Dick A. Semerdjian (State Bar No. 123630)
das@sshbclaw.com
Kristen T. Dalessio (State Bar No. 149081)
kristen@sshblaw.com
SCHWARTZ SEMERDJIAN HAILE BALLARD & CAULEY LLP
101 West Broadway, Suite 810
San Diego, CA 92101
Telephone No. 619 236-8821
Facsimile No. 619 236-8827

Richard L. Hasen (State Bar No. 157574)
hasenr@gmail.com
919 S. Albany Street
Los Angeles, CA 90015-0019
Telephone No. 213 736-1466
Facsimile No. 213 380-3769

Attorneys for Defendant City of San Diego

UNITED STATES DISTRICT COURT

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 ("GILL") 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 CITY OF SAN DIEGO, SUED IN HIS OFFICIAL CAPACITY; AND ELIZABETH MALAND, CITY CLERK OF SAN DIEGO, SUED IN HER OFFICIAL CAPACITY,

Defendants

Case No. 09CV2862IEG

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT CITY OF SAN DIEGO IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: February 1, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

Defendant City of San Diego ("City")[1] respectfully submits this Memorandum of Points and Authorities of Defendant City of San Diego in Opposition to Plaintiffs' Motion for Preliminary Injunction.

1. INTRODUCTION AND STATEMENT OF FACTS

The City of San Diego first adopted comprehensive campaign finance regulations in 1973, the San Diego Municipal Election Campaign Control Ordinance ("ECCO"), currently codified in Article 7: Elections, Campaign Finance and Lobbying, Division 29 of the San Diego Municipal Code.[2] The purpose and intent of the ECCO is:

> To preserve an orderly political forum in which individuals may express themselves effectively, to place realistic and enforceable limits on the amounts of money that may be contributed to political campaigns in municipal elections; to prohibit contributions by organizations in order to develop a broader base of political efficacy within the community; to limit the use of loans and credit in the financing of municipal election campaigns; to provide full and fair enforcement of all the provisions of this division; to avoid the corruption or the appearance of corruption brought about when candidates for elective City office accept large campaign contributions; and to avoid the corruption or appearance of corruption brought about when large campaign contributions are made to support or oppose the recall of an individual holding elective City office.

ECCO § 27.2901.

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

Plaintiffs, ABC PAC, the Lincoln Club of San Diego County, the Republican Party of San Diego ("RPSD"), and San Diego residents Phil Thalheimer and John Nienstedt, Sr., challenge five provisions of the ECCO under the First Amendment of the United States Constitution and seek a preliminary injunction. Specifically, the Plaintiffs, *before any trial on the merits or*

---

[1] All other Defendants have been dismissed pursuant to a Stipulation filed on or about January 7, 2010.

[2] For the Court's convenience, the City has submitted under separate cover the current version of the ECCO as Exhibit "1" to Defendant City of San Diego's Request for Judicial Notice ("RJN") filed concurrently herewith.

development of a factual record, seek to enjoin enforcement (at least as to the named Plaintiffs)[3] of ECCO § 27.2935, imposing a $500 per election individual contribution limit on contributions to candidates and to committees that accept earmarked contributions for candidates; ECCO § 27.2936(b), limiting contributions to certain committees for purposes of supporting or opposing a candidate to $500 per election; ECCO § 27.2938, prohibiting candidates from accepting contributions for office prior to the twelve months preceding the primary election for the office sought; and ECCO §§ 27.2950 and 27.2951, barring political parties and certain business and organizations from making contributions to candidates.

In support of Plaintiffs' arguments to undo key aspects of longstanding city law, Plaintiffs offer no more than a few pages of evidence appended to their Verified Complaint. No depositions have been taken, and no expert witnesses have yet examined the San Diego campaign finance system. Most of Plaintiffs' arguments about First Amendment harms rely upon speculation and unproven assertions.

This Court should reject Plaintiffs' request for a preliminary injunction. The City's campaign finance laws are valid and supported by sufficiently important state interests in preventing corruption and the appearance of corruption, and in preserving voter confidence in the integrity of the electoral process. Some of Plaintiffs' claims are barred by controlling authority from the United States Supreme Court and the Ninth Circuit. Other claims require the development of a detailed factual record and are inappropriate to resolve at the preliminary injunction stage. *See Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007) ("we again emphasize the importance of factual development" in considering First Amendment challenges to campaign finance laws). This is especially true as to new campaign finance provisions enacted since 2008 which have not been applied yet in any election.

---

[3] The Plaintiffs raise both facial and as-applied challenges to five statutes. *See* Complaint at pp. 26-27. To the extent Plaintiffs bring a facial challenge, they bear a heavier burden. The Supreme Court has expressed a preference for as-applied challenges in election cases. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *Crawford v. Marion County Election Board*, 553 U.S. 181(2008).

A preliminary injunction also is against the public interest. The public has an interest in assuring the integrity of its electoral process, an interest which should not be defeated by unproven assertions. Moreover, it is against the public interest to change the rules in effect just as the new election season gets underway. The Supreme Court has counseled against changing rules shortly before an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (in considering granting preliminary relief, a court is "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, *considerations specific to election cases* and its own institutional procedures. Court orders affecting elections...can themselves result in voter confusion and consequent incentive to remain away from the polls." (emphasis added)). Plaintiffs will suffer no irreparable harm if the court denies this motion and considers any remaining issues again on the merits at final judgment.

2. LEGAL ARGUMENT

A. LEGAL STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

As the Plaintiffs concede in their Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction ("Motion") at p. 4, ln. 6-12, a plaintiff seeking a preliminary injunction must establish *each of four separate factors* to prove entitlement 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 Res. Def. Council, Inc.*, 555 U.S. __,129 S.Ct. 365, 374 (2008). "A preliminary injunction is an extraordinary remedy never awarded as a matter of right." *Id.* at 376.[4] A preliminary injunction is primarily designed to preserve the *status quo* pending a determination on the merits. *Chalk v. United States Dist. Court Cent. Dist. of Cal.* 840 F.2d 701, 704 (9th Cir. 1988). "The plaintiff must show that 'he has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be 'both real and immediate', not 'conjectural or hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (internal citations omitted). Moreover,

[4] In *Winter*, the Supreme Court rejected the Ninth Circuit's earlier alternative balancing test, which sometimes allowed a plaintiff to prevail under a "lesser standard." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

requests for preliminary relief that would alter the *status quo*, as the Plaintiffs' requested relief would do, are subject to a higher scrutiny and carry a heavy burden of persuasion on the moving party. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft* , 389 F.3d 973, 975 (10th Cir. 2004) (en banc).

B. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THE CHALLENGED STATUTORY PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT.

1. Basic Campaign Finance Principles and Levels of Scrutiny

"Campaign finance reform presents 'a case where constitutionally protected interests lie on both sides of the legal equation.'" *Jacobus v. State of Alaska*, 338 F.3d 1095, 1107 (9th Cir. 2003), *citing Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000)("*Shrink Missouri*"). Though aspects of campaign finance jurisprudence have been termed "baffling and conflicted," *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004) (Posner, J.), the basic principles applicable in this case are straightforward.

a. Contribution limitations

In the leading Supreme Court case in campaign finance law, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld contribution limitations (that is, money going from a person or entity to a candidate or committee), including a federal $1,000 per election individual contribution limitation on contributions to candidates and an aggregate annual limitation on contributions to all federal committees in a calendar year. *Id.* at 30-34. As the Ninth Circuit recently explained, "[l]imits on contributions to political campaigns are permissible under the First Amendment as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important governmental interest.' This standard is sometimes referred to as 'less rigorous' scrutiny. Under this test, the Supreme Court and this Circuit have tended to uphold limits on contributions to candidate campaigns." *Citizens for Clean Gov't*, 474 F.3d at 650-51 (internal citations omitted); *accord Jacobus v. State of Alaska*, 338 F.3d at 1107-09; *accord Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 937 (9th Cir. 2002); *accord Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090-92 (9th Cir. 2003).

The reason for the less rigorous level of scrutiny is that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction on the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. "The [*Buckley*] Court justified its position that contribution limits impose only a marginal restriction on protected speech by reasoning that contributions are merely speech by proxy, and not full-fledged speech." *Lincoln Club*, 292 F.3d at 937. As the Supreme Court explained in 2003, "Going back to [*Buckley*], restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relative complaisant review under the First Amendment, because contributions lie closer to the edges rather than the core of political expression." *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161 (2003); *see also Cal. Med. Ass'n v. v. Fed. Election Comm'n*, 453 U.S. 182, 195-96 (1981) (plurality opinion) (contributions are "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection"). "While contributions may result in political expression if spent by a candidate or an association …, the transformation of contributions into political debate involves speech by someone other than the contributor. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving 'significant interference' with associational rights passes muster if it satisfies the lesser demand of being 'closely drawn' to match a 'sufficiently important interest.' *Beaumont*, 539 U.S. at 161-62 (citations and internal quotations omitted).

The requirement of close tailoring does not require the least restrictive alternative. *Jacobus*, 338 F.3d at 1115. Rather, a contribution will be considered "closely drawn" if it focuses precisely on the problem of large campaign contributions, while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. *Buckley*, 424 U.S. at 20.

Preventing corruption or the appearance of corruption associated with campaign contributions is a sufficiently important governmental interest to justify contribution limitations, as the Supreme Court has repeatedly acknowledged. *E.g.*, *McConnell v. Fed. Election Comm'n*,

540 U.S. 93, 138 (2003); *Shrink Missouri*, 528 U.S. at 393. Indeed, regulating election-related contributions extends beyond strict *quid pro quo* corruption, and reaches reasonable efforts to prevent large donors from undermining public confidence in the electoral process. *Citizens for Clean Gov't*, 474 F.3d at 652. By the same token, courts have also recognized that governments have a compelling interest in preventing the circumvention of otherwise lawful contribution limits. *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado Republican*"). As the Supreme Court observed in *McConnell*: "Take away [the] authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" 540 U.S. at 144.

b. Expenditure limitations

As the *Buckley* Court explained, limits on independent spending "impose far greater restraints on the freedom of speech than do . . . contributions limitations." 424 U.S. at 44. Accordingly, the Court has applied a strict scrutiny standard to review limitations on spending, striking down limitations both on independent spending by individuals supporting or opposing candidates for public office as well as limitations on a candidate's spending of his own funds to support his campaign. *Id.* at 44-48.

In *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990), the Court upheld under the strict scrutiny standard a law barring for-profit corporations from spending sums in candidate elections on advertising expressly advocating the election or defeat of candidates. It held that the special dangers of a "different type of corruption" posed by corporations justified the limitations. *Austin*, 494 U.S. at 660. The Court reaffirmed *Austin* and extended its rationale to labor unions and to advertising that is the "functional equivalent of express advocacy" in *McConnell*. 540 U.S. at 205.

2. The $500 Individual Contribution Limitation Contained in ECCO § 27.2935 is Constitutional.

ECCO § 27.2935(a) provides:

> It is unlawful for an individual to make to any candidate or committee supporting or opposing a candidate, or for any candidate or committee supporting or

> opposing a candidate to solicit or accept, a contribution that would cause the total amount contributed by that individual to support or oppose the candidate to exceed $500 for any single election.

Plaintiffs argue that the $500 amount is unconstitutionally low, under the Supreme Court's recent decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), striking down Vermont's campaign contribution limits.[5] This Court should reject Plaintiffs' argument for two reasons.

First, such an argument is premature: the Ninth Circuit has stressed the importance of factual development in campaign finance cases, and courts around the country since *Randall* have confirmed that challenges to the amount of contribution limits require a detailed examination of the factual record, complete with expert witnesses. In this case, the factual record is virtually nonexistent.

Second, the San Diego $500 per *election* limits (or $1000 per election cycle) are more than double the $400 limits per *election cycle* struck down in *Randall.* They are also indexed to inflation by ECCO § 27.2937. The "danger signs" present with the Vermont limits are not present in the City's limits, which are virtually the same as the limits in Los Angeles, San Francisco, and many other localities across the United States. Thus, the limits are closely drawn to satisfy the City's sufficiently strong governmental interest in preventing corruption and the appearance of corruption. Contrary to Plaintiffs' claims, the City's limits require no "special justification" to be constitutional.

a. The Applicable Standard for Reviewing the Constitutionality of the Amount of Individual Contribution Limits

Given the "less rigorous" standard of review applicable to contribution limitations, *Citizens for Clean Gov't, supra*, 474 F.3d at 650-51, it should be no surprise that many courts,

---

[5] Plaintiffs further argue that ECCO § 27.2935 is unconstitutional because it bars political parties from making contributions and because it limits the amount of earmarked independent spending. As to the first point, ECCO § 27.2935 does not speak to contributions by non-person entities. ECCO § 27.2950, in contrast, does bar such contributions, and we therefore address the issue in Part 5.a below. As to the second point, we address the question of limitations on contributions funding independent spending in Part 5.b below, concerning the ECCO's $500 contribution limitation on all general purpose recipient committees.

including the Ninth Circuit, have upheld limitations against challenges claiming that the amount of individual contribution limits is too low. *See ,e.g., Eddleman,* 343 F.3d at 1092-96 (upholding Montana's $100, $200, and $400 limits on contributions to legislative candidates, statewide candidates other than governor and lieutenant governor, and candidates jointly filed for the offices of governor and lieutenant governor).

In *Buckley*, the Court rejected the claim that the federal individual contribution limit was too low, because $1,000 was far less than the amount required to exercise actual undue influence over candidates and officeholders. 424 U.S. at 30. The Court rejected the need for congressional "fine tuning" of contribution limits, stating:

> [I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Id. (citations omitted).

Further, in *Shrink Missouri*, the Supreme Court rejected the claim that Missouri's $1,075 limit was unconstitutionally low:

> In *Buckley*, we specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. . . . [W]e referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to "amas[s] the resources necessary for effective advocacy." We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.

528 U.S. at 397 (internal citations omitted).

This test for an unconstitutionally low contribution limit has proven to be difficult to satisfy. Indeed, in only one case, *Randall,* has the Court held a contribution limit was unconstitutionally low. 548 U.S. 230. *Randall* considered the constitutionality of Vermont's campaign contribution limits, including a $400 limit for statewide offices applicable for a two-year election cycle (*i.e.*, primary and general election). *Id.* at 236-237.

In *Randall*, the Court issued no majority opinion. The controlling plurality opinion employed a two-step analysis in determining that Vermont's limits reached the "lower bound" of constitutionality. *Id.* at 248, *quoting McConnell*, 540 U.S. at 137. The plurality first asked whether, despite the usual rule of deference to the legislature as to where to set contribution

limits, there were "danger signs" suggesting that the limits might "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 245. Those danger signs, the plurality said, were present because: (a) Vermont's limits applied *per election cycle*, instead of separately to the primary and general election; (b) Vermont's limits were, overall, the lowest in the nation; and (c) "Vermont's limit[s] [were] well below the lowest limit this Court has previously upheld, the limit of $1,075 (adjusted for inflation every two years) . . . ." *Id.* at 249-253 (citation omitted). Because of those danger signs, the plurality went on to the second part of its test, considering five factors that, in its view, cumulatively justified invalidation of Vermont's contribution limits. *Id.* at 253. These factors included: (1) the significant restriction on "the amount of funding available for challengers to run competitive campaigns" against incumbents, particularly the funds supplied by political parties; (2) the same dollar limit on party contributions to candidates as on individual contributions to candidates; (3) the absence of exceptions for some kinds of volunteer expenses; (4) the absence of an automatic adjustment for inflation; and (5) the absence of a special justification for the lower Vermont contribution limits. Under the plurality's decision, it was the combined effect of all these factors, "[*t*]*aken together*," that rendered Vermont's contribution limits unconstitutional. *Id.* at 253.

b. Plaintiffs' Argument that the City's Limits are Too Low is Premature and Should Be Rejected by This Court Because of the Absence of a Factual Record.

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

The message from *Randall* to the lower courts is clear: in order to consider whether a contribution limit is too low, it is necessary to take a close look at a developed factual record.

Lower courts have understood this message. *See Ognibene v. Parkes*, 599 F.Supp.2d 434, 444 (S.D.N.Y. 2009) ("The question of whether contribution limits impose such restraints on candidates' ability to amass sufficient resources [under *Randall*] is a fact-intensive one, and neither party has raised it in connection with the motion practice now before the Court"); *Preston v. Leake*, 629 F.Supp.2d 517, 524 (E.D.N.C. 2009) ("Considering first the statute's effect on candidates, the court cannot find on the pleadings before it that the Campaign Contribution Prohibition would prevent them from amassing the resources necessary for effective advocacy. Those courts that have made such a finding have relied on the testimony of expert witnesses and the results of surveys conducted on that issue"); *Ex Parte Ellis*, 279 S.W.3d 1, 17 n.14 (Tex. App. 2008) ("an inquiry [into whether Texas's contribution limitations are unconstitutionally low under *Randall*] is dependent on the specific effects of the restrictions in question on the political process. This issue is not before us nor is the record in this case adequate to address the merits of such a challenge..."); *see also Working Californians v. City of Los Angeles*, Order, Case CV-09-08327, at p. 13 (C.D. Cal. Nov. 24, 2009)[6] (rejecting argument that $500 individual contribution limitation to independent expenditure committees was too low on grounds that "Plaintiff has not provided evidence suggesting the limit effectively forecloses independent campaign spending"); *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (noting that trial court, in considering constitutionality of Montana campaign finance law, "heard considerable evidence, both empirical and expert").

Indeed, the Ninth Circuit recently remanded a case challenging the City of San Diego's contribution limits applicable to recall elections because of *the trial court's failure to develop a factual record* on the effect of the contribution limits on the ability of candidates in a recall election to engage in effective advocacy under the *Randall* standard. *Citizens for Clean Gov't, supra*, 474 F.3d at 653-54 ("following both Supreme Court and Ninth Circuit precedent, we again emphasize the importance of factual development").

[6] For the Court's convenience, the City has submitted a copy of this ruling as Exhibit "2" to Defendant's RJN.

In this case, too, there has been no factual development. In their Motion, Plaintiffs point to debates among the Ethics Commissioners over what contribution limitation would be appropriate to recommend to the City Council. Motion at p. 9. The fact that the Ethics Commission, which does not have the authority to pass and did not pass the ECCO, recommended to the City Council a higher limitation on a 4-2 vote than that which was passed by the City Council does not constitute evidence that a lower amount would be unconstitutional under *Randall*. In Plaintiffs' complaint, Plaintiff Thalheimer alleges that "the contributions limits...will prevent him from mounting an effective campaign against an incumbent." Complaint at pp. 16-17, ¶ 92. Beyond the bare allegation, Plaintiffs offer only argument, not evidence.

As the declaration of UC San Diego political scientist Thad Kousser shows,[7] it would require a detailed empirical examination of the San Diego political system to demonstrate that the current limits (recently nearly doubled from the old limits) are so low as to prevent effective advocacy by candidates. This Court should not credit Plaintiffs' unproven speculation. It should deny the request to preliminary enjoin the $500 contribution limits. Plaintiffs can renew their request in a trial on the merits.

c. Based on the Available Evidence, the City's $500 Individual Contribution Limit is Constitutional.

Even a cursory comparison of the Vermont limits struck down by the Supreme Court in *Randall* with the City's limitations reveals the constitutionality of the City's limitations. The City's limitations, which are the virtually the same as the limits in Los Angeles, San Francisco, [8] and many other localities, do not raise the "danger signs" identified by the Court plurality in *Randall*. The limitations are justified by the City's sufficiently important government interest in preventing corruption and the appearance of corruption, and preserving voter confidence in the integrity of the electoral system.

---

[7] Declaration of Thad Kousser in Support of Defendant City of San Diego's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Kousser Declaration" or "Kousser Decl.") at ¶ 3, filed concurrently herewith.

[8] *See* Declaration of Stacey Fulhorst in Support of Defendant City of San Diego's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Fulhorst Declaration" or "Fulhorst Decl.") at ¶ 4; Los Angeles City Charter § 470(c), Exhibit "4" to RJN; San Francisco Campaign and Governmental Code § 1.114(a), Exhibit. "3" to RJN; San Jose, CA, Code of Ordinances, Municipal Campaign and Officeholder Contributions § 12.06.210, Exhibit "5"to RJN.

Vermont imposed a $400 limitation per two year election cycle. In contrast, the City's limitation is $1,000 per election cycle ($500 per election),[9] more than double the limits in Vermont. Vermont's limits were the lowest in the nation; the City's are not even close.[10] The Vermont limits were not indexed to account for inflation. The City's limits are so indexed. *See* ECCO §§ 27.2935(f), 27.2937.

In short, none of the "danger signs" recognized by the *Randall* plurality appear in relation to the city contribution limits. Accordingly, the City's limitations are constitutional and the City need offer no "special justification" to justify them.[11] *See Ognibene, supra*, 599 F.Supp.2d at 449-50 (rejecting argument by same plaintiffs' counsel that "special justification" applied to review of New York City limits on grounds that (1) it was inappropriate for decision in motion practice given the "fact-intensive" nature of *Randall* inquiry and (2) given lack of novelty of City's reliance on its sufficiently important interests in preventing corruption and the appearance of corruption).

3. ECCO § 27.2936(b), Limiting Individual Contributions to Committees to $500 Per Election, is Constitutional.

ECCO § 27.2936(b) states:

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

---

[9] ECCO § 27.2935 imposes a $500 contribution limit "for any single election." ECCO § 27.2903 provides that "For the purpose of this division, a District or Citywide Primary Election, a District or Citywide General Election....are single and separate elections."

[10] For example, Connecticut imposes a $250 per election limitation on contributions to state House Candidates. Conn. Gen. Stat. Ch. 155 § 9-611(a)(5). The Center for Governmental Studies has posted a chart of contribution limitations in states with public financing systems available at: http://cgs.org/images/publications/cgs_state_pfc_050409.pdf (Exhibit "10"to RJN). The City of San Jose imposes a $100 contribution for district elections, which is rising in 2011 to $200 (a mere 40% of San Diego's limits). Fulhorst Decl. at ¶ 4.

[11] Even if danger signs were present (they are not), most of the five factors, which, *"taken together"* led the *Randall* Court to strike down Vermont's limits, are not present here. As noted, the City's law contains an inflation adjustment. The City's law does not include volunteer activity within the definition of contribution. *See* ECCO § 27.2903 (incorporating Cal. Gov't Code § 82015 definition of contribution into city law; § 82015(g) exempts volunteer activity). Even under the older, stricter contribution limits, the city has witnessed vigorously-fought campaigns for city offices—a point that the City would be able to prove at any trial on the merits.

Plaintiffs argue that the statute is unconstitutional as to committees that make only independent expenditures ("independent expenditure committees"), such as the Lincoln Club. *See* Complaint at p. 22, ¶128 (Lincoln Club wants to make independent expenditures). Relatedly, Plaintiffs argue against the constitutionality of the earmarking rule of ECCO § 27.2935(a), which limits contributions to committees when "the total amount contributed by [an] individual to support or oppose [a] candidate [] exceed[s] $500 for a single election." *See* Complaint at 16, ¶ 89 (Mr. Neinstedt would like to make contributions to independent expenditure committees supporting a candidate exceeding $500 per candidate in an election).

Plaintiffs' argument in essence is the following: the Supreme Court has held that independent expenditure limitations applied to individuals are judged under a strict scrutiny standard. Such limitations fail because they are not justified on grounds of preventing corruption. If it is unconstitutional to limit independent spending because of the lack of a corruption potential, it is similarly unconstitutional to bar contributions independent of candidates funding such expenditures. Plaintiffs try to muddy the crystal clear distinction between the standards applicable to contribution limits and spending limits by claiming that strict scrutiny applies when contributions are used to fund independent spending. Nonsense. It is the nature of the activity (contributions, not expenditures), not the identity of the recipient of the contributions, which determines the level of scrutiny.

The question posed by the constitutionality of contribution limits to independent expenditure committees has caused division in the courts. *See Working Californians*, at p. 14 (Exhibit "2" to RJN) ("These are challenging questions...How the Supreme Court decides them is far from clear"). However, the better answer, under existing Supreme Court precedent, is to uphold such contribution limits. As the federal district court recently concluded in the *Working Californians* case in rejecting a similar challenge to a Los Angeles city law:

> The most natural reading of *Buckley* and *McConnell* suggests that (1) contributions to independent political committees are proxy-speech, and thus restrictions on such contributions are subject to rigorous scrutiny, but not strict scrutiny; and (2) government entities have an important interest in preventing large-scale donors from using independent committees to funnel unrestricted money into candidate election campaigns.

Working Californians, at p. 14.

Space limitations prevent a full exploration of these issues in this Opposition. For full analysis, the court may wish to consult the *Working Californians* decision, pages 5-14, the district court decision in *SpeechNow.Org v. Fed. Election Comm'n*, 567 F.Supp.2d 70 (D.D.C. 2008),[12] and Judge Michael's dissenting opinion in *N.C. Right to Life v. Leake*, 525 F.3d 274, 332-337 (4th Cir. 2008). However, we lay out here an outline of the argument for the constitutionality of such limitations:

First, Plaintiffs are incorrect that the question of the constitutionality of contribution limits to independent expenditure committees should be judged under a strict scrutiny standard. In *Lincoln Club*, the Ninth Circuit held that limitations on contributions to independent expenditure committees are generally judged under the lower less rigorous level of scrutiny applicable to contribution limits. 292 F.3d at 938.[13]

Second, under the less rigorous standard of review, Plaintiffs' argument that contributions to fund committees' independent spending cannot corrupt is incorrect. As the district court recently explained in the *SpeechNow.Org* case:

> Plaintiffs' argument presents a false syllogism that relies on a "crabbed view of corruption, and particularly of the appearance of corruption," that is at odds with Supreme Court precedent. First of all, the Supreme Court has never held that, by definition, independent expenditures pose no risk of corruption...Second, that SpeechNow cannot literally funnel contributions to candidates and therefore cannot serve as a vehicle for the direct exchange of dollars for political favors is not dispositive. The Supreme Court has long acknowledged that "corruption" in

---

[12] Plaintiffs rely heavily on the recent 2-1 decision in *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1 (D.C. Cir. 2009), which determined *in dicta* that limitations on independent expenditure committees are unconstitutional. The decision may be short-lived. The precise question is currently before the *en banc* D.C. Circuit in an appeal of the *Speechnow.Org* case, which is currently scheduled for oral argument on January 27, 2010.

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

> the sense that word is used in campaign finance law, "extends beyond explicit cash-for-vote agreements to 'undue influence on an officeholder's judgment.'"

SpeechNow, 567 F.Supp.2d at 78 (citations omitted).

Indeed, the Supreme Court recently recognized the potential for corruption through independent expenditures in *Caperton v. A.T. Massey Coal. Co.*, __ U.S. __, 129 S. Ct. 2252 (2009). There, an individual whose company had interests in litigation pending before the West Virginia Supreme Court made extremely large donations to a political organization, "And for the Sake of the Kids," which used the funds to make independent expenditures advocating the election of a judicial candidate who was believed to be likely to support the donor's interest. *Id.* at 2257. That candidate went on to win the election and provide the decisive vote in favor of the donor's company. *Id.* Essentially treating the contributions made to the political group as the equivalent of direct donations to the campaign of the winning candidate, *see*, *e.g.*, *id.* at 2257 (stating that the justice casting the deciding vote "had received campaign contributions" from the donor), the Court held that the contributions created a "risk of actual bias" so "substantial" that due process required setting aside the court's decision. *Id.* at 2264-65.

Third, to the extent the constitutional question turns upon evidence that contributions can have a corrupting potential, the question is not amenable to decision at this preliminary stage before factual development. *Cf. N.C. Right to Life*, 525 F.3d at 334 (Michael, J., dissenting) ("North Carolina has provided a thorough record of the threat of corruption, the appearance of corruption, and circumvention of election laws that attend the operation of independent expenditure committees."). As with the *Randall* question concerning the *amount* of campaign contributions, Plaintiffs must rely on facts, not unsupported arguments. They offer no evidence on this question. (Kousser Decl. at ¶ 3 [noting absence of facts presented by Plaintiffs on this question and describing potential empirical testing of this question].) Nor do they offer any evidence that the City has another way of insuring that so-called "independent" expenditures are truly independent of candidates who can be corrupted by large contributions.

Finally, we note that the "earmarking" provision in ECCO § 27.2935(a) allows Mr. Nienstedt to give money to both candidates and committees to show his support for candidates, up to the aggregate $500 limit. Aggregate limits, as the Supreme Court recognized in *Buckley*,

424 U.S. at 47, prevent circumvention of valid contribution limits. *See also Mont. Right to Life Ass'n*, 343 F.3d at 1096-97 (upholding Montana's aggregate limitation on individual contributions to PACs). Should Mr. Nienstedt wish to support a candidate further, he may spend unlimited sums independently to do so, without running afoul of City law.

4. ECCO § 27.2938(a), Imposing Temporal Limits on City Election Campaigns, is Constitutional.

ECCO § 27.2938(a) provides:

> 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.

Plaintiffs argue that this limitation is unconstitutional as to candidates accepting funds from others more than a year before the primary election, and as to the candidates' contributions of their own funds to their campaigns. Again, plaintiffs offer no evidence that the temporal limits have affected the competitiveness of elections, though the question could be tested empirically. *See* Kousser Decl. at ¶ 3. We consider first the temporal limitations applied to contributors other than the candidate herself.

Though temporal restrictions on fundraising are commonplace,[14] there is not much case law on the subject, and none we are aware of in the Ninth Circuit. Courts have upheld bans on fundraising from lobbyists during legislative sessions, for example, justified by the government's interest in preventing corruption and its appearance. In *N.C. Right to Life v. Bartlett*, 168 F.3d 705,717 (4th Cir. 1999), 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

[14] For example, the municipalities Los Angeles and San Jose both have temporal limits restricting when candidates in city elections can solicit and accept contributions. *See* Fulhorst Decl. at ¶ 5; Los Angeles Municipal Code, entitled "Campaign Finance Ordinance" § 49.7.7, Exhibit. "6" to RJN; San Jose, CA, Code of Ordinances, Municipal Campaign and Officeholder Contributions § 12.06.290, Exhibit "5" to RJN.

> 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*, 978 P.2d 597, 627-628 (Alaska 1999), 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 least likely to be given to influence electoral outcomes. *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 "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 v. Patton*, 142 F.2d 940, 951 (6th Cir. 1998) (upholding Kentucky ban on campaign contributions in the last 28 days before an election on anti-corruption grounds); *but see Anderson v. Spear*, 356 F.3d 651, 675 (6th Cir. 2004) (striking down Kentucky law as applied to write-in candidates) .

A temporal limitation on contributions is also consistent with *Buckley*, which recognized "reasonable *time*, place and manner" limitations on contributions. 424 U.S. at 18 (emphasis added). By the very language of *Buckley*, temporal limitations fit under the framework provided by the Supreme Court and are permissible if the government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 18. The Supreme Court has repeatedly recognized that governments have a sufficiently important interest in justifying limits on contributions to candidates and their campaigns to prevent corruption and the appearance of corruption. *See McConnell*, 540 U.S. at 138.

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 was perceived as corruption. 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 positions.

Plaintiffs also challenge the temporal limitation applicable to a candidate donating funds to herself in advance of the election period. A 2006 advisory opinion letter authored by the Ethics Commission attached as an exhibit to Plaintiffs' complaint confirms that such self-funded contributions violate City law. Complaint at p. 13, ¶ 74, Exhibit 3.

Though it is true that contributions to oneself do not pose a risk of corruption, allowing only self-financed City candidates to fund their campaigns before 12 months while denying that ability to competing candidates will put pressure on those competing candidates to raise money outside the temporal limits, thereby raising the risk of corruption. The extension of the temporal ban to self-financed candidates is therefore justified to prevent the candidates' competitors from circumventing applicable campaign finance limitations. *See Colorado Republican*, 533 U.S. at 456 (recognizing anti-circumvention rationale for campaign finance law).[15]

5. ECCO §§ 27.2950 and 27.2951, and Related Statutes, Barring Political Parties and Organizations from Contributing to Candidates, are Constitutional.

ECCO § 27.2950(a) bars candidates from accepting contributions from non-individuals, including political parties, corporations, labor unions and other organizations. Subsection (b) bars such non-individuals from making such contributions, and subsection (c) bars committees supporting candidates from taking contributions from non-individuals. Relatedly, ECCO §

[15] The temporal limitation does not prevent candidates from spending money supporting their candidacies; accordingly it is not a spending limitation subject to strict scrutiny. Instead, it simply channels the *timing* of candidate spending. In the event this Court disagrees with the City on the constitutionality of the temporal ban as to candidates' self-contributions, the Court should uphold the statute and simply strike the Ethics Commission opinion interpreting the statute to apply to candidate self-contributions. *See* Complaint at p. 26 (suggesting this alternative).

27.2951 bars the use of organizational bank accounts for candidate contributions and contributions to committees supporting candidates.

Plaintiffs argue these restrictions are unconstitutional. The RPSD complains that it cannot make contributions directly to candidates. Complaint at p. 20, ¶ 114. The Lincoln Club and ABC PAC complain they cannot take contributions from non-corporate organizations such as trusts, and the potential candidate complains that he cannot take contributions from a political party or other non-corporate organizations. Complaint at p. 22, ¶ 122. As we explain, these restrictions do not violate the First Amendment. At the very least, consideration of the First Amendment questions requires development of a factual record at a trial on the merits.

a. Political Parties

As to the political party claim, Plaintiffs argue that the ban on party contributions to candidates "mutes the voices of political parties," and is worse than the Vermont law in *Randall*, which severely restricted political party activity. Motion at pp. 10-11. Plaintiffs' argument misses the mark. While it is true that political parties, like other organizational entities, may not directly contribute to candidates in San Diego (which, unlike Vermont, conducts its elections on a nonpartisan basis[16]), this hardly mutes the voice of political parties. Nothing in San Diego law prevents a party from endorsing a candidate for office, and from raising and spending unlimited sums (raised from individuals subject to the $500 contribution limit) supporting that candidate for office (or opposing her opponent). The party can engage in voter registration activities, urge party members to volunteer for endorsed candidates, sponsor a slate, and do other party-building and candidate support activities. Thus, unlike the limits in *Randall*, which the Court held "would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate," *Randall*, 548 U.S. at 258, political parties in San Diego are in fact encouraged to seek small

[16] *See* City of San Diego, City Clerk's Office, "How to Run for Office: Details," http://www.sandiego.gov/city-clerk/elections/city/details.shtml ("There are three kinds of elective office in the City of San Diego: [1] Mayor [2] City Attorney [3]City Council Member/ [¶] Each of these offices is non-partisan.") attached hereto as Exhibit "11" to RJN.

donations to make a big difference in candidate elections through their own party fundraising. Plaintiffs offer no evidence that parties' abilities to influence San Diego's nonpartisan elections have been limited by the City's law. *See* Kousser Decl. at ¶ 3 [noting potential empirical testing on political party activity in City].)

The limitation on political parties contributing directly to candidates, or spending in coordination with them, is justified by the City's interest in preventing corruption and the appearance of corruption. The Supreme Court has recognized in the *Colorado Republican* and *McConnell* cases that parties can serve a special danger of corruption when they act as conduits for large donors wishing to gain influence over the candidates supported by the parties. *Colorado Republican*, 533 U.S. at 456. "As we said on the subject of limiting coordinated expenditures by political parties, experience 'demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced.'" *Beaumont*, 539 U.S. at 155 (quoting *Colorado Republican*).

If necessary, the City can present evidence in a trial on the merits demonstrating how the party limitation serves these sufficiently important government interests.

b. Non-corporate organizations

Plaintiffs also complain that non-corporate organizations that are not individuals cannot make contributions to candidates. Motion at p. 15. The Plaintiffs appear to concede that a ban on contributions by corporations and unions is constitutional, a concession made necessary by the Supreme Court's decision in *Beaumont*. 539 U.S. 146. In *Beaumont*, the Court held that Congress may constitutionally ban contributions from corporations to federal candidates. The ban could apply even to ideological corporations that do not take corporate or union funds, and who are therefore constitutionally exempt from the rules barring corporations from making independent expenditures in candidate elections. *Id.* at 161-162. The Court held such limits were justified to prevent corruption and the appearance of corruption, and to prevent circumvention of valid contribution limits:

> To the degree that a corporation could contribute to political candidates, the individuals "who created it, who own it, or whom it employs" could exceed the bounds imposed on their own contributions by diverting money through the corporation. As we said on the subject of limiting coordinated expenditures by political parties, experience "demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced."

Beaumont, at 155 (citations omitted and punctuation altered).

The *Beaumont* Court's rationale for recognizing the constitutionality of a ban on contributions by non-profit corporations could apply as well to the kinds of other business entities, such as trusts, LLCs, LLPs, and others, from which the Plaintiffs would like to take donations:

> For present purposes, we will assume advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve. But concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant "state-created advantages," and may well be able to amass substantial "political war chests." Not all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club. Nonprofit advocacy corporations are, moreover, no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals.

Beaumont, at 159-160 (citations omitted).

The City has ample similar anti-corruption and anti-circumvention reasons to bar contributions from other organizations to candidate elections. Why would an LLC present less of a danger than the organizations mentioned by the Supreme Court? *See Ognibene*, 599 F.Supp.2d at 460 ("Congress's decision to limit the FEC's entity restrictions to corporations does not render local regulation of other entities' contributions unconstitutional"); *Inst. of Governmental Advocates v. Fair Pol. Practices Comm'n*, 164 F.Supp.2d 1183 (E.D. Cal. 2001) (upholding ban on campaign contributions by registered lobbyists to those offices they have registered to lobby); *Preston*, 629 F.Supp.2d at 523 (relying on *Beaumont* in upholding ban on campaign contributions to candidates by registered lobbyists).

At the very least, this court should not grant Plaintiffs a preliminary injunction on this issue, and should instead consider at a trial on the merits facts bearing on the nature of organizational form and the threats of corruption, the appearance of corruption, and threats of circumvention of legal contribution limitations. At this stage, Plaintiffs have offered no evidence that individuals who control or participate in these groups have been limited in their ability to influence San Diego's candidate elections by the City's law. *See* Kousser Decl. at ¶ 3 (noting potential empirical testing on organizations' political activity in City).

C. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

A preliminary injunction should also be granted for another reason: because Plaintiffs will not suffer irreparable harm in the absence of the issuance of preliminary relief. A preliminary injunction may not be granted based on the mere possibility that irreparable harm may occur even if Plaintiffs demonstrate a likelihood of prevailing on the merits. *Winter*, 129 S.Ct. at 375-76. While determining if the Plaintiffs personally will be subject to irreparable harm if the *status quo* is maintained, it is important to note that Plaintiffs cannot establish they have standing (as is addressed in greater detail in Rule 12(b)(1) Motion recently filed by Defendant) or that this matter is ripe for determination.

"Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with out characterization of injunction relief as an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to such relief." *Winter*, 129 S.Ct. at 375-276. The plaintiff must provide evidence of actual injury to support claims of irreparable injury; speculative losses are insufficient. *Goldie's Bookstore, Inc. v. Sup.Ct.* 739 F.2d 466, 472 (9th Cir. 1984). The threatened injury must be imminent, an immediate threatened harm. *Caribbean Marine Services Co., Inc. v. Baldrige* 844 F.2d 668, 674 (9th Cir.1988). While Plaintiffs correctly state the proposition that a loss of a First Amendment freedom constitutes an irreparable injury, many of Plaintiffs' claims only speculate about future loss of rights.

By his own admission, Plaintiff Thalheimer is only "considering" a run for elected office. Complaint at pp. 9,10, ¶¶ 51, 55. If he does, either in the district he currently lives in or the

theoretical district Plaintiffs allude to, the election is over two years away. As a result, many of Plaintiffs' concerns have not yet happened. Complaint at p.10, ¶ 55. There can be little justifiable reason short of circumvention of the monetary limitations that Plaintiff Thalheimer believes he will experience irreparable harm in 2010 for an election in 2012 in which he is not sure if he is going to actually campaign.

It should be noted that Plaintiffs have not proven that their freedoms are being abridged - they can still associate as they like and actually say what they like. Any individual can still make unlimited independent expenditures of his own funds in a candidate election. Plaintiffs' concern is about how much money they can raise and from what sources for future elections. Plaintiffs have alternate means of presenting views to voters. Plaintiffs have repeatedly presented their views in public forums without the City interfering. As there is no imminent threat posed by waiting to test the constitutionality of the measures at trial, the Court should deny the preliminary injunction.

D. THE BALANCE OF EQUITIES TIPS IN FAVOR OF THE CITY AND THE GENERAL PUBLIC

In determining whether or not to issue a preliminary injunction, the court must identify the harm a preliminary injunction might cause to the defendant and weigh it against the plaintiff's threatened injury. *Winter*, 129 S.Ct. at 376. Requests for preliminary injunctive relief that alter the *status quo*, are subject to a heavier burden of persuasion. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975. In "balancing the hardships of the public interest against a private interest, the public interest should receive greater weight." *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999).

A preliminary injunction would cause significant harm to the City, its voters, and the public interest. For over a century there have been advocates in favor of the legislation prohibiting the exact contribution practices the Plaintiffs seek to overturn with a preliminary injunction. The public's interest cannot be questioned: contribution limits "directly implicate 'the integrity of our electoral process.'" *McConnell*, 540 U.S. at 136 (internal quotations omitted). In

fact, contribution limits themselves "tangibly benefit public participation in political debate." *Id.* at 137.

Plaintiffs claim that if the preliminary injunction is not issued, there will be nothing that the Court can do to make things "right" after a trial. Motion at p. 20. However, Plaintiffs ignore the great injustice that will be done to the entire electoral process by issuing an injunction before factual development and analysis of the issues. In essence Plaintiffs wish to disrupt the current system based upon their assumptions alone without adequate factual development despite the fact that the limits now in effect almost double the previous limits of $270 and have not yet been tested during an election cycle. Not surprisingly, the public has expressed great concern of this tactic. *See* Exhibits "8" and "9" to RJN.

E. DENIAL OF THE PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Plaintiffs recognize that the public interest in protecting First Amendment liberties can be overcome by "a strong showing of competing public interests." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002). That the public has an interest in this matter is without doubt. The day after the Plaintiffs filed this lawsuit, the San Diego Union Tribune published an editorial denouncing Plaintiffs' efforts to overturn the City's campaign finance legislation. Exhibit "9".

A preliminary injunction also is against the public interest, because it would change the rules in effect for everyone in San Diego (not just the Plaintiffs) just as the new election season gets underway.[17] The Supreme Court has counseled against changing rules shortly before an election. *Purcell*, 549 U.S. at 4-5 (in considering the granting of preliminary relief, a court is "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, *considerations specific to election cases* and its own institutional procedures. Court orders affecting elections...can themselves result in voter confusion and consequent incentive to

[17] *See* City of San Diego, City Elections, June 8, 2010 Primary Information http://www.sandiego.gov/city-clerk/elections/city/100608.shtml (noting Feb. 10, 2010 as the first date for city council candidates to take out candidacy papers) attached hereto as Exhibit "12" to RJN.

remain away from the polls." (emphasis added)). Plaintiffs will suffer no irreparable harm if the court denies this motion and considers the issues again on the merits at final judgment.

3. CONCLUSION

The Court should not grant the Plaintiffs' motion for a preliminary injunction. Plaintiffs are not able to meet the burden of proving a likelihood of success on the merits as binding Supreme Court decisions prove that the City has an interest in preventing corruption and the appearance of corruption. The contribution limitations are narrowly tailored to achieve these interests, while still allowing candidates, parties, individuals and outside groups to effectively campaign and participate in vigorous electoral activity.

Additionally, the balance of equity and public interest tips dramatically in favor of the City's position to maintain status quo until a trial on the merits can fully develop and articulate all of the facts and applications of the laws in question. Defendant respectfully requests this Court to consider the gravity of Plaintiffs' request and deny the preliminary injunction.

Dated: January 15, 2010

SCHWARTZ SEMERDJIAN HAILE BALLARD & CAULEY LLP

RICHARD L. HASEN, ESQ.

By: s/ Dick A. Semerdjian
Dick A. Semerdjian
Attorneys for Defendant City of San Diego