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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHIL THALHEIMER et al.

Appellees and Cross-Appellants

v.

CITY OF SAN DIEGO

Appellant and Cross-Appellee

On Appeal From the United States District Court
for the Southern District of California
Judge Irma E. Gonzalez
Case No. 09 CV 2862IEG

APPELLANT'S/CROSS-APPELLEE'S PRINCIPAL BRIEF

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INTRODUCTION

The City of San Diego ("City"), like many American cities, first adopted a set of campaign finance regulations ("the ECCO") in the 1970s to combat corruption and the appearance of corruption, promote political efficacy, and serve other important values. *See* ECCO § 27.2901.[1] The City has updated its laws periodically, most recently in 2008, when it raised certain individual contribution limits to candidates from $270 per election to the current figure of $500 per election. *Id.*

Also like other American cities with campaign finance laws, San Diego has faced periodic litigation arguing that parts of its laws violate the rights of free speech and association contained in the First Amendment to the United States Constitution. The last time such litigation reached the Ninth Circuit, this Court instructed the district court that such challenges should not be decided without first developing *an adequate factual record* on the extent of the First Amendment burdens imposed by such laws and the strength of the government's interests. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007).

Yet in this case, Plaintiffs, Appellees, and Cross-Appellants Phil Thalheimer, Associated Builders & Contractors, Inc. San Diego Chapter,

[1] The entire text of the ECCO appears in this brief's Addendum.

Lincoln Club of San Diego County, San Diego County Republican Party, and John Nienstedt Sr. (collectively "Appellees") sought a preliminary injunction enjoining enforcement of five separate provisions related to contribution limits contained in the ECCO. The district court properly denied Appellees' request for a preliminary injunction as to some of Appellees' challenges, such as its challenge to the $500 individual contribution limitation per candidate per election to City candidates, because Appellees failed to develop an adequate factual record. However, the district court did grant Appellees' requested relief in part.

In particular, the district court, in an order effective immediately and in the middle of the election season, preliminarily enjoined the City's enforcement of those ECCO provisions barring political committees making only independent expenditures in candidate elections from accepting contributions (or spending money received as contributions) exceeding $500 from individuals. In a further order, the district court clarified that these independent expenditure committees also may accept unlimited contributions for use in City candidate elections from *non-individual* entities, such as corporations and labor unions, and accept payments for the purpose of influencing City candidate elections from the checking and credit card accounts of such entities.

The district court also preliminarily enjoined, as to political parties, a provision of the ECCO barring non-individual entities from making campaign contributions to candidates.

This Court should reverse the district court's orders to the extent the court allowed political committees making solely independent expenditures to accept *unlimited* contributions from individuals and *non-individual* entities, such as corporations and labor unions, for use in supporting or opposing candidates in City elections. It should also reverse the district court's order mandating that the City allow political parties to make direct contributions to City candidates in its nonpartisan elections.

As to the district court's holding related to contributions to independent expenditure committees, the district court's decision suffered from three infirmities.

First, the court misapplied the burden of proof on the constitutional question, and failed to recognize—contrary to how the district court decided other, similar issues in this case—that Appellees failed to provide *a sufficient factual basis* as to the burden the law imposed upon them to support their motion.

Second, the district court committed a legal error, subject to this Court's *de novo* review, in rejecting the City's argument that Appellees had

a higher burden of proof because they were seeking a mandatory preliminary injunction changing the status quo. More generally, the district court failed to engage in a careful analysis of the factors aside from likelihood of success on the merits, which Appellees bore the burden of proving in order to be entitled to a preliminary injunction.

Third, the district court committed legal error, subject to this Court's *de novo* review, in holding that it is likely unconstitutional to limit contributions to political committees that make only independent expenditures. The district court erred in failing to apply the lower level of scrutiny that applies to review of campaign *contribution* limits. Under that lower standard, the City's laws are constitutional because they only marginally affect Appellees' First Amendment rights. Further, the City's contribution limits are amply supported by its important interests in preventing corruption and the appearance of corruption.

On this last point, the Appellees argued below that the City cannot prove its anticorruption interests because of the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, ___U.S. ___, 130 S.Ct. 876 (2010), striking down limits on *spending* by corporations on *independent expenditures*. This is incorrect. As to contributions by *individuals*, the limitations are justified because of the greater danger that

contributions to independent expenditure committees will corrupt candidates or create a public perception of corruption compared to the danger that independent spending itself will do so. As to contributions by *non-individual entities*, such as corporations, the City's law is supported by additional interests, including interests in preventing circumvention of valid contribution limits and restricting the influence of political war chests funneled through the corporate form.

Finally, the district court erred in holding that political parties have the right to make *direct contributions* to candidates. Once again, Appellees have failed to prove their case that they are significantly burdened, given that political parties may spend unlimited sums coordinated with candidates on communications with members of their own parties. In addition, the law is justified by the City's interest in preventing corruption, and preventing the circumvention of its valid contribution limitations.

For the foregoing reasons, the two preliminary injunction orders of the district court should be reversed on these points.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case, in which the underlying Complaint asserts claims under the First and Fourteenth Amendments of the United States Constitution, pursuant to 28 U.S.C.

§ 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). On February 16, 2010, the district court entered an order granting in part and denying in part a motion for a preliminary injunction. (ER pp. 14-40.)[2] On February 22, 2010, the district court entered a second order clarifying or modifying the earlier injunction and adding a new preliminary injunction. (ER pp. 12-13.) The City timely filed notices of appeal from the two orders on March 5, 2010. (ER pp. 65-66, 67-68); s*ee* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

A. Whether the district court abused its discretion in granting a preliminary injunction barring enforcement of City laws limiting contributions to independent expenditure committees?

B. Whether the district court abused its discretion in granting a preliminary injunction barring enforcement as to political parties of a City law barring contributions from non-individuals to candidates for City office?

STATEMENT REGARDING ADDENDUM

A separately filed Addendum to this brief contains the entire San Diego Municipal Election Campaign Control Ordinance ("ECCO"), currently codified in Article 7: Elections, Campaign Finance and Lobbying, Division 29 of the San Diego Municipal Code.

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[2] "ER" refers to the City's Excerpts of Record.

It also contains the unpublished district court opinion and order in *Working Californians v. City of Los Angeles*, Order, Case CV-09-08327 (C.D. Cal. Nov. 24, 2009) ("*Working Californians*").

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from two district court orders granting in part Appellees' motions for a preliminary injunction as to five of the City's campaign finance contribution laws.

II. Course of the Proceedings and Disposition in the Court Below

On December 21, 2009, Appellees filed their Verified Complaint against the City of San Diego and various city officials. (ER pp. 109-176.)[3] They also moved for a preliminary injunction. (ER pp. 106-108.) The district court heard oral argument on the motions on February 1, 2010.

On February 16, 2010, the district court granted in part and denied in part Appellees' motion for a preliminary injunction. (ER pp. 14-40.) The City then filed a letter brief asking for clarification of one aspect of the court's order. (ER pp. 71-81.) Appellees filed a letter joining in the request for clarification, and requesting further injunctive relief. (ER pp. 69-70.) On February 22, 2010, the district court issued an order (dated February 19)

[3] The district court later granted the parties' joint motion to dismiss all the defendants except for the City. (ER pp. 15, n.2.)

clarifying its initial order and granting additional preliminary injunctive relief to the Appellees. (ER pp. 12-13.)

On March 5, 2010, the City filed Notices of Appeal from portions of both court orders. (ER pp. 65-66, 67-68.) This Court *sua sponte* consolidated the two appeals.

On March 8, 2010, the City moved the district court to stay portions of the district court's order. (ER pp. 62-64.) On March 15, 2010, the City also moved this Court for a stay of portions of the district court's order. On March 22, 2010, the Appellees filed a cross-appeal from portions of the district court's February 16, 2010 order. (ER pp. 53-54.) On March 23, 2010, the district court denied the City's request for a stay. (ER pp. 1-11.) At the time the City prepared this brief, the stay motion with this Court remained pending.

STATEMENT OF FACTS

I. The City Enacts and Updates Its Campaign Finance Laws, the ECCO.

The City of San Diego first adopted comprehensive campaign finance regulations in 1973, the San Diego Municipal Election Campaign Control Ordinance ("ECCO"), currently codified in Article 7: Elections, Campaign Finance and Lobbying, Division 29 of the San Diego Municipal Code. The ECCO's purpose is to prevent corruption and the appearance of corruption,

promote political efficacy within the community, and promote other important government interests. ECCO § 27.2901.

The City Council has periodically revised the ECCO, most recently in 2008, when the Council, among other changes, raised certain individual contribution limits to candidates from $270 per election to the current figure of $500 per election. ECCO § 27.2935(a), amended October 27, 2008 as Ordinance O-19795.

II. Appellees Seek a Preliminary Injunction Barring Enforcement of Five City Contribution Limitations, Without Engaging in Factual Development.

Appellees are a past, and possibly future, candidate for the San Diego City Council (Phil Thalheimer) (ER pp. 15-16); a California political committee that receives most of its contributions from business entities ("ABC PAC") (ER p. 16); a political organization ("Lincoln Club") (ER p. 16); a political party (the San Diego County Republican Party) (ER p. 16); and a resident of California "who intends to contribute the full amount allowed by law to a candidate in the San Diego City Council and/or citywide elections" (John Nienstedt Sr.) (ER p. 16).

Appellees, *before any trial on the merits or development of a factual record*, sought a preliminary injunction enjoining enforcement of five provisions related to contribution limits contained in the ECCO. (ER pp.

106-108.) In particular, Appellees challenged ECCO § 27.2935, imposing a $500 per election individual contribution limit on contributions to candidates and to committees that accept earmarked contributions for candidates; ECCO § 27.2936(b), limiting contributions to certain committees for purposes of supporting or opposing a candidate to $500 per election; ECCO § 27.2938, prohibiting candidates from accepting contributions for office prior to the twelve months preceding the primary election for the office sought; and ECCO §§ 27.2950 and 27.2951, barring political parties and certain organizations from making contributions to a candidate.

III. The District Court Grants in Part, and Denies in Part, Appellees' Motion for Preliminary Injunction, Staying Only a Portion of Its Injunction. It Then Clarifies and Expands Its Preliminary Injunction.

The district court issued a 27-page order and opinion granting in part, and denying in part Appellees' motion for a preliminary injunction. (ER pp. 14-40.) Following the City's request for clarification (ER pp. 71-81) and Appellees' request to expand the injunction (ER pp. 69-70), the district court issued a short order. (ER pp. 12-13.) Below we describe in detail the rulings of the district court from these two orders.

A. The District Court Rejects a Preliminary Injunction as to the City's $500 Individual Contribution Limit to Candidates

ECCO §27.2935(a) makes it "unlawful for an individual to make to

any candidate or committee supporting or opposing a candidate, or for any candidate or committee supporting or opposing a candidate to solicit or accept, a contribution that would cause the total amount contributed by that individual to support or oppose the candidate to exceed $500 for any single election." In the trial court, Appellees asked for a preliminary injunction on the grounds that this contribution limit to candidates violated the First Amendment because it was unconstitutionally low. (ER p. 19.)

Determining that the issue was controlled by the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), the district court held that the constitutional question was governed by the lower level of scrutiny applicable to contribution limits, rather than strict scrutiny: "Here, because the City's $500 limit is a contribution limit, it must be 'closely drawn' to a sufficiently important interest.'" (ER p. 20.) Appellees had conceded that the City "has a valid interest in preventing corruption and the appearance of corruption associated with large contributions," but argued that the $500 amount was too low. (ER p. 20.) The district court held that Appellees had not proven enough to get a preliminary injunction on the $500 contribution limit to candidates, under the standards set by the Supreme Court and this Court. (ER pp. 20-21.) Applying the *Randall* standard, the Court held that the "[t]he little evidence before the Court does not demonstrate that the

City's limit is so low as to 'generate suspicion' that it is not closely drawn."[4]

"Because the factual record is not adequately developed, Plaintiffs have not demonstrated a likelihood of success on the merits regarding this provision. Therefore, the Court declines to make any determination as to the constitutionality of the City's $500 contribution limit." (ER p. 22.)

B. The District Court Rejects a Preliminary Injunction as to the City's Laws Barring Non-Individual Entities, Such as Corporations and Labor Unions, from Contributing to City Candidates. It Grants a Preliminary Injunction Barring Enforcement of These Laws Against Political Parties, But Stays Its Order.

Various provisions of the ECCO bar non-individuals (entities such as corporations, labor unions and others) from contributing to City candidates.[5]

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[4] The district court continued: "The City's $500 limit is not significantly lower than contribution limits upheld by the Court in the past. See Buckley ($1,000 for federal office); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 397 (2000) ($275 – 1,075 for statewide office); Montana Right to Live Ass'n v. Eddleman, 343 F.3d 1084 (9th Cir. 2001) ($100, $2000, and $4000 for statewide office). In Randall, the only case striking down a limit as unconstitutionally low, the limit was $400 per election cycle ($400 total for both the primary and general elections). By contrast, the City's limit is $1,000 per election cycle ($500 for the primary, $500 for the general election, more than double the limit in Randall. The City's limit is also indexed to inflation. Plaintiffs have not presented evidence of how the limit presently compares with those around the Nation, but the City points to similar limits in Los Angeles ($500 per election) and San Francisco ($500 per election)." (ER pp. 21-22) (footnote omitted).

[5] ECCO § 27.2950(a) bars candidate from accepting non-individual contributions. ECCO § 27.2950(b) bars non-individuals from making such contributions, and §27.2950(c) bars committees from accepting contributions from non individuals. Section 27.2951 bars any individual from making or any committee accepting a contribution drawn against a

The Court rejected Appellees' argument for a preliminary injunction barring enforcement of these provisions, except as to political parties.

On non-party entities, the district court began by noting that laws banning direct corporate contributions to candidates date back to at least the latter part of the 19th Century. (ER p. 34, citing *Citizens United*, 130 S.Ct. at 900), and that the Supreme Court in *Federal Election Commission v. Beaumont*, 539 U.S. 146, 159-60 (2006), upheld a federal statute barring corporate contributions to candidates. (ER p. 34.) The Court also noted that the Supreme Court in *Citizens United* "explicitly did not address the issue of contribution limits." (ER p. 34.)

After considering whether *Citizens United* undermined the reasoning of the *Beaumont* case, the district concluded that Appellees were unlikely to succeed on the merits on this question. (ER pp. 34-35.) Although the district court stated that *Citizens United* undermined *Beaumont*'s reliance on an "antidistortion" interest in a corporate contribution ban to candidates, the court said that *Citizens United* did not undermine two other government interests recognized in *Beaumont*: a concern over the danger of "political war chests funneled through the corporate form" and a "separate anticircumvention interest for limiting" such contributions. (ER p. 35.) In

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checking account or credit card account of a non-individual.

rejecting Appellees' claim for a preliminary injunction on this point, the district court noted that (1) the Chief Justice of the United States in *Citizens United* reaffirmed "the careful line that *Buckley* drew" between contribution limits to candidates and independent spending; (2) the need for judicial deference to careful legislative judgments recognized by the Supreme Court in *Beaumont*; and (3) *Beaumont*'s statement that "[a] ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information." (ER p. 36, citing *Citizens United,* 130 S.Ct. 876, and *Beaumont,* 539 U.S. 146).

As to limits on political party contributions to candidates, the district court reached a contrary conclusion. The district court recognized that the Supreme Court has upheld limits on political party contributions to prevent political parties "from acting as conduits for large donors wishing to gain influence over candidates." (ER p. 31, citing *Federal Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*")). However, the district court read the Supreme Court's plurality decision in *Randall* as requiring the City to allow parties to make some level of direct contributions to City candidates in its nonpartisan elections. (ER pp. 32-33.)

In granting the preliminary injunction as to political party contributions to candidates, the district court *sua sponte* stayed its own order "so as to allow the Court time to provide an alternative limit on the contributions." (ER p. 39.)

C. The District Court Rejects a Preliminary Injunction as to the City's Law Barring Candidates from Collecting Contributions More than 12 Months Before the Election, Except as to Expenditures by Candidates Themselves.

ECCO § 27.2938(a) bars candidates and candidate-controlled committees from soliciting or accepting contributions "prior to the twelve months preceding the primary election for the office sought." The Ethics Commission interpreted this provision to bar candidates from spending their own funds prior to the twelve month period as well. (ER p. 26.)

As to contributions from others, the district court rejected Appellees' argument for a preliminary injunction. The district court held the matter governed by the lower level of scrutiny applicable to contribution limits (ER p. 27), and said "[t]here is no question that limits on direct contributions to candidates serve the government's valid interest" in preventing corruption and the appearance of corruption from large financial contributions. (ER p. 27.) The district court concluded that "[w]hile temporal limits do burden free speech and association, there is no evidence that the City's limit is more than a minimal burden." (ER p. 28; *see also* ER p. 29 ["Plaintiffs provide no

evidence that the 12-month window prevents challengers from amassing the recourses necessary to mount effective campaigns against incumbents"].) The court further cited other cases upholding temporal limits on contributions. (ER p. 28, citing *Gable v. Patton*, 142 F.3d 940, 951 (6th Cir. 1998) and *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999).)

However, the Court reached a different conclusion on the Ethics Commission's interpretation of this ECCO provision as barring self-funding from candidates. The district court held that this interpretation created a candidate expenditure limitation, in violation of the First Amendment under the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976), and enjoined its enforcement as to candidate self-funded expenditures.[6] (ER pp. 29-30.)

D. The District Court Grants a Preliminary Injunction as to the City's Limits on Contributions to Independent Expenditure Committees, Allowing Corporations, Labor Unions, Other Non-Individual Entities, as Well as Individuals, to Contribute *Unlimited Sums* to These Committees.

In contrast to the district court's decision rejecting a preliminary injunction as to the City's ban on non-individual entity contributions *to candidates*, the district court granted a preliminary injunction as to the City's

[6] The City does not appeal this aspect of the district court's ruling.

ban on non-individual entity contributions *to committees that make only independent expenditures* ("independent expenditure committees"). It further held that individuals could give unlimited sums to these committees, in excess of the City's $500 individual contribution limit.

The district court recognized that the issue was "unsettled" (ER p. 23), but it sided with those courts holding that such limits are unconstitutional. (ER pp. 23-24.) The district court did not articulate the level of scrutiny it applied to the question, even though the parties strongly disagreed on this point. (ER pp. 84-96, 106-108.) The court nonetheless concluded, relying heavily on the Supreme Court's recent opinion in *Citizens United*, 130 S.Ct. 876, that the provision was likely unconstitutional. It stated that "[g]iven the Supreme Court's consistent treatment of independent expenditures, it is implausible that limiting the amount of money that committees can use to make independent expenditures furthers an anticorruption interest." (ER p. 24.) It held that the City's argument failed because "the City has produced no evidence linking contributions to independent expenditure committees with undue influence on a candidate or officeholder's judgment." (ER p. 26.) The district court did "not accept the City's assertion that contributions to committees making only independent expenditures can corrupt or create the appearance of corruption, at least in the absence of convincing evidence.

The Court declines to speculate whether it is possible for the City to make such a showing. At this early state of the proceedings, the City has not done so, and therefore Plaintiffs have demonstrated the likelihood of success as to [this provision]." (ER pp. 26-27.)

After the district court issued its order, the City requested clarification as to whether the Court's order lifting the $500 contribution limit on contributions to independent expenditure committees applied only to contributions from individuals or also from non-individual entities, such as corporations and labor unions. (ER 71-81.) Appellees filed a letter joining in the request for clarification, and requesting further injunctive relief, allowing non-individual entities to make unlimited contributions to independent expenditure committees from organizational accounts. (ER pp. 69-70.) The district court issued an order clarifying that its initial order allowed unlimited individual *and non-individual* contributions to independent expenditure committees and issued an order allowing non-individual entities to make contributions from organizational accounts. (ER pp. 12-13.)

E. The District Court Briefly Discusses Irreparable Harm, the Public Interest and the Balancing of the Hardships.

The district court spent the majority of its 27-page order addressing questions of the likelihood of success on the merits as to each challenged

provision. After discussing the likelihood question as to each challenged provision, it globally addressed the other factors relevant for the granting of a preliminary injunction—irreparable harm, the public interest, and balance of the hardships—together at the end of the opinion. (ER pp. 36-39.) On irreparable harm, the district court simply concluded that "because Plaintiffs have demonstrated a likelihood of success on the merits with respect to certain ECCO provisions, Plaintiffs have demonstrated a likelihood of irreparable harm if enforcement of these provisions is not enjoined." (ER p. 37.) It applied a similar brief analysis as to the public interest (ER p. 38), and the balancing of the hardships (ER pp. 38-39).

IV. The City Appeals and Seeks a Stay. Appellees Cross-Appeal.

The City timely filed notices of appeal from the two court orders. The City moved the district court and this Court to stay portions of the district court's order. The district court denied the request for a stay. (ER p. 1-11 At the time the City prepared this brief, the stay motion with this Court remained pending. Appellees cross-appealed. (ER pp. 53-54.)

SUMMARY OF ARGUMENT

As to the Court's holding related to contributions to independent expenditure committees, the district court's decision suffered from three infirmities. First, the court misapplied the burden of proof on the

constitutional question, and failed to recognize—contrary to how the district court decided other, similar issues in this case—that Appellees failed to provide *a sufficient factual basis* as to the burden the law imposed upon them to support their motion. The *sole evidence* Appellees submitted were a few conclusory sentences in their Verified Complaint. If this Court agrees with the City on this point, it need go no further in considering the thorny constitutional questions that have divided the courts.

Second, the district court committed a legal error, subject to this Court's *de novo* review, in rejecting the City's argument that Appellees had a higher burden of proof because they were seeking a mandatory preliminary injunction changing the status quo. More generally, the district court failed to engage in a careful analysis of the factors aside from likelihood of success on the merits which Appellees bore the burden of proving in order to be entitled to a preliminary injunction.

Third, the district court committed legal error, subject to this Court's *de novo* review, in holding that it is likely unconstitutional to limit contributions to political committees that make only independent expenditures. To begin with, the district court erred in failing to apply the lower level of scrutiny that applies to review of campaign *contribution* limits. The City's law need not survive strict scrutiny; it is enough that its

laws are "closely drawn" to support a "sufficiently important" government interest. Under the lower standard, the City's laws are constitutional because they only marginally affect Appellees' First Amendment rights. Appellees remain free to engage in a host of political activities in the City without undue interference from the City. Further the City's contribution limits are amply supported by its important interests in preventing corruption and the appearance of corruption.

On this last point, the Appellees argued below that the City cannot prove its interests because of the Supreme Court's recent decision in *Citizens United*, 130 S.Ct. 876, striking down limits on *spending* by corporations on *independent expenditures*. This is incorrect.

As to contributions by *individuals*, the limitations are justified because of the greater danger that *contributions* to independent expenditure committees will corrupt candidates or create a public perception of corruption compared to the danger that *independent spending itself* will do so. This is because those who wish to curry favor with elected officials often will want to do so "below the radar," hiding behind the name of an innocuous-sounding group. A candidate will be keenly aware of the identity of those contributing to independent expenditure campaigns supporting the candidate (or opposing her opponent), and could well feel a debt of gratitude

to the contributors, creating the danger of corruption. During the campaign, the public just hears the name of the innocuous-sounding group, and does not connect contributors' interests to the candidate. Afterwards, if the public learns of the connection between the large contributor to the independent expenditure committee and the contributor's interest in currying favor with the candidate, the public's confidence in the electoral system further erodes.

As to contributions by *non-individual entities*, such as corporations, the City's law is supported by additional interests. Business entities in particular have a special interest in masking their identities when they attempt to curry favor with candidates through such contributions. In addition, because there is no limit on the number of non-individual entities a person may create, a person seeking to gain influence over a candidate but wishing to hide her identity from the public can create a large number of sham organizations to make contributions to fund the spending. Finally, the Supreme Court has recognized the dangers in not restricting the influence of political war chests funneled through the corporate form.

Finally, the district court also erred in holding that political parties have the right to make *direct contributions* to candidates. First, once again Appellees have failed to prove their case; given that political parties may spend unlimited sums coordinated with candidates on communications with

members of their own party, Appellees have not shown they are more than minimally burdened by the law. Second, the law is justified by the City's interest in preventing corruption, and preventing the circumvention of its contribution limitations.

STANDARD OF REVIEW

This court reviews a district court's decision to grant or deny a preliminary injunction under an abuse of discretion standard. *See Winter v. Natural Resources Defense Council*, *Inc*., ___ U.S. ___, 129 S.Ct. 365, 381 (2008). This Court recently explained the abuse of discretion standard in *Dominguez v. Schwarzenegger*, ___ F.3d ___, 2010 WL 715396, *2-*3 (9th Cir. 2010):

> Reviewing for abuse of discretion, first, we determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court did not identify the correct legal rule, it abused its discretion. Second, we must determine if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.
>
> In granting a request for a preliminary injunction, a district court abuses its discretion if it base[s] its decision on an erroneous

legal standard or clearly erroneous findings of fact. We review conclusions of law *de novo* and findings of fact for clear error. Under this standard, [a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.

(Internal quotations and citations omitted, and emphasis added.)

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRELIMINARILY ENJOINING CITY LAW LIMITING CONTRIBUTIONS TO INDEPENDENT EXPENDITURE COMMITTEES. THE COURT'S ORDER ALLOWS *UNLIMITED* CONTRIBUTIONS FROM CORPORATIONS, LABOR UNIONS, AND OTHER ENTITIES, IN ADDITION TO INDIVIDUALS.

A. The District Court Erred in Issuing the Injunction Before the Appellees Presented Adequate Facts to Support It.

The district court abused its discretion in granting a preliminary injunction as to the City's limits on contributions to independent expenditure committees for the three reasons outlined in this Part. Of the three reasons, the district court's most fundamental error was its legal error (subject to *de novo* review) in misapplying the burden of proof on the constitutional question, and its resulting failure to recognize—contrary to how the district court decided other, similar issues in this case—that Appellees failed to provide *a sufficient factual basis* to support their motion. If this Court

agrees with the City on this point, it need go no further in considering the thorny constitutional questions that have divided the courts and that are discussed in Subpart I.C below.

In *Citizens for Clean Government v. City of San Diego*, 474 F.3d 653, this Court reversed the grant of an injunction because the trial court accepted an argument about governmental interests justifying a campaign finance law "as a matter of law." This Court determined that before granting judgment, the district court should have entertained "further factual development" of the claims before adjudicating them. *Id.* at 654. It reminded the district courts of the importance of resolving campaign finance challenges on the basis of evidence, not "hypotheticals": "we again emphasize the importance of factual development" in considering First Amendment challenges to campaign finance laws. *Id.* at 653; *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (preliminary injunction in election law case properly denied where legal question required "intense factual inquiry" and plaintiffs had not developed a "full record"); *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (noting that trial court, in considering constitutionality of Montana campaign finance law, "heard considerable evidence, both empirical and expert").

This was precisely the approach of the Supreme Court in the *Randall*

case. The *Randall* plurality reached its decision on the constitutionality of Vermont's campaign contribution limits only after reviewing a detailed trial record following a full trial on the merits. *See* 548 U.S. 230. Among the extensive evidence considered by the Court was expert witness testimony from political scientists regarding the likely effects of the Vermont limits on the ability of candidates to mount competitive campaigns. *Id.* at 254-57 (describing detailed empirical studies done by experts for Vermont and plaintiffs on the effect of Vermont limits on the conduct of campaigns).

Lower courts following *Randall* have required plaintiffs to present sufficient *evidence* of the burdens of challenged campaign finance laws before granting a preliminary injunction enjoining their enforcement. *See Working Californians*, at p. 13 (C.D. Cal. Nov. 24, 2009)[7] (rejecting argument that $500 individual contribution limitation to independent expenditure committees was too low on grounds that "Plaintiff has not provided evidence suggesting the limit effectively forecloses independent campaign spending"); *Ognibene v. Parkes*, 599 F.Supp.2d 434, 444 (S.D.N.Y. 2009) ("The question of whether contribution limits impose such restraints on candidates' ability to amass sufficient resources [under

[7] The City has included a copy of this unpublished opinion in its Addendum to this brief.

Randall] is a fact-intensive one, and neither party has raised it in connection with the motion practice now before the Court"); *Preston v. Leake*, 629 F.Supp.2d 517, 524 (E.D.N.C. 2009) ("Considering first the statute's effect on candidates, the court cannot find on the pleadings before it that the Campaign Contribution Prohibition would prevent them from amassing the resources necessary for effective advocacy. Those courts that have made such a finding have relied on the testimony of expert witnesses and the results of surveys conducted on that issue"); *Ex parte Ellis*, 279 S.W.3d 1, 17 n.14 (Tex. App. 2008) ("an inquiry [into whether Texas's contribution limitations are unconstitutionally low under *Randall*] is dependent on the specific effects of the restrictions in question on the political process. This issue is not before us nor is the record in this case adequate to address the merits of such a challenge...").

At the preliminary injunction stage and at trial, Appellees bear the burden of proving that the City's limits on contributions to independent expenditure committees imposed serious burdens on their First Amendment rights before the City must show that its laws were "closely drawn" to serve "sufficiently important governmental interests."[8] *See Gonzales v. O Centro*

[8] Part I.C.1 below explains in detail the appropriate level of scrutiny applicable to this question.

Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006) (burdens of proof at preliminary injunction hearing track burdens of proof at trial).

We address below how the City indisputably met its burden of showing sufficiently important government interests for purposes of the defeating preliminary injunction motion. But this Court need not even reach this issue of the City's interest because it was the *Appellees* who failed to come forward with sufficient facts meeting their own burden on this constitutional question, just as they failed, as the district court recognized (ER p. 22), to prove sufficient facts in their challenge to the $500 contribution to candidate limits and the temporal limits (ER p. 28).

In particular, Appellees did not show that they were significantly burdened by limits on contributions to independent expenditure committees, given (1) the ability of individuals to give up to $500 to *each* committee supporting a City candidate, for purposes of supporting that candidate, without limit (ER pp. 82-83), (2) the ability of non-individual entities to make unlimited *expenditures* favoring candidates in City elections, and (3) the fact that "individual members of …corporations" (ER p. 36) and other entities are free to make contributions to candidates and political committees.

Yet the *only evidence* the Appellees presented as to the burdens they

faced appeared in their Verified Complaint. The evidence is no more than a series of conclusory and generalized statements that Appellees are burdened.[9] This string of conclusory allegations was insufficient.

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[9] The *sum total* of the evidence put forward by the Appellees is the following:

- "ABC PAC wants to solicit, accept, and use contributions received from non-individuals, such as trusts, corporations and other business entities, for their independent expenditures in support of, or opposition to, candidates of their choice. They would do so, but for ECCO § 27.2936(b)." (ER p. 115.)
- "For the past several years, ABC PAC has received contributions from contributors in excess of $500. They would like to use the full amount of these contributions for independent expenditures. They would also like to solicit and accept other contributions from other contributors in amounts greater than $500, and use as much of those contributions as possible for the purpose of making independent expenditures. They would do so, but for ECCO § 27.2936, which limits their 5 independent expenditures to an amount not greater than what can be attributed to contributions of $500 or less from individual (human) contributors." (ER pp. 115-116.)
- "Lincoln Club wants to make independent expenditures in support of candidates in amounts greater than can be attributed 'to an individual in an amount that does not exceed $500 per candidate per election,' as ECCO § 27.2936(b) requires. It would do so, but for the law." (ER pp. 116-117.)
- "Lincoln Club also wants to solicit, accept, and use contributions received from non-individuals, such as trusts, corporations and other business entities for their independent expenditures in support of, or opposition to, candidates of their choice. They would do so, but for ECCO § 27.2936(b)." (ER p. 117.)
- "Mr. Thalheimer wants to solicit, accept, and use contributions from various organizational entities like sole proprietorships, partnerships, LLPs, LLCs taxed as partnerships, APCs, trusts, labor unions, and PACs. He would do so, but for ECCO § 27.2936(b), 27.2950 and 27.2951, which make it unlawful to solicit or accept contributions from organizations." (ER p. 120.)
- "In addition to contributing to candidates he supports, Mr. Nienstedt would also like to contribute to a committee that makes independent expenditures, and have his contribution used to support his chosen

The district court somehow lost sight of the Appellees' burden of proof in its discussion of the constitutional question, saying it was the *City* that failed to meet its burden of proving sufficient facts. (ER pp. 29, 33.) The district court should not have even *reached* the question whether the City presented sufficient evidence of its interests given the failure of the Appellees to present sufficient facts to show they were likely to be impermissibly burdened by the limits on contributions to independent expenditure committees.

In the district court's order denying the City's request for a stay pending appeal, the district court's response to the City's argument on this point was a single sentence: "Plaintiffs' Verified Complaint alleges that the Plaintiffs are burdened by the restriction, because they would make independent expenditures attributable to contributions in amounts greater than $500 per individual and attributable to contributions from non-individual entities, if not prohibited by the City's laws. (Compl. ¶¶ 39-40, 46.)." (ER p. 4.) The sentence shows that the district court did not examine the City's argument on this question with care, and simply accepted Appellees' conclusory allegations as sufficient evidence without examining

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candidate. But ECCO § 27.2935(a) makes it unlawful for him to contribute more than $500 total to candidates, and then make a contribution to a committee and earmark it for independent expenditures in support of his chosen candidate. He would do so, but for this law." (ER p. 121.)

their adequacy.

Full factual development, with discovery, including a full airing of Appellees' burdens and the City's substantial state interests, should come during a full trial on the merits. Granting a preliminary injunction before this full factual development was an abuse of discretion.

B. The District Court Erred in Issuing the Injunction Which Changed the Status Quo, Considering the Four Preliminary Injunction Factors Incorrectly.

Aside from, and independent of, the Court's error on the burden of proof question, the district court also erred in not taking into account the fact that Appellees were asking for a change in the status quo.

The district court wrote:

> "The City argues incorrectly that requests for preliminary injunctive relief that alter the status quo are subject to a heavier burden of persuasion, citing to O Centro Espirita Uniao Do Vegetal [v. Ashcroft], 389 F.3d 973, 975 (10th Cir. 2004). Unlike the Tenth Circuit, the Ninth Circuit does not apply a different standard for 'specifically disfavored preliminary injunctions.'" (ER pp. 38.[10])

[10] The court continued: "The City relies on Federal Trade Commission v. Affordable Media, LLC, a case involving a preliminary injunction obtained under the Federal Trade Commission Act, which 'places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard.' See 179 F.3d 1228, 1233, 1236 (9th Cir. 1999)." (ER p.

The district court committed a legal error, subject to this Court's *de novo* review. In fact, both the Ninth and Tenth Circuits hold that plaintiffs have seeking a preliminary injunction have a heavier burden when seeking a mandatory order changing the status quo.

In *O Centro*, a majority of the en banc Tenth Circuit cited approvingly to an opinion of *this* Court in reaffirming the heavier burden plaintiffs face in such cases. 389 F.3d at 978-70, Murphy, J., concurring in part and dissenting in part, citing *Anderson v. U.S.,* 612 F.2d 1112, 1114 (9th Cir. 1979). In *Anderson*, this Court held that "[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo Pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Id*. It added that "mandatory injunctions…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, quoting *Clune v. Publishers' Ass'n of New York City*, 214 F.Supp. 520, 531 (S.D.N.Y. 1963).

Anderson remains the law of this Circuit today, reaffirmed as recently as 2009. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.* 571 F.3d 873, 878 (9th Cir. 2009); *see also Stanley v. Univ. of S. Cal.*, 13

38.)

F.3d 1313, 1319 (9th Cir. 1994) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite,* courts should be extremely cautious about issuing a preliminary injunction"), quoting *Martin v. Int'l Olympic Comm.,* 740 F.2d 670, 674-675 (9th Cir. 1984).

Here, the district court in exercising its discretion acted under a misapprehension of the law. The Court did not consider the heavier burden on Appellees, who were asking for a change in the status quo pending a trial on the merits. The Court was not "extremely cautious" about issuing a mandatory preliminary injunction changing the status quo, nor did it decide whether (or explain how) this "particularly disfavored" remedy was appropriate in this case given the lack of "extreme or very serious damage."

The Court compounded the error by focusing almost solely on the likelihood of success on the merits, considering the other factors relevant to the issuance of an injunction in a cursory and conclusory way. (See *ante* at Statement of Facts, Part III.) It was necessary for the Court to consider whether the Appellees *met their burden on all four factors* required for the granting of a preliminary injunction, *Winter*, 129 S.Ct. at 375-76; *Nat'l Meat Ass'n v. Brown*, ___ F.3d ___, 2010 WL 1225477 (9th Cir. 2010); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir.

2009), taking into account the heavy burden imposed on those litigants seeking preliminary injunctions changing the status quo.[11]

For these reasons, the district court's grant of an injunction was an abuse of discretion.

C. The District Court Committed Legal Error in Holding that Contribution Limits to Independent Expenditure Committees are Likely Unconstitutional.

1. The District Court Misapplied the Lower Standard of Scrutiny, Which Applies to Review of Contribution Limits.

In its discussion of Appellees' (unsuccessful) argument for a preliminary injunction as to the City's $500 individual contribution limit to candidates, the district court recognized that contribution limits are not judged under a strict scrutiny standard, but instead under a lower level of scrutiny that requires that the City show no more than that a contribution is

[11] Among the factors the district court should have considered was the upcoming election scheduled for June 18, 2010. This Court and the Supreme Court have cautioned against issuing new election rules close to the time of the election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). Because of this potential for disruption caused by multiple campaign finance rules during a single election season, the court also should have weighed the fact that the Ninth Circuit was considering the same constitutional question in *Long Beach Area Chamber of Commerce et al. v. City of Long Beach* (No. 07-55691) as a factor against granting a preliminary injunction. Although courts ordinarily have discretion not to stay proceedings even when the same legal question is pending before a higher court, in this case it was an abuse of discretion for the court not to even consider staying the injunction until the end of the election season.

closely drawn to sufficiently important interest. (ER p. 20.) Yet in its discussion of the constitutionality of the City's limitations on contribution limits to independent expenditure committees, the district court did not state the level of scrutiny it applied, and it appears from the court's ruling that the court applied strict scrutiny to the question.[12]

There is no question the lower level of scrutiny applies to contribution limits. In upholding federal contribution limits to candidates and political committees, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, explained why contribution limits are subject to a much lower level of scrutiny than expenditure limitations. "[E]xpenditure limitations impose far greater restraints on the freedom of speech and association" than contribution limitations do. *Id*. at 44. A contribution limit "entails only a marginal

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[12] In the district court's order denying the City's request for a stay pending appeal, the district court stated that it had applied the lower level of scrutiny applicable to contribution limits in issuing the preliminary injunction. (ER p. 4.)

Despite this *post hoc* explanation, it does not appear that the district court actually *applied* the lower level of scrutiny. If the court applied that level of scrutiny, it never would have granted the relief sought by Appellees; instead it looks like the court applied strict scrutiny. Indeed, in explaining its earlier analysis of the issue, the district court cited to those parts of the Supreme Court's decisions in *Buckley*, 424 U.S. 45, and *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996) ("*Colorado I*") applying strict scrutiny to the question of the constitutionality of independent *expenditure* limits. (ER pp. 8-9.). These citations make no sense if the court was applying a lower level of scrutiny.

restriction upon the contributor's ability to engage in free communication." *Id*. at 20. "While contributions may result in political expression if spent by a candidate *or an association* to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id*. at 20 (emphasis added).

The reason that contribution limitations impose only a "marginal restriction" on the First Amendment rights of those who would give or receive contributions is that contribution limits "leave the contributor free" to participate in "any political association and to assist personally" in the association's electoral efforts. *Id*. at 22. Contribution limits "permit associations and candidates to aggregate large sums of money to promote effective advocacy [and] merely …require candidates and political committees to raise funds from a greater number of persons." *Id*. "The overall effect of …contribution ceilings" does not "reduce the total amount of money potentially available to promote political expression." *Id*. at 21-22; *see also id*. at 29.

The Supreme Court has repeatedly reaffirmed that this lower level of scrutiny applies to review of contribution limitation laws. In *Beaumont*, 539 U.S. at 161, the Supreme Court stated that "[g]oing back to *Buckley v. Valeo*, 424 U.S. 1 (1976), restrictions on political contributions have been

treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 134-38 (2003) (emphasizing "the limited burdens [that contribution restrictions] impose on First Amendment freedoms" as well as the weighty considerations of stare decisis that support "adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided"); *Cal. Med Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 195-96 (1981) (plurality opinion) ("*CMA*") (contributions are "not the sort of political advocacy that this Court in *Buckley* found to be entitled to full First Amendment protection"). And in *Randall,* the Court again adhered to the holding that contribution limits do not directly restrict contributors' speech. *See* 540 U.S. at 246-48 (plurality opinion); *id*. at 284 (Souter, J., dissenting).

Most recently, in *Citizens United*, 130 S.Ct. 876, discussed more fully below, the Court expressly stated that its ruling on spending limits for corporations was not intended to affect Court precedent related to contribution limits. *Id*. at 909 (Citizens United "has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

This Court too has recognized the applicable lower level of scrutiny for contribution limit laws. "The [*Buckley*] Court justified its position that contribution limits impose only a marginal restriction on protected speech by reasoning that contributions are merely speech by proxy, and not full-fledged speech." *Lincoln Club of Orange County v. City of Irvine, CA*, 292 F.3d 934, 937 (9th Cir. 2002). In the *Lincoln Club* case, this Court held that limitations on contributions to independent expenditure committees are generally judged under the lower less rigorous level of scrutiny applicable to contribution limits. 292 F.3d at 938.[13]

Finally, the Supreme Court has recognized that when it comes to corporate contributions (and presumably other entity contributions as well), a "complaisant" standard of review is especially appropriate given the

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[13] The court then held that strict scrutiny would apply to the City of Irvine ordinance limiting independent expenditures by groups because the ordinance imposed a limit on spending by membership groups from their membership funds. *Id*. at 938-39. In essence, membership organizations with large membership fees could not engage in *any* independent spending under the Irvine ordinance. In contrast to the Irvine ordinance, the San Diego city ordinance applies not to a group's membership funds, but only to "contributions" received by groups "for the purpose of supporting or opposing a candidate." ECCO § 27.2936(b) (section does not limit contributions to committees, limiting only contributions used to participate in city candidate elections); *see also Working Californians* at 7-8 (discussing *Lincoln Club*'s level of scrutiny). Thus, in San Diego groups can collect unlimited amounts in membership and other fees, so long as they are not earmarked for City candidate elections.

limited First Amendment rights implicated. In *Beaumont*, 539 U.S. at 162 n.8, the Supreme Court upheld a total *ban* on contributions by even non-profit ideological corporations to candidates.[14] The Court wrote that "[a] ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information."

In the district court below, Appellees and amicus ACLU of San Diego argued that strict scrutiny applies to review of contribution limits to independent expenditure committees, because limits on independent spending itself is judged under a strict scrutiny standard. (ER pp. 97-103, 104-105.) If the logic of this argument is that the City's law really is an expenditure limit because the amount of contributions *indirectly* affects the amount of expenditures, then courts would have to consider *every* contribution limit an expenditure limit (because all contribution limits indirectly affect expenditures by those entities collecting contributions), a point contrary to Supreme Court and Ninth Circuit precedents consistently applying a lower level of scrutiny to contribution limits. *See also*

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[14] Even before *Citizens United*, the Supreme Court had recognized that those ideological corporations (discussed in *Beaumont*) had a constitutional right to make unlimited *independent expenditures* favoring candidates to office. *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Republican Nat'l Comm. v. Fed. Election Comm'n, ___ F.Supp.2d ___, 2010 WL 1140721 at *4 (D.D.C. March 26, 2010) (three-judge court) ("To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend. But the Court has stated that this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny.").

2. Under the "Complaisant" Level of Scrutiny Applicable to Review of Contribution Limits Laws, The City's Reasonable Contribution Limits to Independent Expenditure Campaigns Are Constitutional Because They Are Closely Drawn to Prevent Corruption and the Appearance of Corruption.

Under the complaisant standard of review applicable to review of contribution limits, the City's laws limiting contributions to independent expenditure committees are constitutional because they only marginally impact Appellees' First Amendment rights and they are closely drawn to prevent corruption and the appearance of corruption.

a. The City's laws only marginally restrict Appellees' First Amendment rights.

For reasons previously stated in Part I.A, *ante*, Appellees have failed to show that the City's limitations on contributions to independent expenditure committees impose a serious burden on their First Amendment

rights. In any weighing of the City's interests, this Court must consider the marginality of the infringement on Appellees' First Amendment rights.

b. The City's laws are closely drawn to prevent corruption and the appearance of corruption.

i. The anticorruption interest.

Ever since *Buckley*, 424 U.S. 1, the Supreme Court has recognized that contribution limits may be justified to prevent corruption and the appearance of corruption. The flow of money into candidate election campaigns and the attendant problems of actual and potential corruption of public officials and public institutions had been and continues to be a central concern behind legislative restrictions on campaign contributions and disclosure requirements in the context of political campaigns, and it is also behind the judicial recognition of the legitimacy of those restrictions.

Thus, in *Buckley*, the Supreme Court declared that "contribution limitation[s] focus[] precisely on the problem of large campaign contributions —the narrow aspect of political association where the actuality and potential for corruption have been identified." *Id*. at 28; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (noting that in earlier Supreme Court decisions upholding contribution limits "we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large

contributors"). The anticorruption interest "extends beyond simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *McConnell*, 540 U.S. at 150, quoting *Colorado II*, 533 U.S. at 456.

Appellees conceded below that the City has "a valid interest in preventing corruption and the appearance of corruption associated with large contributions." (ER p. 20.) They argue, however, that even if some limitations on contributions *to candidates* are constitutional on these grounds, limitations on contributions *to independent expenditure committees* cannot be so justified. (ER p. 22.) They rely upon the Supreme Court's recent *Citizens United* case. In *Citizens United*, the Supreme Court struck down federal limits on corporate independent expenditures on grounds that independent spending cannot corrupt candidates because of the absence of coordination between candidates and those who engage in independent spending. 130 S.Ct. at 909 (concluding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").[15]

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[15] The Court overturned earlier Supreme Court caselaw allowing these limits on antidistortion grounds. *Id*. at 905-908. The City does not rely on this antidistortion interest to justify its laws in this case. (ER p. 36.)

Appellees argue that if independent spending cannot corrupt or create the appearance of corruption, contributions to fund independent spending cannot corrupt or give the appearance of corruption either. In support of this argument, Appellees rely as well upon the recent opinion of the United States Court of Appeals for the D.C. Circuit in *SpeechNow.org v. Fed. Election Comm'n*, ___ F.3d ___, 2010 WL 1133857 at *8 (D.C. Cir. 2010) (en banc). In *SpeechNow.org*, the court relied upon dicta in *Citizens United* in striking down the $5,000 limit on *individual* contributions to federal independent expenditure committees.[16] The *SpeechNow.org* court did not consider, much less rule upon, any right of *non-individual entities*, such as corporations or labor unions, to make contributions to independent expenditure committees. *Id*. at *1 (SpeechNow.org "intends to acquire funds solely through donations by individuals.").

Appellees and the *SpeechNow.org* court are incorrect that contribution limits on independent expenditure committees cannot be justified on grounds of preventing corruption and the appearance of corruption. Even if they were correct, however, on the question as to *individuals*, Appellees are incorrect on the question as to *corporations, labor unions, and other non-*

[16] It also struck down aggregate limits on the amounts that *individuals* may give to federal political action committees in a single calendar year. *Id*.

individual entities, an issue not addressed by the *SpeechNow.org* court. We discuss each point in turn.

ii. The City's interest as to individuals' contributions to independent expenditure committees.

As to individuals, the limitations are justified because of the greater danger that *contributions* to independent expenditure committees will corrupt candidates or create a public perception of corruption compared to the danger that *independent spending itself* will do so. This is because those who wish to curry favor with elected officials often will want to do so "below the radar," hiding behind the name of an innocuous-sounding group. A candidate will be keenly aware of the identity of those contributing to independent expenditure campaigns supporting the candidate (or opposing her opponent), and could well feel a debt of gratitude to the contributors, creating the danger of corruption. During the campaign, the public just hears the name of the innocuous-sounding group, and does not connect contributors' interests to the candidate. (ER p. 55-57 [discussing inadequacy of disclosure laws in revealing contributors to independent expenditure committees].) Afterwards, if the public learns of the connection between the large contributor to the independent expenditure committee and the contributor's interest in currying favor with the candidate, the public's confidence in the electoral system further erodes. *See Shrink Mo. Gov't*

PAC, 528 U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance").

The danger of this type of corruption through contributions to independent expenditure committees is no fantasy, but actually describes the facts of a recent Supreme Court case, *Caperton v. A.T. Massey Coal Co., Inc.,* ___ U.S. ___, 129 S.Ct. 2252 (2009). In that case, an individual whose company had interests in litigation pending before the West Virginia Supreme Court made multi-million dollar donations to a political organization, "And for the Sake of the Kids," which used the funds to make independent expenditures to help the election of a state Supreme Court judicial candidate who was believed likely to support the donor's interest. *Id*. at 2257. The candidate went on to win the election and provide the decisive vote in favor of the donor's company. *Id*. The Supreme Court in *Caperton* stated that these large contributions (made to an *independent expenditure committee*) created such a "substantial" "risk of actual bias" that the constitutional guarantee of Due Process necessitated the judge's recusal from the case.[17] *Id*. at 2263-2265.

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[17] Another recent example comes from California. During the 2006 California gubernatorial primary, the contribution limit to candidates was $22,300, http://www.fppc.ca.gov/bulletin/statelimhistory.pdf. There were

Though Appellees contend that the Supreme Court's decision in *Citizens United*, 130 S.Ct. 876 precludes a recognition that contributions to independent expenditure committees can corrupt candidates or create the appearance of corruption,[18] this argument has two flaws.

First, the argument erroneously equates the weighty First Amendment interest in engaging in speech directly with the much less substantial interest in making contributions to associate oneself with someone else's speech. That the danger of apparent corruption posed by independent expenditures is insufficient to overcome the former does not mean that it does not outweigh the latter. Similarly, just because the interest in preventing actual or

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no limits on contributions to independent expenditure campaigns. Cal. Gov't Code § 85303(c). "Californians for Better Government," an independent expenditure organization, made all of its expenditures, totaling nearly $10 million, in support of one candidate for state treasurer, Phil Angelides. More than eighty percent of those expenditures were paid by two individuals, Angelo Tsakopoulos and his daughter Eleni Tsakopoulos. California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, 11-14, 22 (June 2008), available at http://www.fppc.ca.gov/ie/IEReport2.pdf. It strains credulity to believe the benefitted candidate was unaware of the contributions or ungrateful for them.

[18] In *Citizens United*, the Court held that *Caperton* did not require the Court to conclude that independent expenditures themselves were corrupting so as to justify limits on independent expenditures. 130 S.Ct. at 910. However, the Court in *Citizens United* did not consider how the facts in *Caperton* relate to the potential for corruption and the appearance of corruption caused *by contributions* to such committees, which are less salient to the public (and judged under a lower level of scrutiny).

apparent corruption does not outweigh the political committee's own weighty interest in making unlimited expenditures, that does not mean that the anticorruption interest does not outweigh the lesser interest of contributors in making unlimited contributions. Thus, in *Citizens United*, 130 S.Ct. at 910, the Court noted a "cause for concern" if elected officials "succumb to improper influences," and it endorsed the need for judicial "due deference" to legislative remedies—short of an "outright ban" on expenditures—which "attempt to seek to dispel either the appearance or the reality of these influences" consistent with the First Amendment.

Second, existing Supreme Court caselaw, which binds this Court, has recognized that contributions to independent groups *do* have the potential to corrupt.[19] Thus, in the *McConnell* case, the Court upheld the "core" soft money provisions of Section 323(a) of the Bipartisan Campaign Reform Act ("BCRA"), codified at 2 U.S.C. § 441i(a), which subjects all funds received or spent by the national parties to federal contribution limits, "regardless of how those funds are ultimately used," including for independent expenditures. 540 U.S. at 155. In addition, the Court upheld BCRA §

[19] The Court in *Citizens United* stated in dicta that the definition of "corruption" does not to include "ingratiation and access." 130 S.Ct. at 910. Even under this narrower definition of corruption, limitations on contributions to independent expenditure committees are justified given the more marginal restriction on speech imposed by *contribution* limits.

323(b), imposing similar limits on donations on state and local committees supporting "federal election activity."

In approving these limits, the *McConnell* majority expressly rejected the dissent's argument that only contributions "made *directly to*" or expenditures made "*in coordination with*" a federal candidate are potentially corrupting. 540 U.S. at 152 (emphasis added). The *McConnell* majority determined that large contributions to political parties, even those used for independent expenditures, threaten the integrity of the political system. *Id.* at 146-51; *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 333 (4th Cir. 2008) (Michael, J., dissenting) ("*McConnell* thus recognizes the plausibility of legislative concerns that contributions to fund independent expenditures can lead to the appearance of corruption in the electoral process.").[20]

[20] The lack of coordination between candidate campaigns and independent expenditure committees does not preclude contributors to independent expenditure campaigns from attempting to threaten candidates in order to exert influence over them. Judge Michael, dissenting in the *Leake* case, offered the following example:

> The campaign waged in North Carolina by the independent group Farmers for Fairness (Farmers) provides another example of the corruptive influence of independent expenditures. Farmers created advertisements directly opposing certain legislative candidates. Instead of simply running the advertisements during election time, Farmers scheduled meetings with legislators and screened the advertisements for them in private. Farmers then explained that,

The Supreme Court's plurality opinion in *CMA*, 453 U.S. 182, further supports limitations on contributions to independent expenditure committees. The *CMA* court upheld against facial challenge a First

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> unless the legislators supported its positions, it would run the advertisements that attacked the candidates on positions unrelated to those advocated by Farmers. The majority interprets this activity as the "group feel[ing] passionately about an issue and discuss[ing] it." [Citation] This could not be further from reality. The record reveals that Farmers did not discuss its central issue, deregulation of the hog industry, in its advertisements. Instead, it threatened and coerced candidates to adopt its position, and, if the candidate refused, ran negative advertisements having no connection with the position it advocated. This activity is not "pure political speech," [Citation]; it is an attempt to use pooled money for behind-the-scenes coercion of elected officials. The majority also opines that inasmuch as Farmers discussed its intention to run the advertisements with the candidates, their activities were coordinated. [Citation.] This is simply wrong. A threat cannot qualify as coordination because the targeted candidate would not be willingly cooperating if he or she chose to surrender to the demands of the Farmers group. If the candidate chose not to surrender, and Farmers then made good on its threat to broadcast negative advertisements, it is equally clear that the candidate would not have directed or otherwise cooperated with the airing of the advertisement. The Farmers example shows exactly how independent expenditures can create the same appearance of corruption and potential for actual corruption as do excessively large contributions. The only difference between these two methods (other than, after today's decision, that one may be regulated and the other may not) is that the independent expenditures made by Farmers had the potential to influence candidates through threats and reprisals, while excessively large direct contributions have the potential to influence candidates by rendering them beholden to the donor. In short, the method may differ, but the corrosive effect on the electoral process remains the same.

Id. at 335-336 (citations omitted).

Amendment claim against the federal $5,000 contribution limitation to political committees, holding the limit justified to prevent corruption and circumvention of other federal contribution limits. 453 U.S. at 195-98 (plurality opinion).[21]

In *McConnell*, the Court explained that *CMA* necessarily upheld limits on contributions to committees that were then used to make independent expenditures:

> [In *CMA*] we upheld FECA's $5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 …limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in *express advocacy and numerous other non-coordinated expenditures.*

520 U.S. at 152 n.48 (emphasis added).

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[21] In *CMA*, the committee involved made both independent expenditures supporting candidates and contributions to candidates. The plurality opinion did not consider the "hypothetical application" of the law to political committees that made only independent expenditures. 453 U.S. at 197 n.17. In a separate opinion, Justice Blackmun, concurring in the judgment stated in dicta that the limit could not apply to independent expenditure committees. 453 U.S. at 203 (Blackmun, J., concurring in the judgment). The statement was dicta regarding a hypothetical situation, because the committee at issue did not make only independent expenditures.

Four years after *CMA*, the Supreme Court again recognized that keeping contributions to independent expenditure committees small lowers the risk of corruption of candidates. In *Federal Election Commission v. National Conservative Political Action Committee* ("*NCPAC*"), 470 U.S. 480, 497 (1985), one reason the Court held that unlimited expenditures by political committees posed an insufficient threat of corruption to justify restricting those expenditures was that such committees "overwhelmingly" received their funding from "small contributions of" less than $1,000, which in the Court's view obviated the likelihood that their activities would give particular contributors undue influence over candidates.

Between the time of *NCPAC* and *McConnell*, the Supreme Court recognized the anticorruption interest served by limits on contributions to entities making independent expenditures. In *Colorado I*, 518 U.S. 604, the Supreme Court held that political parties have the same First Amendment right to make independent expenditures that other groups enjoy. But the Court recognized that "[t]he greatest danger of corruption…appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate." *Id.* at 617. The Court stated that it "could understand" that

Congress as a consequence might decide "to change the statute's limitations on contributions to political parties" to lower the danger of corruption. *Id*.

Finally, the Court has recognized the government's important interest in avoiding the circumvention of valid contribution limits. *Colorado II,* 533 U.S. at 457. Donors who seek to curry favor with candidates without revealing their identities will seek to evade the contribution limitations applicable to candidate contributions through contributions to independent expenditure committees. *See also Working Californians* at 11 (finding anticorruption rationale for limiting large contributions to independent expenditures "neither novel nor implausible" given that "independence" does not prevent candidates and other political actors from learning the identity of those political operatives who collect contributions for independent expenditure campaigns).

The Supreme Court in *Citizens United* was careful to leave this extensive caselaw untouched, expressly noting that questions about the constitutionality of contribution limits were not before the Court in *Citizens United*. 130 S.Ct. at 909; *see also id*. ("contribution limits….have been an accepted means to prevent *quid pro quo* corruption"). Any reliance on broad dicta in *Citizens United* to argue that the contribution limits standard has now been *sub silentio* changed would violate the Court's own admonition

not to read into its cases in this way. *See id*. at 920 (Roberts, C.J., concurring) ("the Court generally does not consider constitutional arguments that have not properly been raised").[22]

iii. The City's interest as to corporations' and other non-individual entities' contributions to independent expenditure committees.

Even if this Court agrees with Appellees that limitations on individual contributions to independent expenditure committees are unconstitutional, for three reasons it does not follow that limits on contributions by *non-individual entities*, such as corporations and labor unions, are similarly unconstitutional.

First, the danger of corruption created by allowing unlimited contributions to independent expenditure committees described above as to individuals applies with even greater force as to corporations and other non-individual entities. Business entities in particular have a special interest in masking their identities when they attempt to curry favor with candidates

[22] The *SpeechNow.org* court held that the level of scrutiny question did not matter after *Citizens United*, because the government has *no interest* in limiting contributions to independent expenditure committees. *SpeechNow.org*, 2010 WL 1133857, at *7. As we have shown, however, the government *does* have an interest in limiting contributions to independent expenditure committees, and therefore the level of scrutiny question *does* matter. The *SpeechNow.org* court's reliance on *Citizens United* dicta to reach a decision on the constitutionality of contribution limits is contrary to the directions given by the Supreme Court itself in *Citizens United*.

through such contributions. Business entities will not want to alienate customers by engaging directly in politically controversial spending. By giving money to a group like "And for the Sake of the Kids," the public will be unaware of the business entity's involvement—but the grateful candidate supported by the contributions to the independent expenditure committee will be quite aware of the support.

Second, because there is no limit on the number of non-individual entities a person may create, a person seeking to gain influence over a candidate but wishing to hide her identity from the public (perhaps so as not to garner media inquiries into the relationship between the donor's interest and the candidate) can create a large number of sham organizations to make contributions to fund the spending. Even individuals who control legitimate non-individual entities will sometimes be tempted to use those entities to keep a further step removed from the candidate, as again occurred in the *Caperton* case. The Court in *Beaumont* recognized that "restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'" 539 U.S. at 155, quoting *Colorado II*, 533 U.S. at 456, n.18.

Third, the Supreme Court has recognized the dangers in restricting the influence of political war chests funneled through the corporate form in

Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982) ("*NRWC*"). In *NRWC*, the Supreme Court held that the government had a sufficiently important interest in ensuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted to political 'war chests' which could be used to incur political debts from legislators." *Id*. at 207. On this basis, the Court in *NRWC* upheld restrictions on solicitations for contributions by a corporation to its PAC.

The Supreme Court recently affirmed the reasoning of *NRWC* in *Beaumont*, 549 U.S. at 154. In *Citizens United*, 130 S.Ct. at 2207, the Court characterized *NRWC* as a case about *contributions*, one which had "little relevance" to the question of the constitutionality of limits on independent expenditures.

For these reasons, this Court should hold that reasonable limits on contributions to independent expenditure committees are constitutional, at least as to non-individual entities.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRELIMINARILY ENJOINING CITY LAW BARRING POLITICAL PARTY CONTRIBUTIONS TO CANDIDATES BECAUSE THE FIRST AMENDMENT DOES NOT REQUIRE THE CITY, HOLDING NONPARTISAN ELECTIONS, TO CRAFT SPECIAL CONTRIBUTION LIMITS FOR POLITICAL PARTIES.

The district court correctly ruled that the City has sufficiently important reasons to bar contributions from most non-individual entities directly to candidates. (ER pp. 34-36 [law justified to prevent use of corporate "political war chests" and to prevent circumvention of individual contribution limits to candidates].) However, the district court preliminarily enjoined the law to the extent it barred political parties from making direct contributions to candidates. This was an abuse of discretion for two reasons.

A. Appellees Did Not Show They Are More than Minimally Burdened by the City's Law.

First, once again the Appellees did not put forward *sufficient evidence* showing that the law actually burdened political parties, other than the conclusory statements in the Verified Complaint that Appellee Republican Party would like to contribute directly to candidates. (ER pp. 9, 20.)

The City's law barring direct contributions by political parties to candidates is not much of a burden at all. As Appellees acknowledge, Appellee Republican Party has an active program to support candidates they prefer with "member communications." (ER p. 9.) Under the ECCO and

state law, political parties *may coordinate with candidates* they prefer and take *unlimited contributions from any source* to communicate with their "members," *i.e.*, all voters registered with the political party. (ER pp. 58-61); Cal. Gov't Code § 85312 (excluding member communications from definition of contribution); *id.*, § 85703(b)(2) (state law preempting local laws limiting political party member communications). It is hard to see how allowing the party to give a few hundred or even a few thousand dollars to the candidate's campaign would meaningfully increase the symbolic support the Party may already show through unlimited, coordinated member communications. And of course there is no limit on the party's independent spending favoring candidates in City elections.

B. The District Court Made a Legal Error in Ruling that Political Parties Have a Constitutional Right to Make Campaign Contributions Directly to Candidates.

Second, the district court was wrong on the law: neither the Supreme Court nor this Court has held that political parties have a constitutional right to make direct contributions to candidates, especially in nonpartisan elections such as San Diego's elections. Under this Court's *de novo* review of legal questions, the district court abused its discretion.

Of course, the City has an important interest in limiting organizational, including political party, donations directly to candidates.

Otherwise, individuals could circumvent valid contribution limits to candidates by giving sums to organizational entities. The district court acknowledged as much in stating that the Supreme Court has upheld limits on political party contributions to prevent political parties "from acting as conduits for large donors wishing to gain influence over candidates." (ER p. 31, citing *Colorado II*, 533 U.S. at 456). However, the district court read the Supreme Court plurality decision in *Randall* as requiring that the City allow parties to make some level of contributions to City candidates. (ER pp. 32-33.)

In *Randall*, the Court did not consider the question whether political parties have a constitutional right to donate directly to candidates. *See* 548 U.S. 230. Instead, the *Randall* Court's discussion of political parties came as the plurality listed the factors it considered in reaching the conclusion that the individual contribution limits to candidates in Vermont were unconstitutionally low. *Id*. at 256-257. One factor the Court considered was that political parties had to abide by the same low contribution limits as other contributors. *Id*. at 256. The plurality further remarked that the Vermont law "would severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs." *Id*. at 257. It

also remarked that the Vermont law prevented a group of individuals from giving small donations to the political party, which could be pooled by the party to support the candidate. *Id*. at 258.

The discussion in *Randall* does not indicate that political parties have a constitutional right to contribute directly to candidates. Nor do any other cases of which we are aware. To be sure, a law that barred meaningful political activity by a political party would be constitutionally suspect. But direct contributions are not the only way that a party can participate in meaningful political activity and show symbolic support for a candidate. In San Diego, not only may the Republican Party publicly endorse candidates in City elections; political parties *may coordinate with the candidates* they prefer and take *unlimited contributions from any source* to communicate with their "members," all voters registered with the political party.

In describing the burden on Appellees, the district court gave the example that City law would prevent a political party from making a $6,000 contribution to a City candidate (or coordinate $6,000 in spending with the candidate) funded by 6,000 $1 contributions from individuals. (ER p. 33.) The district court did not recognize, however, that under City law the party could spend that $6,000 in coordination with the candidate on communications to party members. Indeed, it can spend unlimited sums

contributed from whatever sources it wants in coordination with the candidate on member communications, making the City's direct contribution ban much less onerous to political parties than the Vermont law reviewed by the Supreme Court in *Randall*.

Moreover, the City's principal interest is not in preventing the Republican Party from channeling $1 contributions to candidates. Under City law, the Party may accept up to $500 from an individual for use to support a particular City candidate in an election. ECCO § 27.2936. Allowing individuals to contribute $500 directly to a candidate and then another $500 to a political party to then be contributed to the same candidate effectively doubles the individual contribution limit applicable to candidates and circumvents the City's valid contribution limit laws.

Nothing in the Constitution, in *Randall*, or in other Supreme Court cases requires recognition of a right of political parties to contribute directly to candidates. The City could choose not to allow direct political party contributions as part of its choice to structure the City's nonpartisan elections.[23]

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[23] The district court stated that the fact that the City's elections are nonpartisan means there is a lesser danger that parties would become conduits for maxed-out contributors to candidates. (ER p. 33.) The district court did not recognize that allowing *any organization* to make direct contributions to candidates, including political party organizations, increases

The district court's conclusion to the contrary was an erroneous interpretation of the law, and therefore an abuse of discretion.

CONCLUSION

The district court abused its discretion in granting a preliminary injunction allowing unlimited contributions from individuals and non-individual entities to independent expenditure committees in City candidate elections. The court further abused its discretion in granting a preliminary injunction requiring the City to allow political parties to make direct contributions to candidates.

For the foregoing reasons, this court should reverse the district court on these two aspects of its preliminary injunction orders.

DATED: April 2, 2010 Respectfully Submitted,

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the danger that individual contributors will use the organization to circumvent limits on contributions to candidates.

STATEMENT OF RELATED CASES

The same or similar issues as presented in this case also are presented in the currently pending case in this Court, *Long Beach Area Chamber of Commerce et al. v. City of Long Beach* (No. 07-55691).

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached opening brief is proportionately spaced, has a typeface of 14 points, and contains 13,606 words.

Dated: April 2, 2010

By: ___/s/ Dick A. Semerdjian ___
Dick A. Semerdjian