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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**

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| **Phil Thalheimer** et al.,<br>**Plaintiffs,**<br>**v.**<br>**City of San Diego**,<br>**Defendants.** | **Case: 3:09-cv-2862-IEG-WMC**<br>**Memorandum in Support of Plaintiffs' Motion for TRO and PI**<br>**ORAL ARGUMENT REQUESTED**<br>Estimated Time Needed: One Hour |

# TRO and PI Memorandum

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## Introduction

Earlier in this litigation, this Court enjoined enforcement of the SAN DIEGO MUNICIPAL ELECTION CAMPAIGN CONTROL ORDINANCE ("ECCO") sections 27.2950 and 27.2951, which together banned contributions from political parties to their candidates ("party contribution ban"). (Doc. 42 ("Order") 26-27.) The Court recognized that the party contribution ban "threaten[ed] harm to the right to associate in a political party" and "prevent[ed] parties from using contributions by small donors to provide *meaningful assistance* to any individual candidate." (*Id*. 20 (emphasis added)). By enjoining the party contribution ban, the Court restored First Amendment freedoms to political parties by recognizing their right to make contributions to their candidates. The parties were thereby allowed to provide the "meaningful assistance" to their candidates that this Court properly recognized is a constitutional imperative. This decision placed San Diego on equal footing with the State of California, which likewise does not limit the amount political parties may contribute to their candidates, and allowed political parties to fully exercise their First Amendment rights.

In response to the Court's decision, the City took two steps to once again limit the freedom of the political parties in San Diego. First, the City Council enacted a new law, codified at ECCO 27.2934, that placed a $1,000 limit on political party contributions (**"party contribution limit"**).[1] Second, the Ethics Commission issued an authoritative interpretation of ECCO 27.2936(b),[2] requiring that political party contributions to their candidates be

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[1] **ECCO Section 27.2934** provides in relevant part:

> It is unlawful for a political party committee to make, or for a candidate or controlled committee to solicit or accept, a contribution that would cause the total amount contributed by the political party committee to the candidate and the candidate's controlled committee to exceed $1,000 for any single City candidate election.

ECCO 27.2934(b). The current version of ECCO is available at http://docs.sandiego.gov/municode/-MuniCodeChapter02/Ch02Art07Division29.pdf (last visited Aug 10, 2010).

[2] **ECCO Section 27.2936(b)** provides in relevant part:

> It is unlawful for any general purpose recipient committee to use a contribution for the purpose of supporting or opposing a candidate unless the contribution is attributable to an individual in an amount that does not exceed $500 per candidate

attributable to donations to the political party from individuals, in amounts not greater than $500 per individual (**"attribution requirement"**).[3] The attribution requirement had already been enjoined by this Court as it applied to committees making independent expenditures, (*Order* 26,) and had never previously been applied to *contributions*. But the Ethics Commission reasoned that since the Court had not enjoined the attribution requirement as it applied to contributions, it could therefore be utilized to limit political party contributions to their candidates. The Commission stated:

> [T]he plain language of the order establishes that the ruling does not apply to committees that engage in other types of political advocacy. This means that the City may continue to enforce the restrictions set forth in section 27.2936 on political party committees that make contributions to City candidates or make payments for coordinated member communications that support or oppose City candidates.

(Compl., Exh. 6 at 2.)

The effect of these two developments—the party contribution limit and the new, authoritative interpretation of the attribution requirement—is to limit political party contributions to their candidates to $1,000, which must be attributable to donations to the political party from individuals in amounts of $500 or less per individual. Once again, political parties' First Amendment freedoms are infringed.

Plaintiffs Associated Builders & Contractors PAC sponsored by Associated Builders & Contractors, Inc. San Diego Chapter ("ABC PAC"), the Lincoln Club of San Diego County ("Lincoln Club"), Republican Party of San Diego County ("RPSD"), Phil Thalheimer, and

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per election.

ECCO § 27.2936(b). ECCO does not provide a definition of "the purpose of supporting or opposing a candidate."

[3] *See* First Amended Verified Complaint, Exh. 6 ("City of San Diego Ethics Commission Memorandum" (June 8, 2010) *available at* http://www.sandiego.gov/ethics-/pdf/eccomemo100608.pdf (last visited August 10, 2010)). *See also* Ethics Commission, May 24, 2010 Bulletin, "IMMEDIATE CHANGES TO SAN DIEGO CAMPAIGN RULES," *available at* http://www.sandiego.gov/ethics/pdf/ecconotice_100524.pdf (last visited August 10, 2010) (same).

John Nienstedt, Sr. ("Plaintiffs") seek a temporary restraining order ("TRO") and preliminary injunction ("PI") to prevent the City of San Diego from enforcing the party contribution limit and the attribution requirement. A temporary restraining order and preliminary injunction are necessary to prevent immediate and irreparable harm to the RPSD, its candidates, and its contributors.

## Facts

As set out more fully in the First Amended Verified Complaint, the facts are as follows.

In California, political parties are permitted to make unlimited contributions to local candidates where local law does not impose limitations. CALIFORNIA GOVERNMENT CODE § 85312. The City of San Diego, however, imposes limitations—contributions from political parties to their candidates are limited to $1,000 per election, and must be attributable to contributions to the party from individuals of no more than $500 per individual. (*See supra* at 1-2.)

Plaintiff RRSD is San Diego's local organization for the Republican Party. It challenged the party contribution ban (the prior law, which this Court enjoined) because it wants to make contributions to its candidates. This Court enjoined that ban, (Order 26-27), and the City responded by enacting the party contribution limit and adopting the attribution requirement as its authoritative enforcement position. The Plaintiffs therefore sought leave to amend their complaint to challenge the provisions and authoritative interpretation undergirding the party contribution limit and attribution requirement. (Doc. 84.) The Court granted them leave to do so. (Doc. 93.)

The RPSD wants to make contributions *right now* above the $1,000 limit to its candidate(s) for the November general election, and wants to do so in amounts not attributable to donations from individuals of amounts not more than $500. The RPSD is ready, willing and able to do so, and would do so, but for the party contribution limit and the attribution requirement. RPSD also wants to engage in materially similar activity in the future. Having no adequate remedy at law, the Plaintiffs amended their complaint and now ask this Court to enjoin enforcement of the party contribution limit and the attribution

requirement.

## PI and TRO Standards and Burdens of Proof

### A. The Ninth Circuit Employs the *Winter* Standard for Both PIs and TROs.

Courts in the Ninth Circuit determine whether to grant temporary restraining orders by applying the preliminary injunction standard articulated in *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365 (2008). *See*, *Pimentel v. Deutsche Bank Nat. Trust Co.*, No. 09-CV-2264 JLS (NLS), 2009 WL 3398789 at * 1 (S.D. Cal. Oct 20, 2009) (stating that "[t]emporary restraining orders are governed by the same standard applicable to preliminary injunctions" and referencing *Winter*). *See also Societa Italiana Chimici SRL v. eBioscience Corp.*, No. 10CV630 BTM(WVG), 2010 WL 1346317 at *1 (S.D. Cal. April 5, 2010) (order granting TRO) (citing *Winter*). So plaintiffs seeking a TRO and PI must establish the same four factors: (1) likely merits success; (2) irreparable harm; (3) a favorable equitable balance; and (4) public-interest service. *Winter*, 129 S. Ct. at 374-75. In First Amendment cases, once likely merits success is established, the other elements follow. *See, e.g.*, *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973-74 (9th Cir. 2002) (noting that irreparable harm, favorable equitable balance, and public service interest are present when movant establishes likely merits success on First Amendment claim).[4]

### B. The Government Bears the Burden of Proving Its Laws Pass Constitutional Scrutiny.

The *government* must prove its laws burdening the First Amendment survive constitutional scrutiny. For laws subject to strict scrutiny, the government must demonstrate

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[4] *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 other injunction factors to favor the plaintiff.

that the laws are "narrowly tailored" to a "compelling interest" and employ the "least restrictive means." *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464 (2006) ("*WRTL II*"); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). For laws subject to intermediate scrutiny, the government must prove that the laws are "closely drawn" to a "sufficiently important interest." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000) ("*Shrink*"). This is true even at the preliminary-injunction stage, for "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (*citing Ashcroft*, 542 U.S. at 666). The government must provide proof, not speculation. *Gonzales*, 546 U.S. at 430. The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted). If the government fails to carry its burden, the plaintiffs are judged as likely to succeed on the merits.

In the Ninth Circuit, it is reversible error for a district court to presume constitutional tailoring where the government has not proved it. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007) (holding it reversible error for a district court to find an anticorruption interest where the government has not presented evidence of such); *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.").

## Argument

The Plaintiffs seek a TRO and PI against two provisions of San Diego law—the $1,000 limit on contributions from political parties to their candidates (**"the party contribution limit"**), and the requirement that all such contributions be attributable to donations to the party from individuals, in amounts not exceeding $500 per individual (**"the attribution requirement"**). The Plaintiffs are entitled to injunctive relief because they satisfy the *Winter* injunction standard. That is, they are likely to succeed on the merits; they are suffering

irreparable harm; the balance of hardships tips their way; and, injunctive relief is in the public interest. *See infra*.

**I. The Plaintiffs are Likely to Succeed on the Merits.**

Political parties exist "for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). This is accomplished in large part by working to "elect whichever candidates the party believes would best advance its ideals and interests[,]" which is the "basic object of a political party." *Randall v. Sorrell*, 548 U.S. 230, 257-58 (2006). If parties were unable to promote candidates who espouse the political views of their members, representative democracy would be "unimaginable." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). The right of citizens to band together in political parties is therefore "fundamental," *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 990 (1979), and an "integral part" of what the First Amendment protects, *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). And parties themselves—not just their members—have a First Amendment right to engage in political speech and association. *San Francisco County Democratic Cent. Committee v. Eu*, 826 F.2d 814, 818 (9th Cir. 1987), *aff'd sub nom. Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214 (1989) ("*Eu*").

Because of the unique role political parties play in our democracy, limits on their ability to contribute to their candidates must be carefully evaluated. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 486 (D. Vt. 2000). The Supreme Court has held that contributions, including those made by parties to their candidates, may be limited only so long as the limit satisfies intermediate scrutiny—that is, so long as it is "closely drawn" to further a "sufficiently important interest." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 (2001) ("*Colorado II*").[5] The only interest yet recognized as "sufficiently important"

[5]Under the Supreme Court's jurisprudence relating to contribution limits, *intermediate* scrutiny applies to laws that restrict contributions. However, *Citizens*' clarified that laws burdening political speech are subject to *strict* scrutiny. The Court ruled that "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political

to sustain limits on contributions is the interest in curbing quid-pro-quo corruption or the appearance of quid-pro-quo corruption, *Citizens United v. FEC*,130 S.Ct. 876, 901 (2010) (*quoting Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). But the corruption or appearance of corruption the government seeks to combat must be real, and not conjecture, *Shrink*, 528 U.S. at 392. And even then, limits on contributions must be sufficiently high to allow candidates to amass the resources necessary for effective advocacy; otherwise, they are unconstitutional. *Randall*, 548 U.S. at 248.

Both the party contribution limit and the attribution requirement burden and infringe the First Amendment political speech and associational rights of RPSD and every other political party in San Diego. Neither law survives scrutiny, but are unconstitutional. *See infra*. The Plaintiffs therefore enjoy likely merits success.

**A. The Party Contribution Limit is Unconstitutional.**

**1. Political Parties Must be Allowed to Make Robust Contributions to Their Candidates.**

The Supreme Court has twice considered the constitutionality of limits on political party contributions to their candidates. The first time, in *Colorado II*, the Court held that limits on political party contributions to their candidates are not per se unconstitutional. *Id*. at 465. In so concluding, the Court recognized that the government has an interest in preventing circumvention of its valid contribution limits by individuals who seek to funnel funds through political parties. *Id*. at 456. This anticircumvention interest, which the Court

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speech are subject to strict scrutiny." *Citizens United v. FEC*,130 S.Ct. 876, 898 (2010).

Contributions are political speech, not merely association. *Buckley* recognized this when it spoke of contribution limits being a "marginal restriction" on political speech, *Buckley*, 424 U.S. at 20. And even if "contributions lie closer to the edges than to the core of political expression[,]" *FEC v. Beaumont*, 539 U.S. 146 (2003), they are still "political expression." That is, they are *political speech*, and under *Citizens* limits on them must be subjected to *strict* scrutiny. *Citizens*' holding thus indicates that the Supreme Court's contribution-limit jurisprudence should be reconsidered, and overruled to the extent that it requires that contribution limits be evaluated under any scrutiny other than strict, which Plaintiffs assert comports with the original intent of the *Buckley* Court. But the Plaintiffs understand that this Court is not the proper tribunal to undertake that reconsideration. They therefore preserve this issue for appeal.

recognized as "a valid theory" of the anticorruption interest, was sufficiently important to undergird the challenged contribution limits. *Id*. at 465.

The challenged limits in *Colorado II*, however, were actually quite healthy. The *Randall* Court states that they were "at least $67,560 in coordinated spending and $5,000 in direct cash contributions for U.S. Senate candidates, [and] at least $33,780 in coordinated spending and $5,000 in direct cash contributions for U.S. House candidates." *Randall*, 548 U.S. at 258. Further, "they were much higher than the federal limits on contributions from individuals to candidates[,]" thereby demonstrating that Congress attempted "to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties 'to circumvent contribution limits that apply to individuals.'" *Id*. at 258-59 (*quoting Colorado II*, 533 U.S. at 453).

The second time the Supreme Court examined the constitutionality of limits on contributions by political parties to their candidates was in *Randall*, where the Court held the challenged limits unconstitutional. 548 U.S. at 236. Those limits, however, were significantly lower than the robust limits upheld in *Colorado II*. The law at issue in *Randall* imposed on political parties the exact same contribution limit—ranging from $200 to $400, depending on the office—that individuals were subjected to. *Id*. at 238. In concluding that these limits were unconstitutional, the Court described them as "disproportionately severe," *id*. at 237, "strict," *id*. at 238, and "objectionable," *id*. at 252.

The limit on political party contributions to candidates was particularly troubling to the *Randall* Court. *Id*. at 256-59. This is not surprising, considering the role political parties play in our democracy and the importance of their contributions to their candidates. As *Colorado II* recognized, "a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could, using such mechanisms as speech coordinated with a candidate," thereby making their members' political advocacy more effective. *Colorado II*, 533 U.S. at 453.

When political party contributions are subjected to severe limits, the important role that parties play is imperiled as five constitutional problems occur. **First**, low limits "reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper." *Landell*, F.Supp. 2d at 487. *See also Randall*, 548 U.S. at 259 (citing *Landall* with approval). **Second**, low limits on political party contributions to candidates "threaten[] harm to a particularly important political right, the right to associate in a political party." *Randall*, 548 U.S. at 256. **Third**, they discourage small-money donors from contributing to political parties, because the donors recognize that the party is not able to effectively combine party members' resources for robust speech. *Id*. at 257. **Fourth**, they "inhibit collective political activity" by preventing political parties from providing "meaningful assistance" to their candidates. *Id*. at 258. **Fifth**, low limits on political party contributions to candidates risk violating the First Amendment's requirement that limits on contributions not be so severe that they prevent candidates from amassing the necessary resources to mount effective campaigns. *Id*. at 254.

These two cases—*Colorado II* and *Randall*—together stand for the proposition that while government may limit party contributions to their candidates if necessary to combat circumvention of valid individual contribution limits, the limits it imposes must be robust enough—and high enough when compared with the limits imposed on *individuals*—to allow political parties to fulfil their unique function in our democracy. Otherwise, the limits are unconstitutional.

**2. The Party Contribution Limit Is Too Low and Severe To Withstand Scrutiny.**

**Federal law** comports with *Randall*'s rule that party contribution limits must be sufficiently robust. For example, it allows individuals to make contributions of $2,400 to Senate candidates for the 2010 election,[6] while allowing political parties to make direct cash

[6] 2 U.S.C. 441a(a)(1)(A) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Contribution Limits for 2009-10," *available at* http://www.fec.gov/info/contriblimits0910.pdf (*last visited* July 29, 2010).

contributions of $42,600.[7] Plus, political parties also get to make coordinated expenditures with their candidates, above the contribution limits, in amounts that vary according to the population of the state in question but range from $87,000 for Senate candidates in Alaska and Delaware to $2,395,400 for Senate candidates in California.[8] Thus, the total amount political parties may contribute to their candidates for Senate ranges from $129,600 to $2,438,000, which is between 54 and 1,015 times the $2,400 that individuals may contribute.[9] **California law** also follows *Randall* by allowing political parties to make *unlimited* contributions to their candidates.[10] Both California and federal law let political parties make contributions to their candidates that are both robust and also sufficiently high when compared with limits imposed on individuals to allow the parties to fulfil their unique function in our democracy. This is exactly what the First Amendment requires: citizens must be able to band together in political parties to elect candidates, and parties must be able to magnify the expressive power of their members by providing meaningful assistance to the parties' candidates at levels sufficiently greater than an individual alone can provide.

The challenged party contribution limit, however, does not comport with the First Amendment. Rather, it imposes a severely low, $1,000 limit on the amount political parties may contribute to their candidates—a mere two times the individual, $500 contribution limit. Far from being robust and sufficiently high when compared with limits imposed on individuals to allow the parties to fulfil their unique function in our democracy, the party

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[7] 2 U.S.C. 441a(h) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Contribution Limits for 2009-10," *available at* http://www.fec.gov/info/contriblimits0910.pdf (*last visited* July 29, 2010).

[8] 2 U.S.C. 441a(d)(3)(A) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Coordinated Party Expenditure Limits for 2010 Senate Nominees," *available at* http://www.fec.gov/info/charts_441ad_2010.shtml (*last visited* July 29, 2010).

[9] Incidently, these are the limits, adjusted for inflation, that were upheld in *Colorado II*.

[10] *See* California Fair Political Practices Commission, "California Contribution Limits Fast Facts," *available at* http://www.fppc.ca.gov/bulletin/Contriblimit2008update.pdf-#search=%22contribution%20limits%22 (*last visited* July 29, 2010).

contribution limit is draconian in its severity. It suffers from the same defects as the limit declared unconstitutional in *Randall*.

**a. The Party Contribution Limit Impermissibly Reduces the Voices of Political Parties to a Whisper.**

By restricting political parties to the contributing power of a mere two individuals, the political party limit has reduced the voice of political parties to a whisper. *See Randall*, 548 U.S. at 259. The federal limit upheld in *Colorado II* allows parties to contribute *at least* as much as 54 people, and in some instances as much as 1,015 people. California's limit allows parties to contribute without limit—they may contribute as much as an unlimited number of people. The party contribution limit, however, only lets parties contribute as much as *two* people. As in *Randall*, the voice of RPSD and other political parties is muted and reduced to a whisper, in violation of what the First Amendment requires.

**b. The Party Contribution Limit Threatens the Right to Associate in Political Parties.**

The party contribution limit also directly threatens the right of citizens to associate in a political party for the purpose of electing candidates. *See Randall*, 548 U.S. at 256. Using pooled money from its members to "elect whichever candidates the party believes would best advance its ideals and interests" is, after all, "the basic object of a political party." *Id*. at 257-58. But when political parties are not allowed to make contributions that are sufficiently high to provide meaningful assistance to their candidates, their reason for existing is undermined. This imperils the right to associate in a political party, since the benefit of association is eliminated by the limits on the ability of parties to assist their candidates. It also threatens our democracy. *California Democratic Party*, 530 U.S. at 574 (explaining that if parties were unable to promote candidates who espouse the political views of their members, representative democracy would be "unimaginable"). And it renders suspect even constitutionally permissible limits on individual contributions since such limits "constitute 'only a marginal restriction' on First Amendment rights *because* [the] contributor remains free to associate politically, *e.g.*, in a political party, and 'assist personally' in the party's

'efforts on behalf of candidates.'" *Randall*, 548 U.S. at 256-57 (*quoting Buckley*, 424 U.S. at 20-22). When political parties are forbidden from providing meaningful assistance to their candidates, the individual's freedom to associate in a political party and assist meaningfully with its effort to elect candidates is threatened. Individual contribution limits then become something far more than mere "marginal" restrictions on speech—they work to silence citizens' voices altogether. The severely low, $1,000 party contribution limit thus threatens fundamental rights protected by the First Amendment.

**c. The Party Contribution Limit Intolerably Discourages Small Donors.**

Just as in *Randall*, so here: the party contribution limit has the effect of discouraging small- money donors from contributing to political parties, because the donors recognize that the party is not able to effectively combine party members' resources for robust speech. *See Randall*, 548 U.S. at 257. To take the example given in *Randall*:

> [I]imagine that 6,000 Vermont citizens each want to give $1 to the State Democratic Party because, though unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Democratic state legislature. And further imagine that the party believes control of the legislature will depend on the outcome of three (and only three) House races. The Act forbids the party from giving $2,000 (of the $6,000) to each of its candidates in those pivotal races.

*Id*. at 258.

The party contribution limit likewise forbids the RPSD from raising 6,000 $1 donations and giving $2,000—and even that would be a small amount, and arguably an unconstitutional limit—to three candidates in pivotal races. This discourages small-money donors from contributing to political parties, as they understandably question whether there is any point in doing so.

**d. The Party Contribution Limit Unconstitutionally Prevents Parties from Providing Their Candidates with Meaningful Assistance.**

Just like in *Randall*, the party contribution limit "inhibit[s] collective political activity"

by preventing political parties from providing "meaningful assistance" to their candidates. *See Id*. at 258. True, because of this Court's grant of preliminary injunction, political parties may currently make unlimited independent expenditures in support of their candidates—although the City has appealed that ruling. Regardless, allowing parties to make independent expenditures is not the same, and does not have the same effect, as allowing parties to make robust contributions to their candidates. "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate . . . ." *Buckley*, 424 U.S. at 47. Contributions to candidates and coordinated expenditures with them, however, allow the candidates to control the message presented about them. Thus, robust contributions and coordinated expenditures provide the type of "meaningful assistance" that the First Amendment requires parties be allowed to make. The party contribution limit prevents such meaningful assistance, and instead inhibits collective political activity in violation of the First Amendment.

**e. The Party Contribution Limit Threatens the Ability of Candidates to Amass Necessary Resources to Mount Effective Campaigns.**

Finally, just as in *Randall*, the party contribution limit risks violating the First Amendment's requirement that limits on contributions not be so severe that they prevent candidates from amassing the necessary resources to mount effective campaigns. *See Randall*, 548 U.S. at 254. When contributions from individuals are already limited, as they were in *Randall* and are in San Diego, limits on contributions from political parties must be *even more* robust; otherwise, the ability of candidates to amass the resources necessary to engage in political speech is threatened. *Id*. at 254.

Effective political advocacy is expensive. Justice Marshall noted in *Buckley* that "[o]ne of the points on which all Members of the Court agree is that money is essential for effective communication in a political campaign." *Buckley*, 424 U.S. at 288 (Marshall, J., concurring in part and dissenting in part). Or as the Ninth Circuit recently noted, "'[m]ore speech' often

means 'more money.'" *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 686 (9th Cir. 2010). "This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id*. at 687 (*quoting Buckley*, 424 U.S. at 19). Thus, candidates must be able to raise contributions from politically like-minded supporters if they intend to communicate their message to the electorate. "[R]estrictions on the amount of money that a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Restrictions on contributions *for* spending have the same effect. *Id*. at 241-42 (Burger, C.J., dissenting) ("By limiting campaign contributions, the Act restricts the amount of money that will be spent on political activity and does so directly").

Prior to this Court's *Order* enjoining the previous party contribution ban, political parties made *no* contributions to their candidates, yet candidates still managed to amass the necessary resources to mount effective campaigns. However, in those days committees were not allowed to make unlimited independent expenditures as they are today, but rather were subject to unconstitutional limits on the amount of money they could spend. This Court's *Order* properly freed independent expenditure committees from those limits, allowing them to exercise their First Amendment right to engage in political speech. (*Id*.) However, this means there will likely be more political speech than in years past. Candidates will need to raise more contributions to counteract such speech and communicate their message to the voters. The party contribution limit threatens their ability to do so. "Limiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place." *Buckley*, 424 U.S. at 242 (Burger, C.J., concurring in part and dissenting in part). This is because "contributions and expenditures are two sides of the same First Amendment coin." *Id*. at 241 (Burger, C.J., concurring in part and dissenting in part).

**f. The Party Contribution Limit Is Not Closely Drawn, but is Unconstitutional.**

As *Randall* demonstrated, there is some "lower bound" below which contribution limits may not go. 548 U.S. at 248. "[L]imits [that] are sufficiently low . . . generate suspicion that they are not closely drawn." *Id*. at 249. While the Court has 'no scalpel to probe' each possible contribution level," *id*. at 248 (*quoting Buckley*, 424 U.S. at 30), in this case it does not need one. Limits that impact political parties in such unconstitutional ways, as the City's limit does, cannot possibly be closely drawn. Rather, "they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance." *Randall*, 548 U.S. at 262. Whatever interest the City may have in preventing circumvention of its individual contribution limits, the party contribution limit is not closely drawn to it. It is rather overinclusive, burdening far more speech and associational rights than is necessary to further the anticircumvention interest. The party contribution limit thus "goes too far," because it "disproportionately burdens numerous First Amendment interests[.]" *Id*. It therefore "violates the First Amendment," *id*., and is "too low and too strict to survive First Amendment scrutiny." *Randall*, 548 U.S. at 248. The limit is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. It "undermine[s] . . . the potential for robust and effective discussion of candidates and campaign issues by . . . political parties." *Buckley*, 424 U.S. at 29. It is unconstitutional.

**B. The Attribution Requirement is Unconstitutional.**

For the same reasons just discussed, the requirement that all party contributions to their candidates be attributable to donations to the party from individuals in amounts not greater than $500 per individual fails constitutional scrutiny. This attribution requirement functions both as a limit on the amount of money that citizens may give to political parties to support their candidates (only $500), and also as a limit on the amount that parties may then contribute to their candidates. On both counts it is too low and too severe to withstand scrutiny. And it also completely bans entity contributions without justification, in violation

of the rule of *Citizens*, *Buckley*, and *Beaumont*. It is therefore unconstitutional.

**1. The Attribution Requirement Is Too Low and Severe To Withstand Scrutiny.**

The attribution requirement imposes a $500 limit on the amount of money a citizen may donate to a political party to use to support a candidate. This restriction imposes a severe limit on the parties' ability to provide meaningful assistance to their candidates. Yet the constitutional *purpose* of political parties is to allow citizens to band together to elect candidates. *Randall*, 548 U.S. at 257-58; *Timmons*, 520 U.S. at 357. When limits on donations to political parties are too low, they "threaten[] harm to . . . the right to associate in a political party[,]" *see Randall*, 548 U.S. at 256, and "severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending[,]" *see id*. at 257. The attribution requirement therefore imperils the First Amendment right to associate in a political party and is unconstitutional.

**a. The Attribution Requirement Prevents Citizens From Engaging in Effective Expressive Association Through Political Parties.**

Because of the special role political parties fulfill in our society and their special purpose as a mechanism for protected political association (*see supra*), any limit placed on donations to political parties' efforts to elect candidates must be robust. Certainly they must be higher than the amount individuals can contribute to candidates. There is no point in associating in parties if the parties are limited as severely as the citizens. Such limits therefore threaten the ability of political parties to make robust contributions to their candidates, which the Constitution requires they be allowed to make.

**Federal law** recognizes this principle. For instance, an individual may make a contribution of $2,400 to candidates for federal office in 2010,[11] but may make a contribution

[11] 2 U.S.C. 441a(a)(1)(A) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Contribution Limits for 2009-10," *available at* http://www.fec.gov/info/contriblimits0910.pdf (*last visited* July 29, 2010).

of $30,400 per year to national political parties,[12] and the political parties can use the full amount of that contribution to fund its contributions and coordinated expenditure. **California law** likewise recognizes this principle. For example, it lets citizens make contributions of $3,900 to candidates for the state legislature but unlimited contributions to the state political party, which may then use up to $32,400 of the contribution to support state candidates.[13]

San Diego law, however, has failed to recognize the principle that limits on donations to political parties must be sufficiently robust, as compared with individual contributions to candidates, to ensure that the special role of political parties is not threatened. The $500 attribution requirement is *identical* to what an individual may contribute to a candidate, "threaten[ing] harm to . . . the right to associate in a political party[.]" *See Randall*, 548 U.S. at 256. It "reduce[s] the voice of political parties to an undesirable, and constitutionally impermissible, whisper," *Landell*, F.Supp. 2d at 487; *see also Randall*, 548 U.S. at 259 (citing *Landall* with approval), rendering association in political parties pointless.

**b. The Attribution Requirement Mutes the Voices of Political Parties.**

Not only does the attribution requirement threaten the right of citizens to effectively associate in political parties by imposing a severely low limit on the amount they may donate to the party, but it also threatens the right of association by muting the voices of the parties themselves. By restricting the RPSD and other political parties to only the donations they receive from individuals of $500 or less per individual, the attribution requirement imposes a severe limit on the amount of money available to the parties with which to make contributions.

The limit is even more restrictive than might at first glance appear to be the case. To take

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[12] 2 U.S.C. 441a(a)(1)(B) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Contribution Limits for 2009-10," *available at* http://www.fec.gov/info/contriblimits0910.pdf (*last visited* July 29, 2010).

[13] *See* California Fair Political Practices Commission, "California Contribution Limits Fast Facts," *available at* http://www.fppc.ca.gov/bulletin/Contriblimit2008update.pdf-#search=%22contribution%20limits%22 (*last visited* July 29, 2010).

but one example, if Contributor A gives $100 to RPSD, and Contributor B gives $900 to RPSD, RPSD has received $1,000 from two contributors. But RPSD may not use the full $1,000 to support Candidate X—even though that would amount to an average of $500 per contributor. Rather, it may only use $500 from Contributor B's donation, giving it only $600 with which to support Candidate X. This attribution requirement therefore reduces the amount of money political parties may use to provide meaningful assistance to their candidates even more than the $1,000 party contribution limit has already reduced it. This effectively "mute[s] the voice of political parties," *Randall*, 548 U.S. at 261, which the First Amendment cannot tolerate, *id*.; *see also Eu*, 826 F.2d at 818 (explaining that "political parties as well as individual party adherents enjoy First Amendment rights.").

**c. The Attribution Requirement is not Closely Drawn, But is Unconstitutional**.

For the same reasons discussed regarding the party contribution limit, the attribution requirement is not closely drawn. It "severely limit[s] the ability of a party to assist its candidates' campaigns by engaging in coordinated spending[,]" *Randall*, 548 U.S. at 257, and "inhibit[s] collective political activity" by preventing political parties from providing "meaningful assistance" to their candidates, *id*. at 258. The limit is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 528 U.S. at 397. It therefore "undermine[s] . . . the potential for robust and effective discussion of candidates and campaign issues by . . . political parties." *Buckley*, 424 U.S. at 29. It is simply "too low and too strict to survive First Amendment scrutiny." *Randall*, 548 U.S. at 248. It is unconstitutional.

**2. The Attribution Requirement Bans The Use of Entity Donations Without Justification.**

The $500 attribution requirement also unconstitutionally restricts the donations the political parties may use to fund their contributions to their candidates to that which comes from *individuals*, thereby banning corporations, labor organizations and other entities from contributing to political parties for the purpose of supporting candidates. This ban on

corporate contributions subverts the holdings in *Citizens* that (1) the corporate form poses *no* corruption risk, *id*. at 909; which is the only constitutionally cognizable interest in limiting political speech and association, 130 S.Ct. 876, 901 and 913; and (2) a complete ban on corporate political speech is not permissible, *id*. at 911. Post-*Citizens*, there is *no* constitutionally cognizable interest that can justify a complete ban on corporate contributions—yet, that is what the attribution requirement imposes. Because corporations, labor unions and other entities are also banned under San Diego law from making contributions to candidates, ECCO § 27.2950, the attribution requirement means they have *no* way to associate with candidates. They cannot do so directly; they also cannot do so through a political party. This is more severe than the Constitution will allow.

*Buckley* held that *limitations* on contributions are permissible *precisely because* they still "permit[] the symbolic expression of support evidenced by a contribution . . . .[,]" *Buckley*, 424 U.S. at 21, and because *limitations* allow contributors to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources[,]" *id*. at 28. At least *some* ability to make contributions to candidates must remain available to those who want to contribute; otherwise, their First Amendment rights are stripped away and the limit on their contributions cannot be said to be "marginal."

One case that directly considered whether entities could be prohibited from contributing to candidates, *FEC v. Beaumont*, 539 U.S. 146 (2003), recognized this principle. The *Beaumont* Court upheld a ban on direct contributions from corporations and labor unions, *because* the law allowed those entities to make contributions—including contributions to political parties to fund their contributions to candidates—through PACs. 539 U.S. at 162-63.[14] As the *Beaumont* Court said: "[The challenged ban on direct entity contributions]

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[14]The Plaintiffs believe *Beaumont* should be revisited and overruled in light of *Citizens*. *Beaumont*'s holding that a ban on general-fund corporate contributions is permissible was based on its belief that the PAC-option allowed for corporate expressive activity. 539 U.S. at 162-63. But *Citizens* held that a PAC is a separate legal entity from the corporation that creates it, so the PAC-option *cannot* allow for corporate expressive activity. 130 S.Ct. at 897. Further, *Beaumont* found three interests supporting the ban, two of which were invalidated, and one discredited, by *Citizens*.

permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of PACs. The PAC option allows corporate political participation . . . ." *Id*. at 163. *Beaumont* said this option allowed Government to "regulate campaign activity through registration and disclosure . . . without jeopardizing the associational rights of [entities] members." *Id*. Because federal law allowed corporations to employ PACs to make contributions to candidates and political parties, the Court upheld the ban on direct corporate contributions. *Id*.

San Diego law, however, does not allow this option. Rather, it *completely bans* entity contributions to candidates and also to political parties for the purpose of the party making contributions to candidates. This is impermissible under *Citizens*, 130 S. Ct. at 911, *Buckley*, 424 U.S. at 21, and *Beaumont*, 539 U.S. at 162-63.Whatever interest the City might allege to justify *limits* on corporate contributions to political parties, a *complete ban* is not a permissible answer. *Citizens*, 130 S. Ct. at 911.

**II. The Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.**

The Plaintiffs have demonstrated likely merits success as to their First Amendment challenges to the party contribution limit and the attribution requirement. That showing necessitates that the Court find that the Plaintiffs are likely to suffer irreparable harm.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Sammartano*, 303 F.3d at 973 (same); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (same). When the plaintiffs state a colorable First Amendment claim, the risk of irreparable injury is to be presumed. *Brown v.*

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*Compare Beaumont*, 539 U.S. at 154 (antidistortion and shareholder-protection interests), *with Citizens*, 130 S.Ct. at 903-08 (invalidating antidistortion interest), 911 (invalidating shareholder-protection interest). *Compare also Beaumont*, 539 U.S. at 155 (anticircumvention interest), *with Citizens*, 130 S.Ct. at 912 (regulations are always underinclusive to the anticircumvention interest). *Beaumont* thus rests on a now-rejected premise (that PACs can engage in expressive activity for the organization that creates them) and discredited reasoning. Plaintiffs preserve this issue for appeal.

*Cal. Dept. of Transp.*, 321 F.3d 1217, 1226 (9th Cir. 2003).

The fact that First Amendment rights are burdened and chilled, as they are in this case, is enough to meet the preliminary injunction 'irreparable harm' standard. The RPSD wants to engage in constitutionally protected speech *right now*, and would do so, except that the law prevents them. Thus, their speech is burdened and chilled. They have stated a colorable First Amendment claim. As *Cal. Dept. of Transp.* ruled, the irreparable injury must be presumed.

**III. The Balance of Hardships Favors the Plaintiffs.**

In the Ninth Circuit, "[T]he fact that a case raises serious First Amendment questions ***compels*** a finding that ... the balance of hardships tips sharply in [the plaintiffs'] favor." *Sammartano*, 303 F.3d at 973 (internal quotations and citations omitted) (emphasis added). *See also Community House*, 490 F.3d at 1059 (same).

The Plaintiffs have demonstrated likely merits success. And the City cannot claim it is harmed because an *unconstitutional* law is enjoined. *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004). The balance of hardships favors the Plaintiffs.

**IV. The Public Interest Favors An Injunction.**

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974 (quoting with approval *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). *See also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (*citing Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)); *Christian Legal Society v. Walker*, 453 F.3d 853, 879 (7th Cir. 2006); *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Neither "the City nor the public" have "an interest in enforcing an unconstitutional law." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). *See also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) (same).

Because Plaintiffs have established a likelihood of success on the merits of their First Amendment claims, an injunction is in the public interest.

## Conclusion

For the foregoing reasons, this Court should grant the Plaintiffs' motion for a temporary restraining order and preliminary injunction, and should enjoin the City from enforcing:

(1) ECCO § 27.2934 (the party contribution limit), imposing a limit of $1,000 on the amount the RPSD and other political parties may contribute to their candidates (Count 8) and

(2) ECCO 27.2936(b) and the City's authoritative interpretation of it (the attribution requirement), requiring that political party contributions to their candidates be attributable to donations to the political party from individuals, in amounts not greater than $500 per individual (Count 9).

Plaintiffs also ask this Court to grant any other appropriate relief.

No security should be required because Defendants have no monetary stake.

Aug 18, 2010

Respectfully Submitted,

s/ Joe La Rue

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