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** Pro hac vice application granted by the Court on December 30, 2009.*

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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.** **Plaintiffs,** **v.** **City of San Diego**; **City of San Diego Ethics Commissioners Richard M. Valdez**, Chair, **W. Lee Biddle**, **Guillermo ("Gil") Cabrera**, **Clyde Fuller**, **Dorothy Leonard**, and **Larry S. Westfall**, all sued in their official capacity; **The Honorable Jerry Sanders**, Mayor of San Diego, sued in his official capacity; **Jan Goldsmith**, City Attorney for the City of San Diego, sued in his official capacity; and **Elizabeth Maland**, City Clerk of San Diego, sued in her official capacity, **Defendants.**	**Case: 3:09-cv-2862-IEG-WMC** **Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction**

Introduction

In campaign finance cases such as the one before the Court, we should always first remember the constitutional imperative: **"Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."** U.S. CONST. amend I (emphasis added).[1] Although Government *has* sometimes found it necessary to make laws restricting freedom of speech, such restrictions are the exception to the rule. As such, they must pass the applicable level of scrutiny; otherwise, they are unconstitutional. 'Government shall make no law restricting the freedom of speech' is thus the baseline. And, when Government *does* make laws that infringe First Amendment freedoms, it must justify them in ways that satisfy constitutional scrutiny. Otherwise, the laws are unconstitutional.

Argument

This Court is asked to decide whether the Plaintiffs are entitled to a preliminary injunction. This question is not complicated. The City's laws implicate First Amendment freedoms. (Pls.' Prelim. Inj. Mem. at 4–19) (hereafter "PI Memo"). The Plaintiffs want to exercise their freedoms, and have asked this Court to enjoin the laws (Pls.' Prelim. Inj. Mot.; PI Memo). A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365, 374–75 (2008). The Plaintiffs have established the requisite harm needed for a preliminary injunction, because such harm is *always* present when First Amendment freedoms are infringed *for even a moment*. (PI Memo at 19–20).[2] They have also

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[1]The First Amendment is incorporated against the States. *See, e.g.*, *Gitlow v. People of State of New York*, 268 U.S. 652, 664 (1925).

[2]Citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

established that the balance of harms tips in their favor (PI Memo at 20–21),[3] and that an injunction is in the public interest. (PI Memo at 21).[4]

The only question left for the Court to decide is whether the City have an interest in restricting First Amendment freedoms that will survive scrutiny. If not, the Plaintiffs are "likely to succeed on the merits," and so a preliminary injunction should be granted.

I. The Burden Is On The City To Justify Its Laws.

The City appears to attempt to shift the burden of justification from itself to the Plaintiffs by claiming that the Plaintiffs "offer no evidence" that the challenged laws negatively impact elections. (Def.'s Opp'n at 16). This, however, confuses the standard of review. It also misses the point. The question before the Court at the preliminary injunction stage is not whether the challenged laws negatively impact elections. Rather, the questions before the Court at this stage of the litigation are whether the Plaintiffs have a First Amendment right to do certain things, whether the law restricts that right, and whether the City can justify the restriction under the applicable level of scrutiny.

All the Plaintiffs must "prove" at the preliminary injunction stage is enough to establish their standing to bring the lawsuit. Namely, they must demonstrate that they want to engage in activity protected by the First Amendment, and that they would do so, but for the law. The Plaintiffs did that in their Verified Complaint, which in the Ninth Circuit (as elsewhere) "may be 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). The Plaintiffs have proven all they need to. The burden is now on the City to justify its laws in constitutionally acceptable ways.

Similarly, the City faults the Plaintiffs for not offering evidence that other, constitutionally

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[3]Citing *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (noting that "the fact that a case raises serious First Amendment questions ***compels*** a finding that ... the balance of hardships tips sharply in [the plaintiffs'] favor.").

[4]Citing *Sammartano*, 303 F.3d at 974 (observing that "it is always in the public interest to prevent the violation of a party's constitutional rights.").

permissible avenues are available to the City to accomplish its legislative goals. (Def.'s Opp'n at 15). Again, this confuses the issue. The burden is not on those asserting their constitutional rights to establish that the State may meet its goals in constitutionally permissible ways. Rather, the burden is always on the State to conduct itself in ways that are constitutionally permissible. So, when the State infringes constitutional guarantees, the burden is on the State to justify doing so. If it cannot, the Plaintiffs are likely to succeed on the merits, and an injunction should be granted.

II. ECCO's Ban on Candidates Spending Their Own Money, and Soliciting and Accepting Contributions, More Than A Year Before the Primary Is Unconstitutional.

The City attempts to construe the ban on candidates soliciting contributions, or spending their own money in furtherance of their campaigns, more than a year before the primary, as a constitutionally permissible temporal limitation. (Def.'s Opp'n at 6–7). It cites *Buckley* for this proposition, *Id*, even though *Buckley* explicitly said that contribution limits are not sustainable as time, place, and manner limitations. *Buckley v. Valeo*, 424 U.S. 1, at 18–19.

The *Buckley* Court explained that "the Act's contribution and expenditure limitations cannot be sustained . . . by reference to . . . . cases stand[ing] for the proposition that the government may adopt reasonable time, place, and manner regulations . . . in order to further an important governmental interest." *Id*. at 18. Rather, "The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed." *Id*. Regulating contributions and expenditures is different in kind from regulations that are sustainable as time, place, and manner restrictions, because contribution and expenditure limits "restrict the extent of the reasonable use of virtually every means of communicating information." *Id*. at 18 n.17. Thus, whereas the City attempts to make *Buckley* stand for the proposition that contribution and expenditure limits may be justified as time, place, and manner restrictions, *Buckley* actually stands for the exact opposite.

The ban on soliciting and accepting contributions beyond the one-year window must satisfy

'intermediate scrutiny:' it must be "closely drawn" to a "sufficiently important interest." *Randall*, 548 U.S. at 247. But, the City has not articulated an interest that will do so. Instead, it proposes that allowing candidates to solicit funds beyond a one-year window somehow has "great potential for actual corruption and the appearance of corruption" because may give the appearance of "influence." (Def.'s Opp'n at 17–18). Yet, the City established contribution limits to curb corruption and the appearance of corruption; thus, the one-year window restriction is the type of unnecessary "prophylaxis-upon-prophylaxis" that the Supreme Court found unacceptable in *WRTL*. 551 U.S. at 479. Once the danger of corruption has been eliminated, further protections are unneeded.

The City admits that it has no anti-corruption interest to justify its ban on candidates spending their own money beyond the one-year window. (Def.'s Opp'n at 18). Rather, it states that the ban is intended to reduce the "pressure" on candidates to begin fundraising beyond the one-year window. (*Id*.). Yet, since the ban on fundraising beyond that window cannot be constitutionally justified, it cannot be used to justify the ban on candidates spending their own money.

The City argues in a footnote that the ban on candidates spending their own money beyond the one-year window "does not prevent candidates from spending money supporting their candidacies," but merely restricts when they may do so. *Id*. n.15. Yet, the First Amendment "simply cannot tolerate" restrictions upon candidates' freedom "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. That is precisely what the City's ban does—Plaintiff Phil Thalheimer is prohibited from so much as mailing a letter stating that he is considering a run for office in 2012. Instead of having the "unfettered opportunity" that the Constitution requires to make his views known, *Id*. at 52–53, the City seeks to restrict when Mr. Thalheimer may use his own resources to engage in political speech. Such a restriction cannot stand. *See also Davis v. Fed. Election Comm'n*, 554 U.S. ___, 128 S.Ct. 2759, 2771 (2008) (candidates have the right to "engage in unfettered political speech" about their candidacies, and to do so "robustly."); *Randall*, 548 U.S. at 236 ("well established precedent" mandates that limits on how much one may spend of his own money to engage in discussions about his candidacy violate the First Amendment).

III. ECCO's $500 Contribution Limit Is Unconstitutional.

The City attempts to confuse the issue by arguing that the Court cannot decide whether the contribution limits are too low absent the development of a factual record. (Def.'s Opp'n at 6–12). Had the Plaintiffs based their motion for preliminary injunction on a *Randall v. Sorrell* analysis—that is, had the Plaintiffs asserted that the limits kept them from amassing the resources necessary to mount an effective campaign—the City would be correct that a factual record must be developed before the Court can determine whether the limits are constitutional. However, the Plaintiffs have not sought a preliminary injunction on the basis of the *Randall* analysis. Rather, the Plaintiffs have asserted that a preliminary injunction is warranted because the limits fail intermediate scrutiny. Such an assertion is a question of law, requiring no factual record.

The City repeatedly asserts that the Court must decide whether the law keeps challengers from amassing the necessary resources to mount successful campaigns. (Def.'s Opp'n at 6–12). The Plaintiffs make that allegation in their Verified Complaint. (Def.'s Opp'n at 11). However, the Plaintiffs never make that allegation in their preliminary injunction papers, but rather allege that the limits fail scrutiny, have no "special" justification, mute the voice of political parties, and restrict independent expenditures. (PI Memo at 7–12). The allegation that the City argues against in its opposition brief is simply not one that the Plaintiffs made as support for their motion for preliminary injunction. As such, the City's arguments against granting a preliminary injunction are unavailing.

The City is simply incorrect to assert that this Court lacks the ability to determine, right now, whether the challenged limits are "closely drawn" to a "sufficiently important interest." The Plaintiffs have alleged that there is no "sufficiently important interest" that can justify the challenged limits; and, if there is, the limits are not "closely drawn" to it. The only constitutionally permissible interest for contribution limits that the Supreme Court has thus far recognized is the interest of preventing corruption or the appearance of corruption associated with *large* contributions. *See, e.g.*, *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 393 (2000). The City's limits ensnare significantly more contributions than those that can be fairly considered "large." The City's reliance on the fact that its limits are tied to an election cycle is misguided—a limit of $500 per election still ensnares

significantly more contributions than can be justified by its legitimate anti-corruption interest. As such, it must offer "special" justification for its limit. *Randall*, 548 U.S. at 261.[5] Yet, the City cannot do so. The Plaintiffs are therefore likely to prevail on the merits, and the injunction should issue.

IV. ECCO's Ban on Political Party Contributions is Unconstitutional.

The City appears to argue that, since there are some things that it allows political parties to do, it is acceptable that it bans their contributions to their candidates. (Def.'s Opp'n at 19–20). That assertion misses the point: if parties have a First Amendment right to contribute to their candidates, they should be free to exercise it. The City argues that parties "can serve a special danger of corruption" when they are allowed to make contributions to their own candidates. (Def.'s Opp'n at 20). The cases the City cites, however, merely stand for the proposition that it is permissible to place reasonable limits on the amounts political parties may contribute. The Supreme Court has never upheld a complete ban on Party contributions, but rather has said that when party contribution limits are too low, the First Amendment right to associate in a political party is threatened. *Randall*, 548 U.S. at 256. Such is the case with the City's zero-dollar contribution limit for political parties. The Plaintiffs are likely to succeed on the merits, and the injunction is warranted.

V. ECCO's Ban on Soliciting Contributions From Organizations Is Unconstitutional.

In fairness to the City, they filed their opposition papers prior to the Supreme Court's recent decision in *Citizens United v. Fed. Election Comm'n*, No. 08-205 (Supreme Court of the United States Jan. 21, 2010), in which the Court explicitly overruled *Austin v. Michigan Chamber of Commerce* (holding that political speech of corporations could be banned) and explained that, for campaign finance purposes, corporations and other organizations must be treated the same as any other speaker. *Id*. at 24. The Court instructed that corporations could not be barred from exercising their First Amendment rights, because "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not by others." *Id*. (*citing First Nat. Bank of Boston*

[5] *Randall*'s teaching regarding "special" justification is not part of its so-called *Randall*-type analysis. Thus, the fact that the Plaintiffs reference it in their motion papers does not mean that they are implicating the *Randall* analysis, such that a detailed factual record must be developed.

v. Bellottii, 435 U..s 765, 784 (1978)).

The Court rejected the so-called 'antidistortion interest,' *Id*. at 31–40, explaining that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Id*. at 34. The City relies on *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) for the proposition that contributions from organizations may be prohibited because they are able to "amass substantial political war chests." (Def.'s Opp'n at 21 (*quoting Beaumont*, 539 U.S. at 159)). However, *Citizens United* undercut that argument: the use of the corporate form to amass political war chests does not render speech beyond the First Amendment's protections. Rather, "[I]t is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech . . . is not [] permissible . . . ." *Id*. at 45.

The City may have an anticorruption interest that would allow it to *limit* contributions from organizations, just as it limits contributions from individuals. However, a complete ban cannot be said to be "closely drawn" to the interest, especially since Government must treat those who wish to engage in political speech and association the same. *Citizens United*, No. 08-205 at 24.

VI. ECCO's Independent Expenditure Limits Are Unconstitutional.

When individuals pool their money to make independent expenditures, their activity is protected by the First Amendment, which "grants to . . . committees the right to make unlimited independent expenditures." *Colorado Republican Fed. Campaign Committee v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996). But, a committee may not make "unlimited independent expenditures" if it is limited in the amount of money individuals may contribute, because such limitations affect the amount of money available to the committee for its expenditures. Therefore, limits on contributions to independent expenditure committees function as expenditure limits, regardless of the City's assertion to the contrary. (Def.'s Opp'n at 13). Such expenditure limits have *never* satisfied strict scrutiny, but have always been held unconstitutional. (PI Memo at 16–17).

The City asserts, however, that the expenditure limits should be construed as contribution limits, and that it has an anticorruption interest in limiting the amount of money that individuals may

contribute to independent expenditure committees. (Def.'s Opp'n at 15). Further, the City suggests and that a factual record is needed to determine whether contributions to independent expenditure committees have a corrupting potential. (*Id*.). Yet, the Supreme Court definitively stated in *Citizens United* that "we now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption." No. 08-205 at 42.[6] If the expenditures themselves do not give rise to corruption, contributions to committees making expenditures do not, either.

The City also cites *SpeechNow.Org v. Fed. Election Comm'n*, 567 F.Supp.2d 70 (D.D.C. 2008) for the proposition that "corruption" can extend to "undue influence on an officeholder's judgment." (Def.'s Opp'n at 15 (*quoting SpeechNow.Org*, 567 F.Supp 2d at 78). However, the Supreme Court explicitly rejected this contention, stating that "[t]he appearance of influence or access" cannot justify restrictions on independent expenditures. *Citizens United*, No. 08-205 at 44.

The City also cites *Working Californians v. City of Los Angeles*, Case No. CV-09-08327 (C.D. Cal. Nov. 24, 2009), for the proposition that it has an interest in preventing "large-scale donors" from funneling money into candidate elections. Yet, the City admits that wealthy donors are free to privately make all the independent expenditures they want. (Def.'s Opp'n at 16). Thus, a limit on contributions to committees for independent expenditures is not closely drawn to the proffered interest, but is underinclusive. It is also overinclusive to the interest of preventing wealthy donors from flooding elections with money, because it reaches even the contributions of citizens of modest means. Thus, even if the City has an interest in preventing large donors from flooding elections, this regulation is not closely drawn to it.

Finally, the City asserts that the Plaintiffs have no evidence that independent expenditures are truly independent of candidates. (Def.'s Opp'n at 15). Yet, "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

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[6]The City attempts to find a corruption interest in *Caperton v. A.T. Massey Coal Co.*, __ U.S. __, 129 S.Ct. 2252 (2009). In explaining *Caperton*, the *Citizens United* Court noted that "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." No. 08-205 at 44–45. Thus, that the City's reliance on *Caperton* is misguided.

Citizens United, No. 08-205 at 24. That seems to settle the question. Regardless, the City cites no case law suggesting that the Plaintiffs must offer such evidence. Rather, the City bears the burden of showing that its law satisfies scrutiny. Because it does not, it is unconstitutional.

VII. The Ban of Entity Contributions For Independent Expenditures Is Unconstitutional.

Citizens United is clear: the Government must speakers the same with regard to their independent expenditures. No. 08-205 at 24. "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity." *Id*. at 50. "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," *Id*, and "[a]n outright ban on corporate political speech . . . is not a permissible remedy." *Id*. at 45.

The City's law, however, does not just *limit* the political speech of corporations (bad as that would be). It does what the Supreme Court called "not a permissible remedy:" it bans corporate speech altogether. Corporate and other organizational entities may not make independent expenditures, nor contribute to candidates, nor contribute to independent expenditure committees. Such a complete ban cannot pass constitutional muster. Nor can the complete prohibition against entity contributions to independent expenditure committees, because the City has no "sufficiently important" interest. The antidistortion rationale from *Austin* related to the ability of corporations to amass political war chests was invalidated by *Citizens United*. *Id*. at 49–50 (overruling *Austin*) and 34 (stating that the First Amendment protects all speakers, regardless of their "financial ability to engage in public discussion").

Conclusion

For the foregoing reasons, the Plaintiffs are likely to succeed on the merits, and this Court should grant their motion for a preliminary injunction.

January 25, 2010

Respectfully Submitted,

s/ Joe La Rue

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