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 RESPONSE AND REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, Appellees sought a preliminary injunction barring enforcement of five City of San Diego laws regulating campaign contributions in City candidate elections. The district court denied the preliminary injunction as to some of those laws as applied to various entities, but granted it as to others.

On their cross-appeal, Appellees argue that the district court erred in declining to issue a preliminary injunction related to two aspects of the City's campaign contribution laws.

First, Appellees asked the district court to preliminarily enjoin provisions of the City campaign finance law (the "ECCO")[1] barring corporations, labor unions, and other non-individual entities from making campaign contributions directly to candidates. The district court refused, citing the City's strong interest in preventing corruption and the circumvention of valid contribution limits, and concluding that the balance of the hardships tipped in the City's favor.

Had the district court ruled otherwise, it would have been the first U.S. court to recognize a constitutional right of corporations, labor unions, and other non-individual entities to contribute money *directly to candidates*

[1] Appellant's Addendum ("AA") at pages 16-54 reproduces the ECCO in its entirety.

for office, calling into question laws that have been in place on the federal local and state level for up to 100 years or more. *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 152 (2003) ("Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections'…"). Allowing non-individual contributions would make child's play of circumventing valid individual contribution limits through the creation of sham organizations, a point Appellees conceded in the court below.

The district court did not abuse its discretion in denying the preliminary injunction as to these ECCO provisions, which are similar to other longstanding federal, state, and local laws. In the first place, the district court concluded that the balance of the hardships tipped in the City's favor. On appeal, Appellees offer no argument as to why the district court's conclusion on this point was erroneous. For this reason alone, this Court should affirm the district court's ruling on this question. In addition, given the City's strong interest in preventing circumvention of its concededly valid campaign contribution limits, the district court was well within its discretion in concluding Appellees were unlikely to succeed on the merits of their legal challenge to these provisions.

Second, Appellees argue the district court abused its discretion in refusing to preliminarily enjoin the ECCO provision requiring City candidates to wait until 12 months before the primary election before collecting campaign contributions from others. Once again, the district court concluded that the balance of the hardships tipped in the City's favor, and once again Appellees offer no argument as to why the district court's conclusion on this point was erroneous. For this reason alone, this court should affirm the district court's ruling on this question.

In addition, the district court found that the Appellees presented *no evidence* that the law would impose a significant burden on candidates or contributors. Because this factual finding was not clearly erroneous, the district court did not abuse its discretion in declining to preliminarily enjoin the law. Finally, the court did not abuse its discretion in concluding that the ECCO provision was closely drawn to further the City's interest in preventing corruption and the appearance of corruption.

For these reasons, this Court should conclude that the district court did not abuse its discretion in refusing to enjoin these provisions of the ECCO.

In contrast, the district court did abuse its discretion in two respects, both briefed by the City in its appeal.

First, as explained in Appellant's Principal Brief, the district court abused its discretion in enjoining enforcement of City laws barring those political committees making only independent expenditures in candidate elections from accepting contributions (or spending money received as contributions) exceeding $500 from individuals. Here, the district court made three independent errors, any one of which is sufficient grounds for reversal.

(1) The district court clearly erred in concluding Appellees were likely to succeed on the merits, when Appellees presented virtually no evidence the law burdened them. Appellees' response to this argument is to claim that they submitted admissible evidence. The City does not disagree, but believes the admissible evidence submitted was woefully insufficient to show a burden supporting the rare remedy of a preliminary injunction.

(2) The district court made a legal error in failing to hold Appellees to a higher burden of proof given that they were seeking a preliminary injunction changing the status quo. The district court acted under a misapprehension of law related to preliminary injunctions. On this point, Appellees concede that the district court likely stated the law incorrectly, but argue that the law requiring

plaintiffs to show a heavier burden does not apply to them. In fact, the "heavier burden" test does apply to the injunction Appellees sought, and that the failure of the district court to apply it prejudiced the City.

(3) The district court made a legal error in concluding that Appellees were likely to succeed on the merits. After the parties filed their first appellate two briefs, this Court decided another case on a similar issue, *Long Beach Area Chamber of Commerce v. City of Long Beach*, ___ F.3d ___, 2010 WL 1729710 at *9 (9th Cir. 2010) ("*Long Beach*"). We demonstrate that under the *Long Beach* case the district court should not have granted a preliminary injunction without the presentation of evidence from Appellees that the law burdened them.

Second, the district court abused its discretion in concluding that political parties have a constitutional right to contribute directly to candidates in non-partisan elections. Once again, Appellees have failed to prove their case that they are significantly burdened, especially given that political parties may spend unlimited sums coordinated with candidates on communications with members of their own parties and unlimited sums on independent expenditures. In addition, the law is justified by the City's

interest in preventing corruption, and preventing the circumvention of its valid contribution limitations.

Here, Appellees offer nothing but conclusory statements as to how the law burdens them, and they concede the City's valid anticircumvention interest. Their main complaint is one about narrow tailoring, but it is a complaint that is foreclosed by Supreme Court decisions in this area. The City could reasonably determine that a political party's First Amendment rights were amply protected by its ability to engage in unlimited spending (from contributions raised from any source) coordinated with candidates on member communications and its ability to engage in unlimited independent spending. The City could further determine that the danger of parties becoming conduits for large contributions from private donors justified the limit on direct donations. The district court's decision to the contrary was an abuse of discretion.

RESPONSE BRIEF (CROSS-APPEAL)

STATEMENT OF JURISDICTION

The City agrees with Appellees' statement of jurisdiction contained on pages 2-3 of Appellees' Second Brief on Cross-Appeal ("AB").

STATEMENT OF THE ISSUES ON CROSS-APPEAL

A. Whether the district court abused its discretion in refusing to grant a preliminary injunction barring enforcement of a City law preventing non-individual entities, including corporations or labor unions, from making campaign contributions directly to City candidates?

B. Whether the district court abused its discretion in refusing to grant a preliminary injunction barring enforcement of a City law preventing candidates from soliciting or accepting campaign contributions more than 12 months prior to a primary election, when Appellees presented no evidence that the law imposed a significant burden upon them?

STATEMENT OF FACTS

Appellant's/Cross-Appellee's Principal Brief ("APB") at pages 8-19 summarizes the facts relevant for both the City's appeal and Appellees' cross-appeal.

STANDARD OF REVIEW

Appellant's/Cross-Appellee's Principal Brief at pages 23-24 states the applicable abuse of discretion standard of review.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ENJOIN CITY LAWS BARRING CORPORATIONS, LABOR UNIONS AND OTHER NON-INDIVIDUAL ENTITIES FROM CONTRIBUTING DIRECTLY TO CITY CANDIDATES. (FIRST ISSUE ON CROSS-APPEAL)

A. Appellees Cannot Demonstrate that the District Court Abused Its Discretion in Denying a Preliminary Injunction on these Laws Because They Offer No Argument That the Court Erred in Ruling That the Balance of the Hardships Tips in Favor of the City.

Under City law, an individual may contribute up to $500 directly to a candidate for city office per election.[2] Non-individual entities, however, may not contribute directly to candidates.[3] The district court denied a preliminary injunction barring enforcement of these laws, on grounds that Appellees were unlikely to succeed on the merits and that the balance of hardships favored the City. (Appellant's Excerpts of Record ("ER") pp. 34-36, 38.)

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[2] The district court rejected Appellees' motion to preliminarily enjoin enforcement of this individual contribution limitation, citing the Appellees' failure of proof. (ER pp. 19-22; *see* APB pp. 10-12.)

[3] 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 checking account or credit card account of a non-individual.

In order to be entitled to a preliminary injunction, a plaintiff must demonstrate *each of four separate factors* to be entitled to relief: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Resources Def. Counc. Inc.*, 129 S.Ct. 365, 374 (2008). Appellees agreed that this was the applicable standard in the district court. (Appellees' Supplemental Excerpts of Record ("SER") p. 83.)

The district court denied Appellees' request for a preliminary injunction barring enforcement of City laws allowing only individuals (and not non-individual entities) to make direct contributions to candidates. The court found that on this question the Appellees were not likely to succeed on the merits. (ER pp. 34-36.) It also found with regard to these provisions and other provisions that "the balance of hardships tips in favor of denying the injunctive relief." (ER p. 39.)

We explain below that the district court did not abuse its discretion in concluding that Appellees were not likely to succeed on the merits of this challenge. But this Court need not even reach this question, because Appellees offer *no argument* beyond a single passing reference to the "*Winter* preliminary injunction standards" to explain how the district court

could have abused its discretion in concluding that the balance of the hardships favored the City. (AB pp. 25-26 ["Had the court properly applied Supreme Court precedent, it would have found that [Appellees] met each of the *Winter* preliminary injunction standards"].) This single sentence does not offer any argument (other than bootstrapping to the likelihood of success on the merits question) as to how the district court's balancing of hardships constituted an abuse of discretion.

Far from being an abuse of discretion, the district court's determination on the balancing question made perfect sense. Had the court granted the preliminary injunction on these laws, the City faced a potential onslaught of sham entity contributions aimed at circumventing valid contribution limitations. It would have made the City's $500 individual contribution limitation an easily-evaded farce, raising the potential for quid pro quo corruption and the appearance of quid pro quo corruption. A preliminary injunction also would have altered the status quo, and Appellees did not meet the heavier burden plaintiffs face in seeking to change the status quo. (*See* APB 31-34 [discussing cases related to changing the status quo]; *infra* Part III.B.)

For this reason alone, this Court should reject Appellees' challenge to these laws.

B. The District Court Correctly Followed Binding Supreme Court Precedent Recognizing That Limits on Direct Organizational Contributions Are Constitutional to Prevent Circumvention of Valid and Constitutional Contribution Limitations to Candidates.

Had the district court granted Appellees' request for a preliminary injunction allowing direct contributions by non-individual entities to candidates, an individual who gave the maximum $500 contribution to a candidate could set up an unlimited number of sham entities to make additional contributions to the same candidate in the same election. The district court's refusal to countenance this end run around the City's valid individual contribution limitations to candidates was sensible, supported by Supreme Court precedent, and not an abuse of discretion.

Appellees concede, as they must under Supreme Court precedent (*see Buckley v. Valeo*, 424 U.S. 1, 28 (1976); *Nixon v. Shrink Mo. Gov.'t PAC*, 528 U.S. 377, 389 (2000) ("*Shrink Mo*.")), that the government has an important anticorruption interest in limiting large campaign contributions directly to candidates. (ER p. 20 [district court noting concession]; AB pp.15-16.) They also concede that the Supreme Court has recognized the validity of campaign finance laws that prevent circumvention of valid contribution limitations. (AB p. 15 n.5.) Further, Appellees conceded below that a court ruling allowing non-individual entities to contribute

directly to candidates would create the opportunity for individuals to create sham organizations for the purpose of circumventing individual contribution limits, essentially removing such contribution limits for any savvy contributor. (Appellant's Supplemental Excerpts of Record ("ASER") p. 11 ["Professor Hasen brought up the possibility of sham organizations, the idea that, you know, someone might create a bunch of LLCs and, you know, whatever, *I grant that's a possibility, certainly*, but the answer is disclosure."] (emphasis added).)[4]

The district court on the basis of this anti-circumvention rationale rejected Appellees' argument (except as to political parties[5]) for a preliminary injunction enjoining enforcement of City laws barring non-individual contributions directly to candidates: "this Court accepts the City's assertion" that "the limit [barring non-individual entities' contributions directly to candidates] furthers an anticorruption interest by preventing individuals from circumventing contribution limits with the use of sham organizations." (ER p. 36.)

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[4] The Supreme Court in upholding contribution limits has rejected the argument that disclosure is a constitutionally-mandated alternative to reasonable contribution limitations. *See infra* Part III.C.2 [discussing *Shrink Mo.* and disclosure].

[5] As to the court's ruling related to political parties, *see* APB at 14-15, 56-60; *infra* Part IV.

In reaching this conclusion, the district court relied upon the long history of such limitations and Supreme Court precedent. The district court noted 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 v. Fed. Election Comm'n*, 130 S.Ct., 876, 900 (2010)), and that the Supreme Court in *Beaumont*, 539 U.S. at 159-60 upheld a federal statute barring corporate contributions to candidates. (ER p. 34.)

In upholding the federal corporate ban in *Beaumont*, the Supreme Court specifically noted both the long history of such limitations, 539 U.S. at 152-54, as well as the validity of the anti-circumvention interest: "restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'" *Id*. at 155; *see also id*. at 160 ["Nonprofit advocacy corporations are…no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."].[6])

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[6] The Court in *Beaumont* also recognized two other interests justifying a contribution limitation ban applied to corporations. The Supreme Court rejected one of those two interests, the antidistortion interest, in its recent *Citizens United* decision. The district court noted this point and did not rely on this interest in its analysis. (ER p. 35; *see* APB p. 13.) The other interest discussed in *Beaumont* as justifying a ban on direct corporate contributions to candidates, a concern over "political war chests funneled through the corporate form" was first recognized by the Supreme Court in *Fed. Election Comm'n v. Nat'l Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 207.

The Supreme Court has similarly relied upon the anti-circumvention interest in upholding limitations on political action committees that make direct contributions to candidates *Cal. Med Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 195-96 (1981) ("*CalMed*"). The *CalMed* court upheld against facial challenge a First 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 opn.); *see also id.* at 201-204 (opn. of Blackmun, J, concurring) (agreeing that anti-circumvention interest justified political committee limit at least as to committees making direct contributions to candidates). The Supreme Court also has recognized the danger that political parties could serve as conduits for large contributions and on this basis has upheld campaign contribution limitations. *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457, 462 (2001) (*"Colorado II*").

The anticircumvention idea traces to *Buckley*, 424 U.S. at 38, where the Court upheld a $25,000 per year aggregate limitation on contributions by

(1982). The Court in *Beaumont* reaffirmed this reasoning, 549 U.S. at 154, and in *Citizens United,* 130 S.Ct. at 909, the Court characterized *NRWC* as a case about *contributions* and said it had "little relevance" to the issues before the Court in *Citizens United*.

an individual in federal elections in a calendar year:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity *serves to prevent evasion* of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate *through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

(Emphases added.)

This Court as well recently contrasted the special dangers of corruption attendant when committees "operate as middlemen through which funds merely pass from donors to candidates" with the lesser danger of groups that operate wholly independent of candidates and that do not make donations to candidates. *Long Beach*, 2010 WL 1729710 at *9.[7]

In concluding that the federal corporate contribution ban was constitutional, the Supreme Court applied the lower level of scrutiny applicable to contribution limits (which we described in detail in APB 35-39), and held that strict scrutiny is not applicable even though the law banned all contributions. *Beaumont*, 539 U.S. at 161-63; *see also McComish*

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[7] We discuss the relevance of the *Long Beach* case to the issues in the City's appeal *infra* Part III.

v. Bennett, ___F.3d ___, 2010 WL 2011563 at *7 (9th Cir. 2010) ("Laws that place[ ] only a minimal burden on fully protected ... freedoms or that apply to speech and associational freedoms [that] are not fully protected by the First Amendment receive intermediate scrutiny.") (internal quotations and citations omitted); *id.* at *8 (public financing plan subject to lower level of scrutiny because "the public financing of elections itself does not create any burden on speech").[8]

Under this lower level of scrutiny, a law limiting entity contributions to candidates so as to prevent circumvention of reasonable contribution limits is constitutionally justified by the City's "legitimate and non-illusory interest in reducing *quid pro quo* corruption" (*McComish,* 2010 WL 2011563 at *3 n.3), and reducing the appearance of such corruption of candidates for office. *See Citizens United*, 130 S.Ct. at 908 (*Buckley* "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption."). Along similar lines, the Supreme Court recently explained in *Citizens United* that Congress may limit the solicitation rights of corporate PACs which make direct contributions to candidates

[8] In *McComish* this Court confirmed that under *Buckley* "campaign contributions are not fully protected political speech." *Id.*

because contribution limitations "have been an accepted means to prevent *quid pro quo* corruption." *Id*. at 909.

In addition, City law imposes very little burden on these entities, which are free to make unlimited independent expenditures favoring or opposing candidates for City office.[9] As the district court noted, quoting *Beaumont*, "[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, quoting *Beaumont,* 539 U.S. 146.) At the very least, the district court did not abuse its discretion in concluding that the City's interest in preventing circumvention of valid contribution limitations outweighed the Appellees' right to a preliminary injunction enjoining enforcement of these anticircumvention provisions.

C. *Beaumont*'s Anti-Circumvention Holding Does Not Depend Upon City Law Granting Entities a PAC-Like Exception to Make Direct Contributions to Candidates.

Appellees argue that the Supreme Court's holding in *Beaumont* depended upon the fact that federal law gave corporations an ability to form a political action committee ("PAC") to make direct contributions to

[9] If, contrary to the City's position, this Court upholds the district court's decision that allows such entities to make unlimited contributions to independent expenditure committees (*see infra* Part III), these entities will have yet additional means to influence the outcome of City elections.

candidates. They state that because City law does not allow for the creation of a PAC, and because there is supposedly a "complete ban on an entity's First Amendment activity" (AB p. 25), the City's law is distinguishable from the law upheld in *Beaumont*.

In the first place, the City law does not *ban* an entity's political activities. A corporation or other entity may make *unlimited* independent expenditures favoring or opposing candidates for City office and may endorse candidates. Thus, Appellees misstate the law when they state that the City has provided "no such alternative avenues" (AB p. 12) besides direct contributions to candidates to participate in City elections.

Second, the Supreme Court's endorsement and application of anticircumvention principles in *Beaumont* did not depend upon the existence of the PAC alternative. The only mention of PACs in the opinion comes not in the discussion of the validity of anticircumvention principles, but in refuting the argument that federal law imposed a complete ban on electoral activity. *Beaumont*, 539 U.S. at 162-63. Of course, at the time *Beaumont* was decided, many corporate entities could not engage in independent spending supporting candidates, so the PAC option was the only means by which many corporations could directly use money in relation to candidate

elections. Today, after *Citizens United*, corporations may spend unlimited sums independently supporting or opposing candidates for office.

Finally, *Beaumont* does not stand alone in recognizing anticircumvention as a valid rationale for campaign contribution laws. *CalMed*, *Colorado II*, and *Buckley* do as well.

D. *Citizens United* Supports the District Court's Decision.

Appellees argue that the Supreme Court's recent decision in *Citizens United* compels a different result on the constitutional question. They say that the case stands for the proposition that the "government may not discriminate on the basis of the corporate identity of the speaker." (AB p. 22; *see also id*. ["*Citizens United* stands for the proposition that the government may not suppress First Amendment activity on the basis of the identity of the speaker."].)

Appellees are wrong: *Citizens United* did not so hold, and indeed it supports the City's law limiting individuals, and not non-individual entities, to making campaign contributions directly to candidates. In *Citizens United*, 130 S.Ct. 876, the Court held that the federal government could not limit *independent spending* by corporations because such independent spending, which by definition cannot be coordinated with a candidate, lacks the potential for corruption.

In contrast, the Court endorsed the validity of contribution limitations to prevent corruption: "contribution limits….have been an accepted means to prevent *quid pro quo* corruption…" *Id*. at 909. The Court also did not address other issues related to contribution limitations, stating that they were not presented to the Court in the *Citizens United* case. *See id.* (Citizens United "has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.") For this reason, Appellees' statement that it is "doubtful" that *Beaumont*'s holding survives *Citizens United* (AB p. 24) is flatly wrong.[10]

In addition, the City law does not discriminate between *corporations* and everyone else on the basis that the corporation is a "disfavored speaker" (AB p. 33); instead, the law distinguishes between human beings and artificial entities (corporate and non-corporate) in making direct contributions to candidates. A limit on the latter is necessary, as Appellees conceded, to prevent the creation of sham entities to circumvent valid

[10] Appellees also read a statement in *Citizens United,* 130 S.Ct. at 912, noting that "political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws" to conclude that the Court in *Citizens United* has "discredited the anticircumvention interest." (AB p. 24.) Appellees err. No one challenged the anticircumvention rationale applicable to contribution limitations in *Citizens United*, and the Court did not overrule its numerous cases relying on it. As the Chief Justice cautioned, "the Court generally does not consider constitutional arguments that have not been raised." *Citizens United*, 130 S.Ct. at 920 (Roberts, C.J., concurring).

contribution limits—limits which are themselves justified by an anticorruption interest.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ENJOIN CITY LAW BARRING CANDIDATES FROM SOLICITING OR RECEIVING CAMPAIGN CONTRIBUTIONS MORE THAN 12 MONTHS BEFORE THE ELECTION. (SECOND ISSUE ON CROSS-APPEAL)

A. Appellees Cannot Demonstrate that the District Court Abused Its Discretion in Denying a Preliminary Injunction on This Law Because They Offer No Argument that the Court Erred in Ruling That the Balance of the Hardships Tips in Favor of the City.

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 district court rejected Appellees' argument for a preliminary injunction as to this provision, except as to candidate self-contributions.[11]

As explained *ante* in Part I.A, in order to be entitled to a preliminary injunction, a plaintiff must demonstrate *each of four separate factors* to be entitled to relief, including that the burden of the hardships tip in favor of the

[11] 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.) The district court held this restriction unconstitutional (ER pp. 29-30), a decision the City does not contest on appeal. Thus, Appellees' statements that Mr. Thalheimer cannot spend his own funds on his election campaign more than 12 months before the election (AB pp. 2, 7) are incorrect and misleading.

plaintiff. As with the other City laws discussed in Part I above, the district court determined *both* that plaintiffs were unlikely to succeed on the merits (ER p. 27-29) *and* that the balance of the hardship tipped in the City's favor (ER p. 38). Again Appellees offer extensive arguments as to likelihood of success on the merits on appeal (AB pp. 14-22), but on this issue offer *no argument whatsoever* as to why the district court could be said to have abused its discretion in concluding that the balance of hardships tipped in the City's favor.[12] Nor do they explain how they met their special burden of justifying a law altering the status quo.

Once again, though we offer our own arguments related to the merits, this Court need not even reach the merits given the failure of Appellees to even argue, much less demonstrate, an abuse of discretion on the burden of hardships question.

B. The District Court Did Not Clearly Err in Concluding that Appellees Were Not Likely to Succeed on the Merits When They Presented *No Evidence* They Were More than Minimally Burdened By the City Law and the City's Law Was Justified By Its Interest in Preventing Corruption and the Appearance of Corruption.

1. The District Court Did Not Clearly Err in Finding Appellees Presented *No Evidence* They Were More Than Minimally Burdened by the Law.

[12] Appellees cannot raise such an argument for the first time in their reply brief; such an argument is accordingly waived. *See U.S. v. Alcan Elec. & Eng'g Co.*, 197 F.3d 1014, 1020 (9th Cir. 1999).

In declining to preliminarily enjoin enforcement of the twelve month window, the district court held the matter governed by the lower level of scrutiny applicable to contribution limits (ER p. 27), a standard Appellees accept on appeal (AB p. 14). The court examined the entirety of the evidence of the burden of the law submitted by Appellees, which consisted of nothing more than *two sentences* in the verified complaint indicating that a candidate would like to receive, and a resident would like to give, contributions outside the window. (ER p. 119 ["Mr. Thalheimer has created a committee and would like to begin soliciting money to be placed in an account for a possible council run in 2012"]); ER p. 121 [Mr. Nienstedt "would like to contribute money to [a candidate whose primary is more than one year away] now, and would do so but for" the City's law].")

The district court found that "[w]hile temporal limitations do burden free speech and association, there is *no evidence* that the City's law is more than a minimal burden." (ER p. 15 (emphasis added); *see also id*. at 28 ["The City's limit does 'nothing more than place a temporary hold on [Plaintiffs'] ability to contribute.'"].) Further, the district court found that "Plaintiffs provide *no evidence* that the 12-month window prevents

challengers from amassing the resources necessary to mount effective campaigns against incumbents."[13] (ER p. 29.) (emphasis added.)

Under the applicable standard of review (*see* ARB pp. 23-24), this court reviews the district court's factual findings for clear error. *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010).[14] Here, there is no clear error. The court did not clearly err in concluding that appellees' two sentences expressing a bare desire to contribute outside the window do not constitute sufficient evidence of a burden to justify the granting of a preliminary injunction which changes the status quo.

This Court's recent opinion in *McComish,* 2010 WL 2011563, confirms Appellees' evidentiary burden. There, plaintiffs argued that a provision of Arizona's voluntary public financing system for legislative elections imposed an unconstitutional burden upon non-participating

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[13] On this point, the court added: "In addition, the *Buckley* court squarely rejected a similar argument that the $1,000 contribution limit in that case was unconstitutional because it made fundraising more difficult for challengers than incumbents. [Citations.] The *Buckley* Court found important the fact that the $1,000 limit, like the 12-month window in this case, was the same for challengers and incumbents alike. [Citations.]" (ER p. 29.)

[14] The same result would apply if this court applied *de novo* review. *See McComish*, 2010 WL 2011563 at *7, n.8. Appellees put *no evidence* in the record of any substantial burden imposed by this law, so even if this Court gave no deference to the district court's factual findings, the result would be the same.

candidates and others. That provision provided additional "matching funds" to candidate participants in the public financing system when a non-participating opponent spends or receives support above a certain threshold. This Court rejected the argument:

> Plaintiffs, perhaps recognizing that they have not demonstrated any actual chilling of their speech by the Act, argue that under [*FEC v.*] *Davis,* we could strike down the matching funds provision *without any proof* that their speech has been deterred or punished. But *Davis* does not require this Court to recognize mere metaphysical threats to political speech as severe burdens. We will only conclude that the Act burdens speech *to the extent that Plaintiffs have proven* that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures.

Id. at *10 (emphases added).

Should the Appellees have significant evidence of a burden, they are free to present it to the district court when that court considers the matter for purposes of final judgment. In the meantime, this Court should affirm the district court's denial of the preliminary injunction on this question on grounds the district court did not abuse its discretion.

2. The District Court Did Not Abuse Its Discretion in Concluding That the City's Law Was Justified by Its Anticorruption Interest.

As to the City's interests in the 12-month temporal limitation, the court concluded that "[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.)

Though temporal limitations are commonplace in the Ninth Circuit (for example, the cities of Los Angeles and San Jose have temporal limits [*see* ASER p. 13]), there does not appear to be any caselaw in the jurisdiction directly addressing the constitutional question. For this reason, the District Court relied upon cases from other jurisdictions upholding temporal limits. (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).)

In *North Carolina Right to Life v. Bartlett*, 168 F.3d at 717-18, the Fourth Circuit upheld a North Carolina law barring lobbyists from contributing to candidates during legislative sessions:

> More generally, "[n]either the right to associate nor the right to participate in political activities is absolute." When the interests sought to be advanced by the statutory scheme are sufficiently important, minimal burdens on one's right to associate are constitutional. Not only are the interests [in preventing corruption and its appearance] served by North Carolina's statutory scheme important, they are compelling. Moreover, the burden on appellees' right to associate is minimal. *Appellees are not prevented from contributing to the candidates and incumbents of their choice, they are only restrained from doing so while the Assembly is in session.*

(Citations omitted and emphasis added.)

Similarly, in *State v. Alaska Civil Liberties Union* (1999) 978 P.2d 597, 627-628 ("*AkCLU*"), the Alaska State Supreme Court struck down a nine month campaign contribution period but allowed an eighteen month period to remain in effect in the absence of any argument to the Court that the longer period was unconstitutional. *Id*. at 629-30. It also upheld post-election contribution limits. *Id*. at 630.

As the *Bartlett* court recognized, temporal limits do not *bar* campaign contributions; instead, they channel such limitations to prevent corruption and the appearance of corruption by preventing contributions at a time when they are most likely to be given solely to curry favor with officeholders and candidates. *See also Ferre v. State ex rel. Reno*, 478 So.2d 1077, 1079-80 (Fla. Dist. Ct. App. 1985), *aff'd*, 494 So.2d 214 (Fla. 1986) (upholding post-election contribution ban on grounds that the "Legislature could determine that a post-election contribution to a winning candidate could be a mere guise for paying the officeholder for a political favor"); *Gable*, 142 F.2d at 951 (upholding Kentucky ban on campaign contributions in the last 28 days before an election on anti-corruption grounds);[15] *but see Anderson v. Spear*,

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[15] The American Civil Liberties Union of San Diego & Imperial Counties ("ACLU") concedes that the "28-day ban was appropriate" (Brief of Amicus Curiae of ACLU ("ACLU Br.") p. 7) in that case but seeks to distinguish the City's limit on grounds that it was not part of a public financing system. By so conceding, the ACLU has recognized that temporal limits on soliciting

356 F.3d 651, 675 (6th Cir. 2004) (striking down Kentucky law as applied to write-in candidates).

The City has a sufficiently important interest to restrict campaign contributions to this reasonable temporal period: the avoidance of actual and perceived corruption. When enacting the temporal limitation the City did so to alleviate concern that the solicitation and acceptance of contributions during remote periods of time was perceived as corruption.[16] Inherently remote contributions have great potential for actual corruption and appearance of corruption of both incumbents and challengers. Contributions to incumbents during off-periods have potential to provide the appearance of corruption by the sale of influence, especially as incumbents build up "war chests" to deter challengers in off years from those with business before the incumbent, and challengers entering an election with a clean slate may give an appearance of selling their platform to the highest bidder before they have announced their plans. *See McComish*, 2010 WL 2011563 at * 12 ("the State's interest in eradicating the appearance of *quid pro quo* corruption to

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and accepting campaign contributions may be justified by sufficiently strong governmental interests. The only disagreement is as to the strength of the interests in each case, and the extent of the burden.

[16] In addition, speech closest to the election may be the most important. (*See* AB p. 39 ["Speech in temporal and topical proximity to an election enjoys the highest protection"].)

restore the electorate's confidence in its system of government is not 'illusory' it is substantial and compelling.").

Both Appellees and amicus ACLU disagree with these assessments, believing that the greater period of corruption comes in contributions given more closely to the election. (AB p. 17; ACLU Br. p. 9.) They further believe that once the City has limited the amount of contributions, it has no further interest in preventing corruption. (*See* AB p. 17; ACLU Br. p. 9; *but see McComish*, 2010 WL 2011563, *12 ["Arizona voters were justified in concluding that contribution limits alone were not sufficient to combat corruption and its appearance."].)

But the district court did not abuse its discretion in concluding that the City could reasonably decide that limiting the period of time during which officeholders raise contributions—contributions that frequently come from those with business before the City—directly reduces the risk of actual and apparent corruption that could result from such officeholder fundraising.[17]

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[17] The district court wrote that "[t]he 12-month window furthers the government's anticorruption interest by channeling contributions to a time period 'during which the risk of actual quid pro quo or the appearance of one runs highest.' *See North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999)." It is clear from the context of the district court's sentence that the court meant to write that the 12-month window channels contributions *away* from the period of highest corrupt potential. The full sentence from the *Bartlett* case, quoted by the district court, reads: "In short, the restrictions cover only that period during which the risk of an actual quid

In other words, there is a greater threat of corruption when an officeholder raises political funds from those with business before the City throughout the entirety of her term of office, rather than only during the now-allowed shorter fundraising time period.

The ACLU further argues that temporal limits do not prevent corruption, because they supposedly "force[] candidates to raise funds as quickly as possible by focusing on the largest possible contributions and relying on persons with the access necessary to mobilize such contributions rapidly." (ACLU Br. p. 9.) Given the $500 contribution limit, no one will be accepting very large contributions during the 12-month campaign period. The City could reasonably decide that there was a greater corruption risk posed by remote contributions than those in the period closer to the election.

The ACLU also points to cases from other jurisdictions striking down temporal limits as unconstitutional. (ACLU Br. pp. 3-7.) Some of those cases are distinguishable on their facts, such as the Alaska case considering a shorter temporal limitation than the City's limits. *AkCLU*, 978 P.2d at 627 (limit beginning January 1 of election year). But some of these cases indeed are contrary to the City's position. In the City's view, they should not be

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pro quo or the appearance of one runs highest."

followed, especially not prior to a full exploration of the issues at a trial on the merits.

Appellees complain that the City did not put forward sufficient evidence of its anticorruption interest justifying the City's law. (AB pp. 19-22.) But the City had no obligation to do so given that the Appellees had not first put forward evidence, *see ante* Part II.B.1, that they were burdened by the City's law. 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." *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 429 (2006) (burdens of proof at preliminary injunction hearing track burdens of proof at trial).

The question posed about the constitutionality of temporal limits raises important legal *and* factual questions that should not be resolved through motion practice. The district court did not abuse its discretion in denying the preliminary injunction, allowing it to reconsider the question after a fuller exploration of how temporal limitations affect City politics. *Cf. Ognibene v. Parkes*, 599 F.Supp.2d 434, 444 (S.D.N.Y. 2009) (refusing to

consider constitutionality of New York City individual contribution limits in motion practice in the absence of factual development).

REPLY BRIEF (APPEAL)

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING CITY LAWS LIMITING CONTRIBUTIONS TO INDEPENDENT EXPENDITURE COMMITTEES. (FIRST ISSUE ON APPEAL)

Appellant's Principal Brief at pages 24-55 explained the three separate reasons why the district court abused its discretion in enjoining City laws limiting contributions to independent expenditure committees. If this Court agrees with the City on *any* of these three alternative arguments, it should reverse the grant of the preliminary injunction as an abuse of discretion and need not reach the other two arguments. We reply to Appellees' responses to the City's three arguments below.

A. Plaintiffs Failed to Meet Their Initial Burden of Proof.

As the City explained, the district court abused its discretion by misapplying the burden of proof on the question of the constitutionality of City law limiting contributions to independent expenditure committees. In particular, the district court erred in rejecting the argument that Appellees failed to provide *a sufficient factual basis* as to the burden the law imposed upon them to support their motion. (*See* ER pp. 29, 34 [inappropriately placing burden of proof on City].)

As we explained (APB pp. 27-28), 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. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. at 429 (burdens of proof at preliminary injunction hearing track burdens of proof at trial).

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. (*See* APB p. 29 n.9 [reprinting *entirety* of evidence].) This string of conclusory allegations was insufficient.

Appellees' response to this argument misses the point. Appellees argue that facts contained in a verified complaint constitute admissible evidence to support a preliminary injunction (AB pp. 26-27) and that preliminary injunctions may issue before discovery is conducted (AB pp. 27-30). The City disputes neither point. Instead, the City has argued that the *amount and quality* of evidence put forward by the Appellees is factually insufficient. It was clear error, and an abuse of discretion, for the district

court to issue a preliminary injunction based upon such a sparse and conclusory record.

When Appellees turn in their brief to describe the actual evidence supporting the preliminary injunction, they have virtually nothing to say. They repeat the few sentences on the issue from the verified complaint and then baldly state "[t]hese facts establish that [Appellees] want to engage in protected First Amendment activity, and would do so, but for the IE source ban." (AB p. 31.)

Not so. 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.

Should Appellees make a showing at a trial on the merits that the law imposes significant burdens upon them, at that point the City would need to come forward with evidence demonstrating that the law is closely drawn to

prevent corruption and the appearance of corruption. In the meantime, a preliminary injunction was unwarranted.

Appellees in this case put forward no significant evidence of a burden. A full trial on the merits is necessary for Appellees to actually prove the extent of these burdens. For this reason, the district court abused its discretion in granting a preliminary injunction enjoining enforcement of these laws.

B. The District Court Erred in Granting the Preliminary Injunction Without Considering the Heavy Burden Plaintiffs Face When Asking for a Change in the Status Quo.

As Appellant's Principal Brief at pages 31-34 explains, 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. Under the law of this Circuit, a plaintiff seeking a preliminary injunction which changes the status quo must meet a heavier burden in showing that such an injunction is justified.

The district court wrote that plaintiffs do not bear a heavier burden when seeking preliminary injunctive relief which alters the status quo. (ER p. 38.) As we demonstrated (APB pp. 32-33) through citations to cases in this Circuit and in the Tenth Circuit, this statement was in error. In addition, the City suffered prejudice from the district court's failure to take the extra

burden into account. In ruling on Appellees' request for a preliminary injunction, the court granted some of the relief Appellees requested and denied others. The City was entitled to have the weighing on each request for relief done under the appropriate balancing test.

Because the district court applied the incorrect legal standard and could have reached a different decision applying the correct legal standard, the district court necessarily abused its discretion (*see Dominguez* 596 F.3d at 1092), and the preliminary injunction must be reversed.

Appellees concede that the district court was "likely incorrect" in its statement of the law (AB p. 41), but argue that the rule does not apply to the injunction they requested. Appellees make two arguments (AB pp. 33-41): first, the injunction they sought did not change the status quo; second, the injunction they sought was prohibitory, not mandatory, and plaintiffs do not bear a heavier burden when seeking a prohibitory injunction. We consider each argument in turn.

1. Appellees Sought an Injunction Changing the Status Quo.

The City of San Diego has been enforcing its campaign finance laws since 1973. (*See* AA p. 16.) Until Appellees brought their challenge to five City campaign contribution laws in late 2009, the City's laws were on the books, and they were regularly enforced by the Ethics Commission and law

enforcement officials. In late 2009, Appellees sought a preliminary injunction which would no longer allow the City to enforce some of its longstanding campaign contribution laws pending a trial on the merits.

It strains credulity to argue that such an injunction does not constitute a change in the status quo because before the lawsuit the City was enforcing its law as to all persons contributing money and collecting contributions in City campaigns. Appellees' counterargument boils down to a single point: "The status quo is not the City's law. Rather, the status quo is the First Amendment." (AB p. 34.) In other words, because the City, according to Appellees, never had a legal right to impose its law against Appellees, the law never became the status quo.

Nonsense. Appellees confuse the question of the status quo (the position of the parties before the litigation started) with their view of the merits of the case. The Tenth Circuit, sitting *en banc*, confronted this very issue and explained that is the position of the parties before the litigation, and not the underlying view of the merits, which establishes the status quo.[18] *O Centro Espirita Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir.

[18] As the City explained at ARB page 32, the Tenth Circuit and Ninth Circuit standard on this question is identical.

2004), *aff'd sub. nom. Gonzales v. O Centro Espirita Uniao Do Vegetal*, 546 U.S. 418.

There, a majority of the *en banc* court considered what constituted the status quo in a case in which the government had been enforcing a law banning the sale of controlled substances and plaintiffs, a religious organization, had been secretly importing and using one of those substances for religious purposes. The majority concluded that it was the "government's enforcement" of the law that was the status quo, and that plaintiffs' claim of a legal right to import and use the substance was irrelevant to that question. *Id.* at 981-82 (opn. of Murphy, J.). "The status quo is not defined by the [parties'] existing *legal rights;* it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights." *Id.*, quoting *SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1100 (10th Cir. 1991) (opn. of Murphy, J.).[19]

As Appellees concede, "[t]he status quo is 'the last uncontested status which preceded the pending controversy.'" (AB p. 36, quoting *Marlyn*

[19] In all of the parts of the opinion by Judge Murphy quoted in this brief, Judge Murphy wrote for a majority of the *en banc* Tenth Circuit.

Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009).) Had the City passed a new campaign contribution law and Appellees sought a preliminary injunction barring its enforcement before it had ever been enforced, an injunction enjoining enforcement of the law would maintain the status quo. But the City's law has been on the books and enforced for decades. Enforcement of longstanding City law is the last uncontested status which precedes the current controversy. A preliminary injunction issued now changes the status quo, and it therefore suffers from a heavier burden.

2. Whether or Not the Injunction Appellees Sought Was "Mandatory," It is Subject to a Heavier Burden Because it Changes the Status Quo.

Appellees also maintain that the rule requiring plaintiffs to meet a heavier burden applies only to "mandatory" injunctions, and that in this case Appellees sought a "prohibitory" injunction barring the City from enforcing its law. (AB p. 34 n.8.) Appellees are wrong on both counts.

First, the rule requiring plaintiffs to meet a heavier burden applies to preliminary injunctions seeking to change the status quo, whether they are mandatory or prohibitory. Thus, the heavier burden applies to "(1*) a preliminary injunction that disturbs the status quo*; (2) a preliminary injunction that is mandatory as opposed to prohibitory; and (3) a preliminary

injunction that affords the movant substantially all the relief he may recover at the conclusion of a full trial on the merits." *O Centro Espirita Uniao Do Vegetal v. Ashcroft,* 389 F.3d at 977 (opn. of Murphy, J.) (emphasis added). This rule is applied to these three categories "[b]ecause each of these types of preliminary injunction is at least partially at odds with the historic purpose of the preliminary injunction—the preservation of the status quo pending a trial on the merits." *Id.*[20]

Second, though Appellees offer a plausible definition of the term "mandatory" as used in other contexts, in this context, *any injunction* which alters the status quo—even one that prohibits the government from enforcing its existing laws—constitutes a mandatory injunction. As the *O Centro* court explained about the law in the Ninth Circuit and elsewhere:

> [M]ost courts decide whether a given preliminary injunction is "mandatory" or "prohibitory" by determining whether or not it alters the status quo. *See, e.g., Tom Doherty Assocs.,* 60 F.3d at 34; *Acierno v. New Castle County,* 40 F.3d 645, 647 (3d Cir. 1994); *Stanley v. Univ. of S. Cal.,* 13 F.3d 1313, 1319 (9th Cir. 1994); *Martinez v. Mathews,* 544 F.2d 1233, 1242-43 (5th Cir. 1976). For these courts, then, the question whether an injunction is mandatory or prohibitory is merely a proxy for the more significant question whether an injunction alters the status quo.

Id. at 979.

[20] Judge McConnell's concurring opinion in *O Centro Espirita Uniao Do Vegetal v. Ashcroft,* 389 F.3d at 1012-1018 gives a more detailed historical and policy rationale for imposing a heavier burden on preliminary injunctions which would change the status quo.

As this Court explained in *Anderson v. U.S.,* 612 F.2d 1112, 1114 (9th Cir. 1979), "[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." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994); *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 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. 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*, 599 F.3d 1093, 1097 (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.

C. The District Court Committed Legal Error in Concluding that Appellees Were Likely to Succeed on the Merits on Their Constitutional Claim.

Appellant's Principal Brief at pages 34-55 explained that 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 City does not repeat its extensive arguments here, especially given that Appellees devoted a mere three pages of their brief (AB pp. 41-44) to the constitutional question. Instead, we explain the relevance of the new *Long* Beach case to this appeal and respond to arguments of amicus ACLU.

1. The *Long Beach* Case Does Not Compel a Different Result.

Since the parties filed their opening briefs in this case, this Court decided the *Long Beach* case. In that case, this Court held that a City of Long Beach law limiting contributions to independent expenditure committees was unconstitutional. *Long Beach* does not control the outcome in this case.

In the *Long Beach* case, the district court considered the constitutionality of the City of Long Beach's law limiting contributions to independent expenditure committees. The parties filed a joint stipulation of undisputed facts to accompany their cross-motion for summary judgment.

Long Beach, 2010 WL 1729710 at *1 n.1. This Court examined the uncontested evidence and held that the Long Beach law as applied to the Long Beach Chamber of Commerce PAC and similarly situated entities was unconstitutional. *Id*. at *11-*12.

In so doing, this Court stressed the importance of *evidence presented to the district court* in adjudicating such challenges. In the *Long Beach* case, Amicus League of California Cities sought to present evidence to this Court of the corruptive potential of contributions to independent expenditure committees. This Court held that such evidence needed to be presented first to the district court, and stated that it "appreciate[d]" the observation of amicus that "[a] significant number of cities, including many of the largest municipalities" had adopted similar laws. *Id.* at *11. "However, *we can only decide the appeal before us,* and *our holding today extends only to the [Long Beach law]* as applied to the Chamber PACs and similarly situated entities." *Id*. at *11 (emphases added). Thus, *Long Beach* does not dictate the outcome of this case, and there are some salient differences between the two cases which may lead to a different constitutional result following a trial on the merits.

In this case, unlike the *Long Beach* case, there is a dispute about the burden the law imposes on the complaining parties. (*See ante* Part I.) In this

appeal, this Court is not deciding a legal issue de novo on the basis of stipulated facts. *Cf. Long Beach,* 2010 WL 1729710 at *3. Instead, in the district court and this Court, the City has vigorously contested Appellees' unsupported claim that that the law significantly burdens Appellees' First Amendment rights. Appellees at this stage have presented virtually no evidence to prove such a burden.

The City also has not yet gone to trial to put forward facts for court consideration supporting the City's interest in preventing corruption and the appearance of corruption. According to the *Long Beach* case, the City could well prevail on this issue upon proof that groups funding independent expenditure committees have a "close relationship" with City officials and political parties to justify contribution limitations on anticorruption grounds. *Id.* at *9; *see also McComish*, 2010 WL 2011563 at *3 n.3 (confirming that after *Long Beach* case this Circuit will continue to uphold campaign finance laws justified on anticorruption grounds). In contrast, in the *Long Beach* case the city of Long Beach "*even stipulated*" to the lack of corruption caused by contributions to independent expenditure committees in that city. 2010 WL 1729710 at *10 (emphasis added).

Finally, the law in the City of Long Beach differs from the City's law at issue in this case. Long Beach law prohibited an entity from making *any*

expenditures in Long Beach candidate elections if the entities received dues in excess of a certain amount. *Id*. at *1 ["The parties stipulate that the Chamber's dues constitute 'contributions' under" Long Beach law].) As explained in Appellant's Principal Brief at page 38 footnote 13, under this Court's *Lincoln Club* case, such a scheme is treated as creating expenditure limits, and therefore it is subject to strict scrutiny. In contrast, San Diego City law does not treat dues as contributions, and entities can collect unlimited amounts in membership and other fees, so long as they are not earmarked for City candidate elections. (*See* ECCO § 27.2936(b).) Accordingly, strict scrutiny does not apply.

2. The ACLU's Arguments are Unavailing.

Amicus for Appellees, the ACLU, devotes the bulk of its brief to arguing against the constitutionality of contribution limitations to independent expenditure committees under any circumstances.[21] The ACLU, which filed its brief after this Court decided the *Long Beach* case, misreads the *Long Beach* case as controlling the outcome of this case.

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[21] The ACLU brief does not address the City's argument that, aside from the merits of the constitutional question, the district court independently abused its discretion by (1) granting the preliminary injunction in the absence of significant evidence of a burden on Appellees and (2) failing to apply a "heavier burden" to a plaintiff seeking a preliminary injunction altering the status quo. Of course, if this Court agrees with the City on points (1) or (2), it need not reach the merits of the constitutional question.

(ACLU Br. p. 11.) For reasons explained in the last section, this is incorrect.

The City addressed most of the constitutional arguments raised by the ACLU in the City's first brief. Here, we respond to two additional arguments raised by the ACLU.

First, the ACLU argues that the City's law imposes a spending limit, rather than a contribution limit, on independent expenditure committees. (ACLU Br. pp. 11-15.) The ACLU misconstrues City law. City law expressly provides, as the ACLU acknowledges (ACLU Br. pp. 12), that the City does not limit an individual's donations to such committees. Instead, it limits the amount that an individual may contribute to such a committee that may be *used to support or oppose* a candidate for City election.[22] Thus, if Voter Smith wishes to give $5,000 to Committee X, she may do so, but no more than $500 of that contribution may be used by the committee support a particular candidate in a given election. (*See* ECCO § 27.2936(b), (f).)

This provision does not limit how much Committee X may spend. It may spend as much money as it wants per candidate, per election, so long as

[22] The ACLU misreads ECCO § 27.2936(f) as a limitation on the amount of money an independent committee can spend to participate in candidate elections. The section simply provides, consistent with the *Lincoln Club* case, that the only funds that count for purposes of determining compliance with ECCO's contribution limits to committees are those funds given by contributors *for use in City candidate elections*. (*See* ECCO § 27.2936(f).)

the money is funded solely from contributions of $500 or less per individual. If the ACLU's logic 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 this Court's precedents consistently applying a lower level of scrutiny to contribution limits.

The second argument the ACLU raises is that the City's compelling interest in preventing corruption and the appearance of corruption may be met through improved disclosure rules rather than contribution limitations. Opponents of campaign contribution limitations have been making such arguments for some time. For example, in *Shrink Mo.,* 528 U.S. at 428, Justice Thomas in dissent put forward the argument that contribution limitations are unconstitutional because disclosure is a "less restrictive means" to address the problem of corruption and the appearance of corruption. The majority rejected this argument, *id.* at 395 n.7, upholding Missouri's campaign contribution limitations. *See also Buckley*, 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative

concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.").

To accept the ACLU's argument would be to render all contribution limitations unconstitutional, because disclosure laws could always be used as a substitute. This position, however, is not the law of the Supreme Court or this Court.

Moreover, requiring additional *relevant* disclosures by political committees participating in City elections is far more easily said than done. For example, there is no practical way for the City to require general purpose committees (a category that includes Appellees Associated Builders and Contractors PAC, Lincoln Club of San Diego, and the Republican Party of San Diego) to disclose the names of the major donors funding campaign advertising disseminated to support or oppose a City candidate. Due to the nature of these "general purpose" entities, which collect dues, donations, and other types of funding for a variety of purposes and a variety of elections, it can be difficult, if not impossible, to link a particular political advertisement to its true source of funding. Campaign statements may identify contributors, but will not link those contributors to a particular campaign

advertisement. Identifying a particular source of funding on the advertisement itself may be virtually impossible given that any number of persons may have given any amount of money to the committee for any number of purposes. Thus, anyone could donate $50,000 to the Lincoln Club of San Diego and ask that the funds be used to pay for campaign mailers supporting a particular City candidate, and the public would never know that the person was behind the mailers.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRELIMINARILY ENJOINING CITY LAW BARRING POLITICAL PARTY CONTRIBUTIONS TO CANDIDATES. (SECOND ISSUE ON APPEAL)

Appellant's Principal Brief at pages 56-61 explained the two separate reasons why the district court abused its discretion in preliminarily enjoining as to political parties the City law allowing only individuals to contribute to political parties.[23]

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[23] Since that time, the City has taken steps to enact a $1,000 per election contribution limit applicable to political party contributions to City candidates. *See* ASER p. 4. Even assuming the contribution limitation goes into effect, the dispute between the parties is not moot for two reasons. First, the City enacted the limitation only to comply with the district court's order, and could well decide to eliminate the provision should this Court reverse. Second, the City fully expects Appellees to challenge the $1,000 contribution limitation as not constitutionally adequate when the case is tried on the merits in the district court. A ruling from this Court that the party has no constitutional right to make direct contributions to candidates would resolve that challenge.

First, Appellees failed to provide sufficient evidence that they are significantly burdened by the law, given that political parties may spend unlimited sums coordinated with candidates on communications with members of their own parties. The *only evidence* Appellees offered of a burden was a few conclusory sentences in the Verified Complaint that Appellee Republican Party would like to contribute directly to candidates. (ER pp. 9, 20.)

Second, the City's law barring entity contributions to candidates is justified by the City's interest in preventing corruption and preventing the circumvention of its valid contribution limitations. The arguments the City made *ante* in Part I as to the constitutionality of limits on other entity contributions to candidates apply equally to political parties.

On the first argument, Appellees offer nothing more than yet another conclusory statement: "This factual averment is enough to show that the [Republican Party of San Diego] wants to engage in protected First Amendment activity, but the party contribution ban prevents it from doing so." (AB p. 45.) Of course, this statement assumes the conclusion that there is a First Amendment right of a non-individual entity to contribute directly to candidates. That the Republican Party "wants to" give $20,000 to a City candidate (ASER p. 3) does not establish that it has a constitutional right to

do so. Given the ability of political parties *to 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 (*see* APB p. 57), as well as to make independent expenditures (potentially with unlimited individual and entity contributions), Appellees needed to do more than express a desire to contribute money to show that the law imposed an unconstitutional burden upon them.

On the City's second argument—that Appellees are unlikely to succeed on the merits because political parties, like other non-individual entities, do not possess a constitutional right to make contributions directly to candidates—Appellees make four points. We consider each of them in turn.

1. Appellees first cite *Colorado II* for the proposition that "[i]t is constitutionally impermissible for the City to prohibit [the Republican Party of San Diego] from making contributions to its candidates." (AB p. 46, citing *Colorado II*, 533 U.S. at 453.) *Colorado II* does not so hold. In that case, the Supreme Court *upheld* against First Amendment challenge a federal law *limiting* the amount of money a party may spend in coordination with a candidate.[24] The Supreme Court in *Colorado II* did not recognize a

[24] Coordinated spending is treated like a contribution, not an expenditure,

right of parties to make such coordinated expenditures; instead, it recognized the government's ability to limit such coordinated spending.

2. Appellees next argue that this Court need not reach this question, because "the City does not allege that the district court based its decision on an erroneous legal standard or clearly erroneous findings of fact." (AB p. 46.) Of course the City made such arguments, both that the district court clearly erred in concluding that Appellees presented sufficient evidence they were burdened by the City law (APB pp. 5, 56-57) and that the district court reached an incorrect legal conclusion in determining that political parties likely have a constitutional right to make contributions directly to candidates in nonpartisan elections. (APB pp. 5, 57-61.) Nor does the City contend, as Appellees suggest (AB p. 47), that a district court necessarily errs in deciding a legal question of first impression. Instead, our point is that the legal question is subject to *de novo* review. *See Dominguez*, 596 F.3d at 1092 ("We review conclusions of law *de novo*…").

3. Appellees next cobble together a series of statements from the Supreme Court about the role of political parties in our representative democracy to reach the conclusion that parties have a constitutional right to make contributions directly to candidates. (AB p. 48-51). None of these

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and therefore may be limited on the same basis. *Id*. at 488.

cases so hold. *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) do not even consider campaign finance questions.

Randall v. Sorrell, 548 U.S. 230 (2006) did concern the constitutionality of campaign contribution limitations but, as explained in detail in Appellant's Principal Brief at pages 58-59, 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 Vermont contribution limit scheme as a whole was unconstitutional. *Id*. at 256-257.[25] Accordingly, *Randall* is not authority for the proposition never considered by the Court:

[25] Contrary to Appellees' argument (AB p. 49), *Randall* did not conclude at 548 U.S. at 256 that "political parties must be able to contribute *more* than individuals can." (emphasis in original.) The Court's discussion at page 256 comes in the midst of a long discussion of the factors the Court plurality considered in striking down the individual contribution limitations. Similarly, Appellees' statement that "Vermont's limits on political parties…were held unconstitutional in *Randall*" (AB p. 50) is true only insofar as the Court considered the constitutionality of Vermont's campaign contribution laws as a whole and struck down the entirety of those laws. *Randall*, 548 U.S. at 262. The Court did not consider whether a limit on political party contributions standing alone is unconstitutional, especially under a system of nonpartisan elections allowing *unlimited spending on member communications* coordinated between parties and candidates. Vermont's campaign finance law imposed significant restrictions on coordinated spending in a way that the City does not. *Id*. at 257-58.

that political parties have a constitutional right to make contributions directly to candidates under a system of nonpartisan elections allowing for *unlimited spending (funded from any source) on member communications* coordinated between parties and candidates.[26] *See Citizens United*, 130 S.Ct. at 920 (Roberts, C.J., concurring) ("the Court generally does not consider constitutional arguments that have not been raised.").

4. Appellees concede that the City "may have an anti-circumvention interest" in limiting contributions from political parties[] to ensure that individuals do not engage in *quid pro quo* corruption, or create its appearance, by circumventing constitutional limits on individual contributions." (AB p. 51.) This is a wise concession, as the City's anti-circumvention interest is supported by a broad range of Supreme Court cases and is unassailable. *See ante* Part I. But Appellees argue that a complete

[26] Appellees cite with approval to the district court's statement that under City law parties have a "complete inability" "to assist candidates they support by engaging in coordinated spending." (AB p. 53, citing SER p. 20.) This statement of the district court is clearly erroneous. (*See* APB pp. 56-57) [describing City and state law allowing political parties to accept contributions in any amount from any source to engage in unlimited coordinated spending with candidates on member communications]; ASER pp. 8-9 [recognizing right of Appellee to engage in such coordinated spending].)

ban on direct party contributions to candidates is "not closely drawn to that interest" and is therefore unconstitutional.[27] (AB p. 51.)

The Supreme Court rejected a similar argument in *Beaumont*, 539 U.S. 146, which we described in detail *ante* Part I.B. *Beaumont* upheld a complete ban on direct corporate contributions to candidates, even from nonprofit advocacy corporations, on anticircumvention grounds. These same arguments apply to political parties, and nothing in the First Amendment says otherwise. As the Court recognized in *Colorado II*, 533 U.S. at 464, limits on party spending in coordination with candidates are constitutional "to minimize circumvention of [individual] contribution limits." So too are limits on direct contributions to candidates by parties. This limit prevents the most straightforward way to exceed individual contribution limits: large donors using multiple levels of political parties as pass-through entities to exceed individual contribution limits.

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[27] Appellees also mischaracterize the law as an "outright ban" on the parties' speech. (AB p. 52.) It is not. Parties may spend unlimited sums independently supporting or opposing candidates for City office. They may also engage in unlimited coordinated spending with candidates on member communications. If the district court's ruling on independent expenditure committees stands, *see supra* Part III, parties may also make unlimited contributions to such committees as well. This hardly is an "outright ban" on speech.

Appellees conclude by stating that a $10 individual donation to a political party funneled to a candidate imposes no harm, and for this reason the complete ban is unconstitutional. (AB p. 51.) But of course Appellees want to do significantly more than pool tiny donations. In asking the district court to lift the stay imposed until the City could enact a reasonable political party contribution limit, Appellee Republican Party of San Diego revealed its immediate plans: "Plaintiffs want to contribute an amount 40-times larger than the $500 limit on contributions from individuals, as well as make significant coordinated expenditures and in-kind contributions." (ASER p. 4.) The danger of the parties serving as conduits for large individual contributions is real.

The district court's conclusion that political parties have a constitutional right to contribute directly to candidates was an erroneous interpretation of the law, and therefore an abuse of discretion.

CONCLUSION

The district court did not abuse its discretion in declining to enjoin a sensible City law barring non-individual entities from making contributions directly to candidates. This law is amply justified by the City's indisputable interest in preventing circumvention of its valid individual contribution limits. Nor did the district court clearly err in concluding that the balance of

the hardships on this question favored the City. The district court also did not abuse its discretion in declining to enjoin the 12-month temporal limitation on City candidates collecting contributions from others. The court acted within its discretion, among other reasons, because Appellees presented virtually no evidence they were burdened by the law.

In contrast, 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. Among other ways, the district court abused its discretion on these two points in granting a preliminary injunction in the absence of sufficient evidence the laws imposed any significant burden on Appellees.

For the foregoing reasons, this court should reverse the district court on these two aspects of its preliminary injunction orders and affirm on the denial of the preliminary injunction in all other respects.

DATED: May 28, 2010 Respectfully Submitted,

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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 Appellant's/Cross-Appellee's Response And Reply Brief is proportionately spaced, has a typeface of 14 points and contains 11,025 words.

Dated May 28, 2010

By: /s/ Dick A. Semerdjian
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CERTIFICATE OF SERVICE

ELECTRONIC FILING VIA CM/ECF

I, Dick A. Semerdjian, am a partner of the Law Firm of Schwartz Semerdjian Haile Ballard & Cauley, LLP. My business address is 101 W. Broadway, Suite 810, San Diego, CA 92101.

I am not a party to the above-entitled action. I hereby certify that I have caused to be served the following document to be served on each of the participants on this case as stated below:

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I declare under penalty of perjury that the foregoing is true and correct.

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