributions aimed at circumventing valid contribution limits." (Appellant's Resp. at 10.) It says such a "potential onslaught" would have "rais[ed] the potential for quid pro quo corruption and the appearance of corruption." (*Id*.) It spoke of the "opportunity for individuals to create sham organizations" (*id*. at 12), which was "a possibility[.]" (*Id*.) Yet, the government's "mere conjecture" about possible harms it hopes to address are not adequate to justify burdening and chilling speech and association. *Nixon*, 528 U.S. at 379. When the government restricts First

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[11]The City cites *Cal. Med Ass'n v. Fed. Election Comm'n*, 453 U.S. 182 (1981) and *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Committee*, 533 U.S. 431 (2001) as examples of cases in which the Supreme Court upheld contribution limits under the anticircumvention theory. (Appellant's Resp. at 14). However, as the City acknowledges (*id*.), these cases upheld *limits*; that is, corporations were still able to make contributions. They did not uphold a complete ban, such as is at issue in this case.

Amendment freedoms, its "burden is not satisfied by mere speculation or conjecture, but only by demonstrating that the harms the government recites are real and that its restriction will in fact alleviate them to a material degree." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 458 n.3 (2002) (quotation and citation omitted).

The City's fear of "possible" sham organizations is not sufficient to justify infringing the speech and association rights of non-sham organizations that want to make contributions to candidates. Nor is it sufficient to justify infringing the speech and association rights of Phil Thalheimer, who wants to solicit and accept such entity contributions, and would do so, but for the entity contribution ban. (SER 113, 122.) The City's entity contribution ban is thus impermissible, and the district court erred when it found it unlikely that the Coalition would prevail in their challenge to it.

IV. The Contribution Window Cannot Satisfy Scrutiny, And The District Court Erred By Not Enjoining It.

The City notes that the district court found no evidence that the contribution window was more than a "minimal burden" on the Coalition's First Amendment rights. (Appellant's Resp. at 23-24) (*citing* SER 15.) However, whether the burden on speech and association is "minimal" or "great" is not important; what matters is that First Amendment activity is infringed. When political speech and association

is burdened and chilled, the government must demonstrate that its regulation is properly tailored to a constitutionally cognizable interest. If the government does not do so, the infringing regulation is unconstitutional. *Buckley*, 424 U.S. at 25; *Nixon*, 528 U.S. at 387–88.

A. The Coalition Presented Sufficient Evidence That Their Speech And Association Was Burdened.

The court below acknowledged that temporal limits such as the contribution window infringe First Amendment freedoms. (SER 15). And, the Coalition demonstrated that the contribution window burdened and chilled their political speech and association. (SER 116.) The City, though, mistakenly argues that this Court's recent *McComish* decision,[12] which rejected the "evidence" presented by

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[12] *McComish v. Bennett*, __ F.3d __, 2010 WL 2011563 (9th Cir. 2010). The City relies extensively on the *McComish* decision in its Response. However, the Supreme Court granted an emergency application to stay the Ninth Circuit's decision pending the timely filing and disposition of a cert petition. *See* Order 09A1163, *Mccomish, John, et al. v. Bennett, Az Sec. of State, et al.* (June 8, 2010), *available at* http://www.supremecourt.gov/orders/courtorders/060810zr.pdf (last visited June 9, 2010). The Order states:

> The application to vacate the stay of the District Court's injunction and to stay the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 10-15165 presented to Justice Kennedy and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

the plaintiffs that their speech was chilled, somehow compels a similar result in this case. (Appellant's Resp. at 24-25.) The City is wrong. The Coalition, unlike the *McComish* plaintiffs, presented sufficient evidence of burden and chill, and so the district court should have required the City to demonstrate its interest in the contribution window, and that the contribution window was closely drawn.

McComish involved a challenge to Arizona's public financing of elections, in which publicly financed candidates are eligible for public funds based on the amount of money other candidates spend, and the amount of independent expenditures that are made against them or for their opponents. *McComish*, 2010 WL 2011563 at *1-3. This Court found that "[n]o Plaintiff . . . has pointed to any specific instance" of burden or chill as a result of the challenged matching funds scheme. *Id*. at *10. Further, "[t]he record as a whole contradicts many of Plaintiffs' unsupported assertions that their speech has been chilled." *Id*. For instance, one candidate plaintiff who averred the matching funds regime chilled his speech "admitted he was willing to trigger matching funds and spent as much money as he needed to in order to communicate his message." *Id*. An independent expenditure

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As the Coalition explains, *McComish* is inapposite to the facts of this case and so does not apply. But, even if it did apply, the Supreme Court's stay might counsel against relying upon it.

committee plaintiff claimed that "it declined to speak in the 2006 primary for fear of triggering matching funds[,]" yet "it only had $52.72 cash on hand." *Id*. The *McComish* Court rejected the plaintiffs' claims of chill as disingenuous, finding that "[p]laintiffs have not demonstrated that any chilling effect exists." *Id*.

The Coalition has no such evidentiary problem. It filed a verified complaint which, in the Ninth Circuit, is "treated as an affidavit to the extent that the complaint is based on personal knowledge and sets forth facts admissible in evidence and to which the affiant is competent to testify." *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985). Preliminary injunctions may be granted on the basis of such affidavits. *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953). Phil Thalheimer averred in the Coalition's verified complaint that he is an experienced candidate who has run competitively for city council in the past (SER 110). He is preparing for a possible run for city council in 2012, (*id*. 111-112) and has created a committee to prepare for the run. (*Id*. 112.) He wants to begin soliciting and accepting contributions now, and would do so but for the contribution window. (*Id*. 112, 116.) John Nienstedt, meanwhile, has made contributions to candidates in the past and intends to make contributions to candidates in the future in both city council and citywide elections. (*Id*. 113.) He supports a candidate whose primary is more than a year away; that is, beyond the contribution window. (*Id*. 114.) He wants to make

contributions to this candidate now, and would do so but for the contribution window. (*Id*. 114, 116.)

Unlike the *McComish* plaintiffs, the Coalition presented sufficient evidence that its speech and association was burdened and chilled by the contribution window. Contrary to the City's suggestion, there is no requirement—Constitutional or otherwise—that the Coalition present "*significant* evidence of a burden." (Appellant's Resp. at 25) (emphasis added). The Coalition need only present enough evidence to show that its speech and association is burdened or chilled, which it did.

B. The Contribution Window Is Not Closely Drawn To A Sufficiently Important Interest.

The district court should therefore have required that the City demonstrate that the contribution window was closely drawn to a sufficiently important interest. The court did not do so, but rather presumed that the contribution window furthered an anticorruption interest, and also presumed—with no credible offer of evidence from the City—that the contribution window was closely drawn to the interest. (SER 15.) Because the court both presumed an interest and also presumed tailoring, this Court should reverse. *Citizens for Clean Gov't*, 474 F.3d at 653.

Although the district court concluded that the contribution window furthered the City's anticorruption interest, an interest it presumed the City

possessed, the district court offered no analysis explaining how it reached that conclusion. (SER 14-16.) Rather, it states without explanation that the contribution window "furthers the government's anticorruption interest by channeling contributions to a time period during which the risk of an actual quid pro quo or the appearance of one runs highest." (SER 15.)

The Coalition explained that this result is both illogical and implausible, since channeling contributions toward the time when the risk of corruption is greatest cannot possibly serve an anticorruption interest. (Appellees' Br. at 18.) The City attempts to save the district court's opinion from implausibility by arguing that the court meant to say that the contribution window "channels contributions *away* from the period of highest corrupt potential," not toward it (Appellant's Resp. at 29 n.17.) Even if the City is correct, the district court's decision is still an illogical and implausible application of precedent, because the City's $500 contribution limit eliminates the only contributions—large ones—that can give rise to real and apparent corruption. *Buckley*, 424 U.S. at 45 ("dangers of actual or apparent quid pro quo arrangements" are presented by "large contributions"); *id* at 28 (the challenged $1,000 contribution limit "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"). Even the City concedes that their anticorruption interest is limited to

restricting *large* contributions. (Appellant's Resp. at 11.) Yet, it is no longer possible to make large contributions to San Diego candidates. No matter when contributions are made, they are limited to $500. Thus, the contribution window *cannot* further an anticorruption interest, because there is no danger of corruption in contributions up to the regular, $500 limit no matter when they are given.

The City did not explain to the district court how its contribution window furthered an anticorruption interest, when real and apparent corruption had already been addressed by eliminating large contributions. Nor did the district court explain this in its opinion. The district court instead "accept[ed]"—with no evidence—"the City's assertion" that the contribution window "furthers its anticorruption interest." (SER 16.) This conclusion does not follow, however, from the fact that the anticorruption interest is already *fully* served by the $500 contribution limit, which eliminates large contributions. The conclusion is thus an illogical or implausible application of law.

C. The City And District Court Implausibly Or Illogically Apply Law In Their Attempt To Save The Contribution Window.

Both the City (Appellant's Resp. at 26) and the district court (SER 15) attempt to substantiate the district court's decision through reliance on *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998). Both cases, though, cut against the City's

argument as well as the district court's decision. As such, they simply underscore the implausibility of the district court's application of law.

North Carolina Right to Life concerned temporal contribution restrictions imposed on lobbyists, who the court identified as "paid to effectuate particular political outcomes" and so had extra incentive to attempt to create quid pro quo arrangements with office holders and candidates. 168 F.3d at 715-16. Because the restrictions were targeted at the group with incentive to engage in quid pro quo, and covered only that period during which the risk of quid pro quo was greatest, the court upheld the restrictions. *Id*. Similarly, *Gable* involved a challenge to a ban on contributions within the final 28 days before an election. 142 F.3d at 944. The court found that the ban was necessary in order to further various other provisions of the state's campaign finance scheme, which in turn were necessary to curb corruption. *Id*. at 950.[13] Because the 28-day window therefore furthered a corruption interest, the court upheld it. *Id*. at 950-51.

Unlike the situation in *North Carolina Right to Life*, the contribution window does not target only those with incentive to engage in quid pro quo. Nor does it apply only to the period when the danger of corruption is the greatest.

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[13] *Gable*'s reasoning is called into question by the Supreme Court's *Wisconsin Right To Life* decision, which rejected "prophylaxis-upon-prophylaxis approaches" to regulating political speech and association. 551 U.S. at 479.

Rather, the contribution window bans *everyone* from making contributions more than a year prior to the primary. And, it applies to the period when the temptation to engage in *quid pro quo* is smallest, when the election is far away and candidates are not frenetically engaged in fundraising to pay for campaign ads and other speech activity.

Nor can *Gable* save the district court's decision. The window at issue in *Gable*, though a now-rejected "prophylaxis-upon-prophylaxis," *Wisconsin Right To Life*, 551 U.S. at 479, at least somewhat furthered the state's anticorruption interest. That is not the case with the contribution window here. The City's anticorruption interest has been fully addressed by the $500 contribution limit, which eliminated the large contributions that can give rise to real or apparent corruption. Because of the regular contributions limits, there is simply no anticorruption need for the contribution window. A $500 contribution outside the contribution window cannot give rise to corruption any more than a $500 contribution inside the window will. It is *large* contributions that give rise to corruption, not already-limited ones.[14]

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[14]The City's argument that "[i]nherently remote contributions have great potential for actual corruption and appearance of corruption of both incumbents and challengers[,]" (Appellant's Resp. at 28), cannot save the district court's implausible decision. Once again, the City offers no evidence that such contributions are especially corrupting. Common sense indicates that contributions remote in time from the election have *less* potential to be corrupting, as the

Thus, neither *North Carolina Right to Life* nor *Gable* can support the contribution window. Rather, they cut against the constitutionality of the contribution window by suggesting that proper windows further an actual anticorruption interest (*Gable*), and are directed at those most likely to engage in corruption in the period when corruption is most likely to occur (*North Carolina*). Since the contribution window does none of these things, the district court erred when it relied on these cases to uphold it.[15]

Conclusion

For the foregoing reasons, this Court should reverse the district court, finding the district court's denial of the Coalition's preliminary injunction request of the contribution window and the entity contribution ban to be an abuse of discretion.

Coalition has argued. Regardless, since the $500 contribution limit has eliminated the large contributions that can give rise to corruption, the City's argument that the contribution window furthers an anticorruption interest fails.

[15]The other cases the City cites in its Response likewise cannot save the district court's decision. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (1999) upheld an 18-month window where, unlike here, no one argued that the period was unconstitutional. *Ferre v. State ex rel. Reno*, 478 S.2d 1077 (Fl. Dist. Ct. App. 1985) upheld a ban on contributions given *after* the election was over, because contributions to a *winning* candidate reasonably appeared to be payment for a political favor.

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Respectfully Submitted,

s/ Joe La Rue

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Pursuant to F.R.A.P. 32(a)(7)(C), I hereby certify that this document, including all headings, footnotes and quotations, but excluding the corporate disclosure statement, table of contents, table of authorities, statement of related cases, statement of oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel, contains 6,995 words, as determined by the word count of the word-processing software used to prepare this document, specifically WordPerfect 12, which is no more than the 7,000 words permitted under Fed. R. App. P. 28.1(e)(2)(C).

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