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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Phil Thalheimer; Associated Builders & Contractors PAC sponsored by Associated Builders & Contractors, Inc. San Diego Chapter; Lincoln Club of San Diego County; Republican Party of San Diego; and John Nienstedt, Sr.

Plaintiffs,

v.

City of San Diego; City of San Diego Ethics Commissioners Richard M. Valdez, Chair, W. Lee Biddle, Guillermo ("Gil") Cabrera, Clyde Fuller, Dorothy Leonard, and Larry S. Westfall, all sued in their official capacity; The Honorable Jerry Sanders, Mayor of San Diego, sued in his official capacity; Jan Goldsmith, City Attorney for the City of San Diego, sued in his official capacity; and Elizabeth Maland, City Clerk of San Diego, sued in her official capacity,

Defendants.

Case:

**Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction**

**ORAL ARGUMENT REQUESTED**

Estimated Time Needed: One Hour

MEMO IN SUPPORT OF PLAINTIFFS' MOTION FOR PI

*Thalheimer v. City of San Diego*  
Case Number To Be Assigned

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## Introduction

The Plaintiffs have brought suit to defend their First Amendment right under the United States Constitution to engage in political speech and association. Simply put, certain San Diego laws infringe on that right, and prevent the Plaintiffs from speaking and associating as they would like and as they are constitutionally entitled to. They ask this Court for a preliminary injunction, that they might speak and associate *now*; and also for final declaratory and injunctive relief when their case is heard. This memorandum supports their motion for preliminary injunction.

Specifically, the Plaintiffs challenge five provisions of San Diego law; namely, **SAN DIEGO MUNICIPAL ELECTION CAMPAIGN CONTROL ORDINANCE §§ 27.2935** (limits of \$500 on contributions to candidates), **27.2936** (expenditure limit on committees, including political parties, making independent expenditures), **27.2938** (ban on solicitation or acceptance of contributions prior to 12 months before the primary election, and also prohibiting candidates from spending their own money in support of their candidacy more than 12 months before the primary), **27.2950** (ban on contributions from political parties to their own candidates, as well as a ban on candidates soliciting or accepting contributions from organizations), and **27.2951** (ban on accepting contributions for certain political speech activity that are not drawn against a checking account or credit card belonging to an *individual*).

## Facts

As verified in the Verified Complaint, the facts are as follows.

Plaintiff Phil Thalheimer is a resident of San Diego. He has previously been a candidate for city council in Council District 1. He is preparing for a possible run for City Council in 2012, either in District 1 or in a new ninth district, if San Diego's voters vote to create it next June and he lives within its boundaries. Council District 1 is served by Council Woman Sherry Lighter. She will likely run as the incumbent in the 2012 election. Mr. Thalheimer is not certain that he would run against an incumbent: his past experience makes him believe that, under the current contribution limits imposed by ECCO, he may not be able to raise the finances needed to mount an effective campaign against an incumbent, with the name recognition that comes with incumbency. Still, he is studying

1 the issue and preparing for a possible candidacy, either in District 1 or District 9 (if it is created).

2 In preparation for these contingencies, Mr. Thalheimer has created a committee and would  
3 like to use his own money to begin advertising his potential candidacy. He would like to create a  
4 website, print flyers, and/or mail letters to build name-recognition among the electorate and  
5 excitement for his potential campaign. He would do so, except the Ethics Commission interprets  
6 ECCO § 27.2938(a) as prohibiting a candidate from using his own money to advocate for his own  
7 campaign more than a year prior to the primary election. Mr. Thalheimer would also like to begin  
8 soliciting money to be placed in account for a possible council run in 2012. He would do so, but for  
9 ECCO § 27.2938(a), which makes it unlawful for him to solicit or accept contributions prior to the  
10 twelve months preceding the primary election.

11 Mr. Thalheimer intends to solicit contributions from diverse types of contributors, including  
12 sole proprietorships, partnerships, LLPs, LLCs taxed as partnerships, trusts, labor unions, nonprofits,  
13 and political action committees. He would do so, except he is barred by ECCO §§ 27.2950 and  
14 27.2951, which make it unlawful to solicit or accept contributions from any person that is not an  
15 individual, or to accept a check drawn on a business account.

16 Plaintiff ABC PAC is a committee formed by Associated Builders & Contractors, Inc. San  
17 Diego Chapter to advance the merit shop philosophy through political action. Because ABC PAC  
18 receives most of its contributions from business entities, it does not currently make independent  
19 expenditures as that term is defined in ECCO § 27.2903, because ECCO § 27.2936 only allows  
20 contributions from individuals to be used for independent expenditures. But, ABC PAC wants to  
21 make independent expenditures, and would do so, if the law allowed it to use trust and business  
22 entity contributions for that purpose.

23 ABC PAC receives contributions from organizational entities in amounts greater than \$500.  
24 It would like to use the full amount of these contributions for independent expenditures, and solicit  
25 and accept other contributions from other contributors in whatever amounts they want to give, and

26 //

27 //

1 use as much of those contributions as possible for the purpose of making independent expenditures.  
2 It would do so, but for ECCO § 27.2936, which limits its independent expenditures to an amount not  
3 greater than what can be attributed to contributions of \$500 or less from individual (human)  
4 contributors.

5 Plaintiff Lincoln Club makes independent expenditures as that term is defined in ECCO §  
6 27.2903 in support of candidates it supports. It wants to make independent expenditures in amounts  
7 greater than can be attributed "to an individual in an amount that does not exceed \$500 per candidate  
8 per election," as ECCO § 27.2936(b) requires. It would do so, but for the law. It also wants to solicit  
9 and accept contributions from trusts and business entity contributors in whatever amounts they want  
10 to give, and use as much of those contributions as possible for the purpose of making independent  
11 expenditures. It would do so, if the law allowed.

12 Plaintiff Republican Party of San Diego County ("RPSD") is San Diego's local organization  
13 for the Republican Party. RPSD actively supports Republican candidates for local offices. RPSD  
14 would like to give financial support to Republican candidates for local office in San Diego, and make  
15 coordinated expenditures with their candidates, and would do so, but for ECCO § 27.2950, which  
16 bans contributions from organizations (including political parties) to candidates.

17 Plaintiff John Nienstedt is registered to vote in San Diego. He has contributed in the past to  
18 candidates. He intends to contribute financially to the candidate(s) of his choice in upcoming San  
19 Diego city council and citywide elections. He would like to contribute more than \$500 to these  
20 candidates, and would do so, but for ECCO § 27.2935, which imposes a contribution limit of \$500  
21 per candidate per election. He would also like to contribute to a committee that makes independent  
22 expenditures, and have his contribution used to support his chosen candidate. But, ECCO §  
23 27.2935(a) makes it unlawful for him to contribute more than \$500 total to candidates, and then  
24 make a contribution to a committee and earmark it for independent expenditures in support of his  
25 chosen candidate. He would do so, but for this law.

26 Finally, Mr. Nienstedt supports a candidate whose primary is more than a year away. He  
27 would like to contribute money to this candidate's campaign now, and would do so, but for ECCO  
28

§ 27.2938(a) which makes it unlawful for candidates to “accept contributions prior to the twelve months preceding the primary election for the office sought.”

Each of the defendants has been sued in his or her official capacity. They are entrusted by the laws of the City of San Diego with enforcement power for ECCO.

### Argument

In the Ninth Circuit (as elsewhere), a plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. \_\_\_, 129 S. Ct. 365, 374–75 (2008) (rejecting the Ninth Circuit’s “possibility” standard for preliminary injunctions in favor of the standard uniformly accepted elsewhere). A preliminary injunction is warranted in this case because the Plaintiffs have demonstrated that they readily meet the criteria.

#### I. The Plaintiffs Are Likely To Succeed on the Merits.

As explained below, the plaintiffs are likely to succeed on the merits for each of their challenges to ECCO.

##### A. ECCO’s Ban on Candidates Spending Their Own Money In Furtherance of Their Campaign Is Unconstitutional.

ECCO § 27.2938(a) says, “It is unlawful for any candidate or controlled committee seeking elective City office to solicit or accept contributions prior to the twelve months preceding the primary election for the office sought.” The Ethics Commission (“**Commission**”) construes this language to mean that a candidate is prohibited from using even *his own money* “to pay for goods or services in connection with seeking ... elective City office” more than a year before the primary.<sup>1</sup> This includes spending “designed to promote an individual’s qualifications or otherwise advocate that individual’s bid for elective office[,]” including even spending on “literature if that literature

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<sup>1</sup>See COMPLAINT, Exh. 3 (Ethics Commission Informal Advice Letter No. IA06-11).

1 expressly or *impliedly* advocates for his or her election.”<sup>2</sup> The Commission explains that merely  
 2 mentioning one’s qualifications for office in a letter mailed more than a year before the primary  
 3 violates the law.<sup>3</sup>

4 Restricting candidates’ spending of their own money, as ECCO (or the Commission’s  
 5 enforcement position) does is blatantly unconstitutional. In *Buckley v. Valeo*, the Supreme Court held  
 6 that it is unconstitutional to restrict how much of his own money a candidate can spend. In reaching  
 7 this decision, the Court explained that a candidate “has a First Amendment right to engage in the  
 8 discussion of public issues and vigorously and tirelessly to advocate his own election ....” *Buckley*  
 9 *v. Valeo*, 424 U.S. 1, 52 (1976). The First Amendment “simply cannot tolerate” restrictions upon  
 10 candidates’ freedom “to speak without legislative limit on behalf of his own candidacy.” *Id.* at 54.  
 11 Rather, candidates must have “the *unfettered* opportunity to make their views known so that the  
 12 electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital  
 13 public issues before choosing among them on election day.” *Id.* at 52–53. Simply put, “a candidate’s  
 14 expenditure of his personal funds directly facilitates his own political speech,” *Id.* at 53 n.58, and  
 15 the government may not limit such spending. *Id.* at 52–54.

16 Similarly, the Supreme Court said in *Davis v. Fed. Election Comm’n*, 554 U.S. \_\_\_, 128 S.Ct.  
 17 2759 (2008), that candidates have a First Amendment right to “engage in unfettered political speech”  
 18 and to do so “robustly.” *Id.* at 2771. And, the Court explained in *Randall v. Sorrell*, 548 U.S. 230  
 19 (2006) that “well-established precedent” mandates that limits on how much a candidate may spend  
 20 necessarily violate the First Amendment. *Id.* at 236.

21 Mr. Thalheimer wants to spend *his own money* to announce his possible candidacy for City  
 22 Council. Yet, he cannot even mail a 44 cent letter, if the letter can arguably be taken as even  
 23 *implying* that he is running for office. He does not want to wait until a year before the primary to  
 24 begin trying to garner the name recognition that he believes will be vital in his potential race against  
 25

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26 <sup>2</sup>*Id.*

27 <sup>3</sup>*Id.*

1 an incumbent. He wants to spend his own money to begin garnering that name recognition *right now*.  
 2 Yet, under ECCO (or, the Commission's enforcement position) he cannot do so. This law (or the  
 3 Commission's enforcement position) burdens and chills the speech rights of Mr. Thalheimer and all  
 4 other candidates similarly situated.

5 As the *Randall* Court explained, "Well-established precedent" mandates that this ban on  
 6 candidates spending their own money in furtherance of their campaigns should be held  
 7 unconstitutional. *Id.* Thus, the plaintiffs are likely to succeed on the merits as to Count 1 of the  
 8 complaint, because ECCO § 27.2938(a)—or, the Commission's enforcement position—is likely to  
 9 be declared unconstitutional.

10 **B. ECCO's Ban on Candidates Soliciting, Accepting, or Spending Contributions More**  
 11 **Than a Year Before the Primary is Unconstitutional.**

12 Similarly, the ban on candidates soliciting, accepting, or spending contributions more than  
 13 a year before the primary, found in ECCO § 27.2938(a), is likewise unconstitutional.

14 It is important that we remember that the Court has taught that contribution limits "operate  
 15 in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. They  
 16 "implicate fundamental First Amendment interests," *Id.* at 23, namely the freedoms of "political  
 17 expression" and "political association." *Id.* at 15. Contributions serve as "a general expression of  
 18 support for the candidate and his views." *Id.* at 21. "Making a contribution, like joining a political  
 19 party, serves to affiliate a person with a candidate." *Buckley*, 424 U.S. at 22.

20 Because contributions are protected First Amendment activity, they may only be limited if  
 21 the government demonstrates that the limits are "closely drawn" to match a "sufficiently important  
 22 interest." *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25); *McConnell v. FEC*, 540 U.S.  
 23 93, 231 (2003). The baseline is "Congress shall make no law." U.S. CONST., amend I. But, if the  
 24 government *does* make a law restricting contribution rights, it must have a *sufficiently important*  
 25 reason for doing so, and the limits must be "closely drawn" to that reason.

26 By banning contributions prior to a certain date, the City effectively bans political association  
 27 between candidates and their supporters prior to that date. That stretches the First Amendment to the  
 28

1 breaking point. While the Court has held that government may *limit* contributions, a complete ban  
 2 on them is constitutionally unacceptable. There is a “lower bound” beyond which contribution limits  
 3 may not pass. *Randall*, 548 U.S. at 248. Just as it is not correct to say, “the lower the limit, the  
 4 better,” *Id.*, so it is not correct to say, ‘the less time one has to contribute, the better.’ “Limits that  
 5 are too low can ... harm the electoral process by preventing challengers from mounting effective  
 6 campaigns against incumbent officeholders.” *Id.* at 249. So too can limits that completely ban  
 7 contributors and candidates from associating prior to a certain date.

8 And, that is what ECCO does. It prohibits Mr. Thalheimer from soliciting, accepting, and  
 9 using contributions, and Mr. Nienstedt from contributing to the candidates he supports. Both  
 10 plaintiffs want to engage in this activity *right now*, even though the relevant primary is more than  
 11 a year away. Based on his past experience, Mr. Thalheimer believes he must start raising funds now  
 12 if he is to be a competitive candidate against an incumbent. And, Mr. Nienstedt wants his chosen  
 13 candidate to have as great a chance for success as possible, and wants to contribute to that  
 14 candidate’s campaign right now. This law burdens and chills the speech and associational rights of  
 15 both plaintiffs by preventing them from exercising their First Amendment freedoms.

16 There simply is no interest, “sufficiently important” or otherwise, that can justify a complete  
 17 ban on the right of Mr. Thalheimer and Mr. Nienstedt to engage in constitutionally protected speech  
 18 and association. Even if there were a “sufficiently important interest” to limit their First Amendment  
 19 rights prior to a certain date, a complete ban cannot be “closely drawn” to it. Thus, the plaintiffs are  
 20 likely to succeed on the merits as to Count 2 of the complaint, because ECCO § 27.2938(a) is likely  
 21 to be declared unconstitutional.

22 **C. ECCO’s \$500 Contribution Limit Is Unconstitutional.**

23 ECCO § 27.2935 makes it “unlawful for an individual to make to any candidate or committee  
 24 supporting or opposing a candidate, or for any candidate or committee supporting or opposing a  
 25 candidate to solicit or accept, a contribution that would cause the total amount contributed by that  
 26 individual to support or oppose the candidate to exceed \$500 for any single election.”

1           **1. The Limits Are Not “Closely Drawn” to a “Sufficiently Important Interest.”**

2           To be constitutional, contribution limits must be “closely drawn” to a “sufficiently important  
3 interest.” *Randall*, 548 U.S. at 247; *Buckley*, 424 U.S. at 25; *McConnell*, 540 U.S. at 231; *see also*  
4 *Montana Right to Life Assoc. v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003). Preventing  
5 corruption and appearance of corruption associated with *large* contributions is the only interest the  
6 Court has ever found “sufficiently important” to justify contributions limits. It is *large* contributions  
7 that raise the specter of corruption or its appearance. *McConnell*, 540 U.S. at 138 (“large financial  
8 contributions” can lead to corruption and its appearance); *Nixon v. Shrink Mo. Gov’t. PAC*, 528 U.S.  
9 377, 393 (2000) (“*Shrink PAC*”) (“large contributions” can corrupt and create an appearance of  
10 corruption); *Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 198–199,  
11 and n. 1 (1982) (same); *Buckley*, 424 U.S. at 26–27 (“large contributions” can be offered for  
12 quid-pro-quo). To establish the necessary corruption interest, contributions must be *large* enough  
13 to give rise to a legitimate suspicion of corruption; and there must be a bona fide “suspicion that  
14 [the] large contributions are corrupt.” *Shrink PAC*, 528 U.S. at 390–91.

15           Yet, San Diego’s limits do not restrict only *large* contributions, but also small ones.  
16 Adjusted for inflation to 1976 dollars (the year *Buckley* was decided), the City’s limit amounts to  
17 only \$131 dollars, compared with the \$1,000 dollar limit upheld in *Buckley*.<sup>4</sup> Viewed another way,  
18 the \$1,000 limit upheld in *Buckley* would be worth \$3,799 in today’s dollars.<sup>5</sup> Yet, the City would  
19 have us believe that contributions above \$500 are corrupting. This type of disparity between  
20 challenged contribution limits and those upheld in *Buckley* was a concern to the *Randall* Court, 548  
21 U.S. at 250, and should be to this Court as well.

22           It is difficult to imagine influence being peddled for \$501 dollars, for instance, or that such  
23 a contribution would create the *appearance* of corruption. Yet, that is what the City would have us  
24 believe by enacting its limits.

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25           <sup>4</sup>“Inflation Calculator,” United States Dept. of Labor, Bureau of Labor Statistics, *available*  
26 *at* [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (visited December 10, 2009).

27           <sup>5</sup>*Id.*

1 The Ethics Commission's position undermines the City's contention that limits of \$500 are  
 2 needed to combat the appearance of corruption. At its May, 2008 meeting, the Commission voted  
 3 on what limits would be sufficient to eliminate the appearance of corruption, while still allowing  
 4 candidates to amass the resources necessary to mount effective campaigns. They had considered this  
 5 issue for at least seven months, and had heard expert testimony on the subject. The Commissioners  
 6 decided that limits of \$1,000 would accomplish their twin goals of avoiding the perception that  
 7 candidates were being 'bought,' while also allowing candidates to raise the money they need.<sup>6</sup>

8 Thus, the body that is responsible "to monitor, administer, and enforce the City's  
 9 governmental ethics laws[ and] propose new governmental ethics law reforms"<sup>7</sup> considered  
 10 testimony and debated for at least 7 months what the appropriate contribution limit should be. And,  
 11 that body determined that a \$1,000 contribution limit would eliminate the appearance of corruption.

12 To be constitutional, contribution limits must be "closely drawn" to a "sufficiently important  
 13 interest;" that is, as the Ninth Circuit has said, they must "focus narrowly" on the anti-corruption  
 14 interest. *Montana Right to Life*, 343 F.3d at 1092. ECCO's limits do not do that. While the Court  
 15 has "no scalpel to probe" each possible contribution level, *Randall*, 548 U.S. at 248, no scalpel is  
 16 needed to determine that these limits fail constitutional scrutiny. The Commission itself admitted  
 17 as much when they voted that a \$1,000 limit would eliminate the appearance of corruption. The \$500  
 18 limit restricts too much speech and associational rights. San Diego simply cannot justify limits this  
 19 low. Rather, the limits fail scrutiny because they are overinclusive: they restrict not only large  
 20 contributions, but small ones as well. They are also overbroad, because they burden "substantially"  
 21 more associational and speech rights than are justified by the proffered anti-corruption interest.  
 22 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

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 24 <sup>6</sup>Compl., Exh. 4 (City of San Diego Ethics Commission, Minutes for Meeting of Thursday,  
 25 May 8, 2008).

26 <sup>7</sup>San Diego Municipal Code, Ch. 2, Art. 6, Div. 4, § 26.0401 (*available at*  
 27 <http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art06Division04.pdf>) (last visited  
 28 December 15, 2009).

1           **2.       The Limits Are Too Low, With No “Special” Justification.**

2           Even if there were a “sufficiently important interest,” they would still be unconstitutional;  
 3 for, they are *too* low, without the “special” justification the Supreme Court requires. The Court has  
 4 explained that limits that are too low create “constitutional risks” that are “too great,” *Randall*, 548  
 5 U.S. at 248, and “generate suspicion that they are not closely drawn.” *Id.* at 249. Extremely low  
 6 limits, such as ECCO’s, should not be allowed to stand absent some “special justification” beyond  
 7 what is usually necessary to sustain contribution limits. *Id.* at 261. Yet, the City can provide no  
 8 justification at all for these extremely low limits, let alone “*special*” justification. There is simply no  
 9 constitutionally permissible reason to restrict the amount that Mr. Neinstedt can contribute, and the  
 10 amount Mr. Thalheimer can receive, to such low levels.

11           The fact that *Buckley* concerned a challenge to federal congressional contribution limits, and  
 12 ECCO’s limits are for city races, does not solve the constitutional problem. Candidates need money  
 13 to effectively communicate their message, regardless of whether they are running for Congress or  
 14 city government. And, the larger the electorate, the more money it takes to communicate. In 1976,  
 15 when *Buckley* was decided, congressional districts averaged 465,000 people. *Randall*, 548 U.S. at  
 16 250. San Diego’s population, on the other hand, is *over 1.2 million people*.<sup>8</sup> Thus, San Diego’s  
 17 population is over 2 and a half times greater than the 1976 congressional districts were, but its  
 18 contribution limits—even for city wide offices—are over 7 times smaller. The fact that ECCO’s  
 19 limits involve races for city government, and *Buckley*’s involved congressional races, is of no matter:  
 20 San Diego’s population dwarfs the districts at issue in *Buckley*. The *Randall* Court recognized that  
 21 a *larger* district with a *smaller* contribution limit was problematic in Vermont. *Id.* It is likewise  
 22 problematic in San Diego.

23           **3.       The Limits Mute the Voice of Political Parties.**

24           Especially troubling is the fact that ECCO § 27.2935 mutes the voice of political parties, like  
 25 RPSD, since it completely bans contributions from political parties to their candidates. In *Randall*,

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 27           <sup>8</sup>City of San Diego Planning Dept., Census 2000, *available at* <http://www.sandiego.gov/planning/programs/mapsua/population.shtml> (last visited December 10, 2009).

1 the Supreme Court noted that when limits on what a party may contribute to its own candidates are  
 2 too severe, the right to associate in a political party is threatened. 548 U.S. at 256. Such restrictions  
 3 “severely limit the ability of a party to assist its candidates’ campaigns by engaging in coordinated  
 4 spending .... [a]nd, to an unusual degree[] ... discourage those who wish to contribute small amounts  
 5 of money to a party ....” *Id.* at 257. Severe limits on the contributions of political parties to their own  
 6 candidates “reduce the voice of political parties ... to a whisper.” *Id.* at 259. That is precisely what  
 7 is happening in San Diego.

8 The *Randall* Court indicated that the limits at issue in that case were harmful to political  
 9 parties. We should consider how much *more harmful* the limits in ECCO are. In *Randall*, the limits  
 10 restricted political parties to the *same contribution* as individual contributors. 548 U.S. at 256. San  
 11 Diego, however, *bans* party contributions *altogether*. ECCO § 27.2935. The limits in *Randall*  
 12 “would severely limit the ability of a party to assist its candidates’ campaigns by engaging in  
 13 coordinated spending ....” *Id.* at 257. San Diego, however, *bans* coordinated spending completely.  
 14 ECCO § 27.2935. The limits in *Randall* “would severely inhibit collective political activity by  
 15 preventing a political party from using contributions by small donors to provide meaningful  
 16 assistance to any individual candidate.” *Id.* at 258. San Diego, however, completely eliminates such  
 17 “collective political activity,” since political parties may not make *any* contribution to their  
 18 candidates. ECCO § 27.2935. Such a complete ban on political party contributions threatens the First  
 19 Amendment right of *every* American to associate in a party to advance political interests.

#### 20 4. The Limits Impermissibly Restrict Independent Expenditures.

21 Contribution limits are not permissible when applied to *independent expenditure committees*.  
 22 The only interest that can justify regulating contributions is the so-called “anti-corruption interest.”  
 23 But, the regulation of contributions to independent expenditure committees “does not fit within the  
 24 anti-corruption rationale, which constitutes the sole basis for regulating campaign contributions and  
 25 expenditures.” *Emily’s List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009). Indeed, “[T]he Court has *never*  
 26 held that it is constitutional to apply contribution limits to political committees that make solely  
 27 independent expenditures.” *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008)

1 (“NCRL III”). See also *Emily’s List*, 581 F.3d at 11 (quoting with approval *NCRL III*). There simply  
 2 is no corruption interest to justify such limits. *Id.* As the *Buckley* Court said, “We find that the  
 3 governmental interest in preventing corruption and the appearance of corruption is inadequate to  
 4 justify [a] ceiling on independent expenditures.” *Buckley*, 424 U.S. at 45. This is because:

5 independent expenditures may well provide little assistance to the candidate’s  
 6 campaign and indeed may prove counterproductive. The absence of prearrangement  
 7 and coordination of an expenditure with the candidate or his agent not only  
 undermines the value of the expenditure to the candidate, but also alleviates the  
 danger that expenditures will be given as a quid pro quo ....

8 *Id.* at 47. So, just as an anti-corruption interest fails to justify restricting independent expenditures,  
 9 because they are made independently of candidates, the interest fails to justify restricting  
 10 contributions for independent expenditures. There simply is no danger of corruption when persons  
 11 make contributions to independent expenditure committees. Thus, there is no “sufficiently important  
 12 interest” which can possibly justify imposing limits on these contributions.

13 However, ECCO § 27.2935 says that one may only contribute \$500, total, to candidates and  
 14 committees that support them. Thus, if Mr. Nienstedt supports candidate X, and gives him the full  
 15 amount allowed, he may not then make a contribution to a committee and earmark it for the purpose  
 16 of making independent expenditures in support of candidate X. Mr. Nienstedt would do this, if the  
 17 law allowed him to. Such a limit on pooling money for independent expenditures is unconstitutional,  
 18 and cannot stand.

19 **5. ECCO § 27.2935 Is Likely to be Held Unconstitutional.**

20 The plaintiffs are thus likely to succeed on the merits as to Count 3 of the complaint, because  
 21 ECCO § 27.2935 is likely to be declared unconstitutional.

22 **D. ECCO’s Ban on Political Parties Contributing to Their Candidates Is Unconstitutional.**

23 As mentioned previously,<sup>9</sup> ECCO § 27.2950 bans contributions from organizations to  
 24 candidates, and ECCO § 27.2951 makes it unlawful for contributions to be drawn against  
 25 organizational banking accounts. This prevents political parties, like the RPSD, from contributing  
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27 <sup>9</sup>See *supra* Section I.C.3, at 11.

1 to their own candidates. Such a law cannot stand, but should be declared unconstitutional.

2 The government may constitutionally impose limits on the amount of money that political  
3 parties may contribute to party candidates. *Federal Election Commission v. Colorado Republican*  
4 *Federal Campaign Committee*, 533 U.S. 431 (2001) (“*Colorado I*”). However, that does not mean  
5 that the government may impose any limit it wants. In *Randall*, the Court noted that Vermont’s  
6 imposition on political parties of the “same low contribution limits” that applied to individuals  
7 “threatens harm to a particularly important political right, the right to associate in a political party.”  
8 548 U.S. at 256. Citizens have a First Amendment right to associate in political parties in order to  
9 elect candidates. *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Timmons v. Twin*  
10 *Cities Area New Party*, 520 U.S. 351, 357 (1997); *Colorado Republican Fed. Campaign Committee*  
11 *v. Fed. Election Comm’n*, 518 U.S. 604, 616 (1996) (“*Colorado P*”); *Norman v. Reed*, 502 U.S. 279,  
12 288 (1992). When political parties cannot adequately contribute support to their candidates, that right  
13 is threatened. *Randall*, 548 U.S. 256.

14 The *Randall* Court was concerned that Vermont’s decision to limit political parties to  
15 contributions of not more than \$200 to candidates for state representative, \$300 for state senator, and  
16 \$400 for governor “would severely limit the ability of a party to assist its candidates’ campaigns by  
17 engaging in coordinated spending .... [a]nd, to an unusual degree, it would discourage those who  
18 wish to contribute small amounts of money to a party ....” *Id.* at 257. Treating parties this way—that  
19 is, imposing on parties *the same* contribution limit as imposed on individuals—“would reduce the  
20 voice of political parties . . . to a whisper.” *Id.* at 259 (internal quotations and citations omitted).

21 San Diego’s limits are even more constitutionally troubling than Vermont’s were. Vermont  
22 at least allowed political parties to contribute the same amount as individuals. San Diego does not  
23 allow political parties to contribute at all. This includes in-kind contributions, such as would occur  
24 if the parties were to mail a letter advocating for the election of their candidate to a non-member.

25 Vermont’s limits on political parties were held unconstitutional in *Randall*. *Id.* at 256.  
26 ECCO’s limits, which completely eliminate contributions from political parties, should be held  
27 unconstitutional, too. They impermissibly burden the speech and associational rights of RPSD and  
28

1 others similarly situated to them, and are not closely drawn to a sufficiently important interest. The  
 2 government simply has no interest that would justify completely banning contributions from the  
 3 political parties to their own candidates. There is no credible corruption interest, as there is no  
 4 plausible risk that political parties will corrupt their own candidates. And, while the government may  
 5 have an anti-circumvention interest in limiting contributions from political parties, *Colorado II*, 533  
 6 U.S. at 456 n.18, a complete ban on contributions cannot be closely drawn to such an interest. As  
 7 the *Colorado II* Court noted:

8 [A] party combines its members' power to speak by aggregating contributions and  
 9 broadcasting messages more widely than individual contributors generally could  
 10 afford to do, and the party marshals this power with greater sophistication than  
 individuals generally could, using such mechanisms as speech coordinated with a  
 candidate.

11 *Id.* at 453. Completely eliminating the ability of political parties to coordinate with, and contribute  
 12 to, their candidates destroys the ability of parties to engage in Constitutionally protected speech and  
 13 association with their candidates. It is not "closely drawn" to the anti-circumvention interest, but is  
 14 overinclusive, prohibiting more speech and associational rights than necessary to achieve the interest.

15 As the *Randall* Court noted, even though *Colorado II* upheld contribution limits on political  
 16 parties, the limits still allowed the parties to contribute significant amounts—over \$70,000 to  
 17 candidates for the Senate, and over \$38,000 to candidates for the House. And, these limits were  
 18 "much higher" than the corresponding limits on individuals. *Randall*, 548 U.S. at 258. The limits  
 19 on political parties in San Diego, though, are *zero*. Such limits simply cannot stand—they do not  
 20 pass constitutional scrutiny.

21 The limits are also unconstitutionally overbroad, burdening substantially more associational  
 22 and speech rights than are justified by the proffered anti-corruption interest. *Broadrick*, 413 U.S. at  
 23 612. RPSD wants to contribute to its candidates in the upcoming election cycle, but cannot because  
 24 of this law. Its candidates need money now to communicate their messages to the electorate. The  
 25 plaintiffs are thus likely to succeed on the merits as to Count 4 of the complaint, because ECCO §  
 26 27.2935 is likely to be declared unconstitutional.

1 **E. ECCO's Ban on Soliciting Contributions From Organizations Is Unconstitutional.**

2 ECCO §§ 27.2950 and 27.2951 make it unlawful for candidates like Mr. Thalheimer to  
3 solicit and accept contributions from organizational entities such as sole proprietorships,  
4 partnerships, limited liability partnerships, limited liability corporations taxed as partnerships, trusts,  
5 labor unions and political action committees. Mr. Thalheimer wants to solicit, accept, and use  
6 contributions from these types of organizational entities. Yet, he cannot do so under the law. This  
7 ban should be declared unconstitutional.

8 To be constitutional, contribution limits must be "closely drawn" to a "sufficiently important  
9 interest." *Randall*, 548 U.S. at 247. Yet, the Defendants have no interest to justify the organizational  
10 contribution ban. While the Supreme Court has recognized that "the compelling governmental  
11 interest in preventing corruption support[s] the restriction of the influence of political war chests  
12 funneled through the *corporate* form," *FEC v. National Conservative Political Action Committee*,  
13 470 U.S. 480, 500–01 (1985) (emphasis added), the fact that organizations "may accumulate large  
14 amounts of wealth" is not sufficient justification for restricting their ability to participate in the  
15 political process. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). Rather, the  
16 justification comes from "the unique state-conferred corporate structure that facilitates the amassing  
17 of large treasuries." *Id.* This is because state law grants corporations special advantages, such as  
18 "favorable treatment of the accumulation and distribution of assets" that "enhance their ability to  
19 attract capital and deploy their resources." *Id.* at 658–59 (1990).

20 The "corporate advantage" interest that might justify banning corporate contributions cannot  
21 justify banning all organizational ones, since most of the banned organizations do not have the  
22 requisite "corporate advantages." As the Federal Election Commission acknowledges, organizational  
23 entities that are not taxed as corporations do not enjoy "corporate advantages" such as "flexible  
24 merger rules, the avoidance of personal income tax for ... members, [and] preferential tax treatment  
25 on dividends received and deductions for corporate losses."<sup>10</sup> Consequently, the FEC continues to

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26  
27 <sup>10</sup>Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64  
28 Fed. Reg. 37,397 (July 12, 1999) (codified at 11 C.F.R. pt. 110.1(g)).

1 allow partnerships, LLPs, and LLCs that elect to be taxed as partnerships to make contributions to  
2 political campaigns, even though contributions from corporations are prohibited. *Id.*

3 Even if there is a sufficiently important interest in limiting organizational contributions, a  
4 complete ban that *eliminates* the speech and associational rights of organizational entities and  
5 candidates is not closely drawn. Rather, the ban is overinclusive, reaching the speech of  
6 organizations that do not have the advantages the Court has recognized as justification for such a  
7 ban. It is also overbroad, burdening substantially more speech and associational rights than justified.  
8 *Broadrick*, 413 U.S. at 612. The Plaintiffs are likely to succeed on the merits as to Count 5 of the  
9 complaint, because ECCO §§ 27.2950 and 27.2951 are likely to be declared unconstitutional.

10 **F. ECCO's Independent Expenditure Limits are Unconstitutional.**

11 ECCO § 27.2936(b) makes it "unlawful" for committees like Lincoln Club "to use a  
12 contribution for the purpose of supporting or opposing a candidate unless the contribution is  
13 attributable to an individual in an amount that does not exceed \$500 per candidate per election." This  
14 law functions as a limit on independent expenditures. As such, it should be declared unconstitutional,  
15 because the "Constitution ... grants to individuals, candidates, and ordinary political committees the  
16 right to make *unlimited* independent expenditures." *Colorado I*, 518 U.S. at 618 (emphasis added).

17 The limit is even more restrictive than might at first glance appear to be the case. For  
18 example, if Contributor A gives \$100 to Lincoln Club, and Contributor B gives \$900 to Lincoln  
19 Club, it cannot spend the full amount for independent expenditures, even though \$1000 divided by  
20 2 equals \$500 that *could* be attributed to each of the 2 contributors. Rather, because Contributor A  
21 did not actually contribute \$500, Lincoln Club cannot attribute any money to him beyond his \$100  
22 donation. So, Lincoln Club would only be able to spend \$600 on independent expenditures (the \$100  
23 contribution of Contributor A, and the first \$500 contributed by Contributor B).

24 Advocacy accomplished by means of independent expenditures is political speech that is  
25 protected by the First Amendment. *Buckley*, 424 U.S. at 48. Such speech is at the very *core* of the  
26 First Amendment. *NCPAC*, 470 U.S. at 496. A limit on independent expenditures therefore "heavily  
27 burdens *core* First Amendment expression." *Buckley*, 424 U.S. at 48 (emphasis added). Such limits  
28

1 are subject to strict scrutiny; that is, they must be narrowly tailored to a compelling interest.  
2 *Colorado II*, 533 U.S. at 440; *NCPAC*, 470 U.S. at 496. See also *Lincoln Club of Orange County*  
3 *v. City of Irvine, CA*, 292 F.3d 934, 937 (9th Cir. 2002) (noting that “Supreme Court decisions have  
4 construed *Buckley* as requiring strict scrutiny of limitations on independent expenditures”).

5 The Supreme Court has repeatedly found independent expenditure limits unconstitutional.  
6 *Buckley*, 424 U.S. at 51, *NCPAC*, 470 U.S. at 501, *Colorado I*, 518 U.S. at 608 & 618. This makes  
7 sense, since the Constitution grants the right to make “unlimited independent expenditures.” *Id.* at  
8 618 (emphasis added). In fact, the Court has *never* upheld a restriction on independent expenditures  
9 when their source is the contributions of individuals or non-corporations. As the D.C. Circuit Court  
10 of Appeals noted, “The First Amendment, as interpreted by the Supreme Court, protects the right  
11 of individual citizens to spend unlimited amounts to express their views about policy issues and  
12 candidates for public office. Similarly, the First Amendment, as the Court has construed it,  
13 safeguards the right of citizens to band together and pool their resources as an unincorporated group  
14 or non-profit organization in order to express their views about policy issues and candidates for  
15 public office.” *Emily’s List*, 581 F.3d at 4; see also *Colorado I*, 518 U.S. at 618.

16 The City has no compelling interest to justify limiting the amount of money advocacy groups  
17 like Lincoln Club can use to make independent expenditures. The anti-corruption interest that  
18 sometimes justifies limits on contributions to candidates is “inadequate” to justify limits on  
19 expenditures made *independent* of candidates. *Buckley*, 424 U.S. at 45. There is little chance that an  
20 expenditure made without coordination would corrupt candidates or curry favor with them. *NCRL*  
21 *III*, 525 F.3d at 292–93. Limits on independent expenditures therefore should be struck down absent  
22 “convincing evidence of corruption” by committees making them. *Id.* at 293. Yet, there is *no*  
23 evidence of such corruption in San Diego.

24 ECCO’s limit on the amount of money advocacy groups like Lincoln Club may use for  
25 independent expenditures is not narrowly tailored to a compelling interest, but is overinclusive,  
26 burdening and chilling speech without constitutionally acceptable justification. It is also overbroad,  
27 burdening substantially more speech and associational rights than is justified. *Broadrick*, 413 U.S.

1 at 612. The plaintiffs are thus likely to succeed on the merits as to Count 6 of the complaint, because  
 2 ECCO §27.2936(b) is likely to be declared unconstitutional.

3 **G. ECCO's Ban on Using Funds From Trusts and Organizations For Independent**  
 4 **Expenditures is Unconstitutional.**

5 ECCO § 27.2936(b) makes it unlawful for committees to spend contributions for independent  
 6 expenditures, unless the contribution is attributable to an *individual*. Further, ECCO § 27.2951(a)  
 7 makes it unlawful for committees to accept contributions "drawn against a checking account or credit  
 8 card account unless such account belongs to one or more individuals in their individual capacity,"  
 9 while ECCO § 27.2951(c) clarifies that this only applies to contributions the committee uses to  
 10 participate in city candidate elections, including making independent expenditures in support of, or  
 11 opposition to, candidates. Thus, Lincoln Club and ABC PAC cannot use organizational  
 12 contributions, such as those from sole proprietorships, partnerships, LLPs, LLCs taxed as  
 13 partnerships, trusts, labor unions, nonprofits, and political action committees, to support or oppose  
 14 the candidates of their choice, nor can they accept such contributions if they are to be used for  
 15 independent expenditures. Both Lincoln Club and ABC PAC want to use such funds to make  
 16 independent expenditures in support of candidates in the next election cycle.

17 The Supreme Court has noted that state law grants *corporations* special advantages, such as  
 18 "favorable treatment of the accumulation and distribution of assets" which "enhance their ability to  
 19 attract capital and deploy their resources." *Austin*, 494 U.S. at 658–59. So, "[T]he compelling  
 20 governmental interest in preventing corruption support[s] the restriction of the influence of political  
 21 war chests funneled through the corporate form." *NCPAC*, 470 U.S. at 500–01. However, "the mere  
 22 fact that corporations may accumulate large amounts of wealth" is not sufficient justification for  
 23 restricting the ability of corporations to participate in the political process; rather, the justification  
 24 comes from "the unique state-conferred corporate structure that facilitates the amassing of large  
 25 treasuries." *Id.* at 660.

26 Business entities (such as sole proprietorships, partnerships, LLPs, and LLCs taxed as  
 27 partnerships, and APCs), political action committees, and other non-corporate entities like trusts and  
 28

labor unions, do not possess the “unique state-conferred corporate structure” that the Supreme Court has found justifies restricting corporate contributions to candidates. The City, in fact, has no compelling interest that would justify this ban, and the ban is not narrowly tailored to the interest in “restricting the influence of political war chests funneled through the *corporate* form.” The law is thus is overinclusive, burdening and chilling speech without constitutionally acceptable justification. It is also overbroad, burdening substantially more speech and associational rights than is justified. The plaintiffs are thus likely to succeed on the merits as to Count 7 of the complaint, because ECCO §§ 27.2936(b) and 27.2951(a) are likely to be declared unconstitutional.

**H. The Plaintiffs Are Likely to Succeed on the Merits as to All Their Claims**

The plaintiffs are thus likely to succeed on the merits as to all their claims. Consequently, they meet the first requirement the Supreme Court enunciated in *Winter* for qualifying for a preliminary injunction. They meet the second requirement as well: they will suffer irreparable harm if the injunction is denied. Indeed, they are currently suffering irreparable harm, and will continue to suffer such harm until these laws are enjoined.

**II. The Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted.**

The irreparable harm standard for preliminary injunctions is satisfied where, as here, First Amendment freedoms are impermissibly burdened. “The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury.” *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added); *see also Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (same); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (same). Therefore, when the plaintiffs state a colorable First Amendment claim, the risk of irreparable injury is to be presumed. *Brown v. Cal. Dept. of Transp.*, 321 F.3d 1217, 1226 (9th Cir. 2003).

The fact that First Amendment rights are burdened and chilled, as they are in this case, is enough to meet the preliminary injunction ‘irreparable harm’ standard. Each of the plaintiffs wants to engage in constitutionally protected speech *right now*, and would do so, except that the law

1 prevents them. Thus, their speech is burdened and chilled. They have stated a colorable First  
2 Amendment claim. As *Cal. Dept. of Transp.* taught, the irreparable injury must be presumed.

### 3                   **III. The Balance of Harms Favors the Plaintiffs.**

4           The Plaintiffs have demonstrated both the likelihood of success on the merits as well as a  
5 clear irreparable injury, so a preliminary injunction should issue. But, the balance of harms tips  
6 decidedly in favor of the Plaintiffs as well.

7           In the Ninth Circuit, “[T]he fact that a case raises serious First Amendment questions  
8 *compels* a finding that ... the balance of hardships tips sharply in [the plaintiffs’] favor.”  
9 *Sammartano*, 303 F.3d at 973 (internal quotations and citations omitted) (emphasis added). *See also*  
10 *Community House*, 490 F.3d at 1059 (same). The only time that the balance of hardships should not  
11 be presumed to tip toward plaintiffs raising First Amendment questions is when the plaintiffs cannot  
12 establish their likelihood of success on the merits. *Paramount Land Co. LP v. California Pistachio*  
13 *Com’n*, 491 F.3d 1003, 1012 (9th Cir. 2007).

14           In this case, the Plaintiffs have established a likelihood of success on the merits of their First  
15 Amendment claims. Thus, the balance of hardships **must** tip in their favor—for, that is what the  
16 clause “compels a finding that ... the balance of hardships tips sharply in [the plaintiffs’] favor”  
17 means. *Sammartano*, 303 F.3d at 973.

18           If preliminary injunctive relief is not granted, and the Court later finds that the challenged  
19 provisions impermissibly infringe upon the Plaintiffs’ constitutional rights, the Plaintiffs will have  
20 suffered irreparable harm. There will be nothing this Court can do at that point to make things right  
21 again. By contrast, if this Court grants preliminary injunctive relief and later finds that the Plaintiffs  
22 were not deprived of their constitutional rights, the Defendants will not have suffered any real  
23 hardship, because the City has no interest that would be harmed.

24           Because the City will not suffer harm if an injunction is granted, but the Plaintiffs will suffer  
25 harm if an injunction is not granted, the balance of hardships favors the Plaintiffs. When plaintiffs  
26 establish that a case raises First Amendment issues, as the Plaintiffs have in this case, the Court  
27 should presume that the balance of harms tips in their favor. *Sammartano*, 303 F.3d at 973.

#### IV. An Injunction is in The Public Interest.

The Ninth Circuit Court of Appeals has recognized that “it is always in the public interest to prevent the violation of a party's constitutional rights.” *Sammartano*, 303 F.3d at 974 (quoting with approval *G & V Lounge, Inc. v. Mich. Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by “a strong showing of other competing public interests,” *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to deny injunctive relief. *Id.* (noting that the appellees had made no showing that their challenged regulation, which infringed on appellants’ First Amendment rights, could “plausibly be justified,” and so granting appellants’ request for injunctive relief). In this case, there simply is no interest—strong or otherwise—which can justify San Diego’s challenged laws. It is, however, in the public interest that First Amendment freedoms be preserved. The political speech of the Plaintiffs—and others like them—is being burdened and chilled. Enjoining the offending laws is the only way to overcome that pernicious effect. Thus, an injunction is in the public interest and this Court should grant it.

#### Conclusion

For the foregoing reasons, this Court should grant the Plaintiffs motion for preliminary injunction, and should thereby enjoin enforcement of the following:

- ECCO § 27.2938 (or, in the alternative, the Commission’s enforcement position regarding this provision), which impermissibly prohibits candidates from spending their own money to further their campaigns more than a year before the primary; and also impermissibly prohibits candidates from soliciting, accepting, and using contributions, and donors from making contributions, more than a year before the primary;

- ECCO § 27.2935, which impermissibly imposes a \$500 limit on the amount one may contribute to a candidate, and also imposes a \$500 total amount that one may contribute to support a candidate (including earmarked contributions to independent expenditure committees);

- ECCO §§ 27.2950 and 27.2951, which together impermissibly prohibit political parties

1 from making contributions to their own candidates, and also impermissibly ban business and  
2 organizational contributors from making contributions to candidates; and,

3 • ECCO § 27.2936(b), which impermissibly imposes limits on independent expenditures,  
4 and also impermissibly requires that all money used to make independent expenditures be  
5 attributable to *individuals*, thereby excluding organizational and business entities.

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

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

8 Respectfully Submitted,

9  
10 /s/ Gary D. Leasure

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\* *Pro hac vice application to be filed when  
docket number is available.*