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

**UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**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;

Defendant.

Case: 3:09-cv-2862-IEG-WMC

First Amended Verified Complaint

Plaintiffs Associated Builders & Contractors PAC sponsored by Associated Builders & Contractors, Inc. San Diego Chapter (“ABC PAC”), the Lincoln Club of San Diego County (“Lincoln Club”), Republican Party of San Diego County (“RPSD”), Phil Thalheimer, and John Nienstedt, Sr. (together, “Plaintiffs”), complain against Defendant City of San Diego¹ as follows:

¹On January 8, 2010, the Court granted the parties’ joint motion to dismiss all defendants from Plaintiffs’ Verified Complaint except the City of San Diego (Doc. 9.) The dismissed defendants (the members of the Ethics Commission, the Mayor, the City Attorney, and the City Clerk, all sued

Introduction

1. The Plaintiffs bring this action to defend their First Amendment right under the United States Constitution to engage in political speech and association.

2. Article 7, Division 29 of the San Diego Municipal Code, known as the SAN DIEGO MUNICIPAL ELECTION CAMPAIGN CONTROL ORDINANCE (“ECCO”), imposes certain restrictions and prohibitions on financial contributions to candidates for public office, independent expenditures, and electioneering communications.

3. The Plaintiffs believe some of these restrictions and prohibitions are impermissible under the First Amendment to the United States Constitution and so violate their constitutional rights.

4. At issue in this lawsuit is the constitutionality of ECCO §§ **27.2934** (limits of \$1,000 on contributions from political parties to candidates); **27.2935** (limits of \$500 on contributions to candidates), **27.2936** (placing limits on independent expenditures by committees, including political parties, and also placing limits on political party contributions, requiring all these expenditures and contributions to be attributable to contributions from individuals in amounts not greater than \$500, thereby operating as a de facto contribution limit for contributions to those committees,), **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*).

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in their official capacities) agreed to be bound by all the Court’s rulings in this case. (Doc 6.)

Jurisdiction and Venue

5. This action arises under 42 U.S.C. § 1983, 42 U.S.C. § 1973 et. seq., and the First and Fourteenth Amendments to the Constitution of the United States.

6. The jurisdiction of this Court over claims arising under 42 U.S.C. § 1983 and 42 U.S.C. § 1973 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

7. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because the events and occurrences giving rise to the claim occurred within the Southern District of California.

8. Venue is also proper in this district under 28 U.S.C. § 1391(b)(1) because the Defendants reside in the Southern District of California.

Parties

A. Plaintiffs

(1) Plaintiff Phil Thalheimer

9. Mr. Thalheimer is a resident of San Diego, and has previously run for a city council seat in Council District 1. He is considering another run for a council seat, either in Council District 1 or else in a to-be-formed Council District 9, if it is formed and if he lives within it.

(2) Plaintiff ABC PAC

10. Plaintiff ABC PAC is a committee formed by Associated Builders & Contractors, Inc. San Diego Chapter to advance the merit shop philosophy in San Diego and Imperial Counties through political action. It is properly registered with the State of California as a political action committee.

11. ABC PAC supports candidates and ballot measures that support fair and open competition for every construction project, and oppose candidates and ballot measures that impose “union only” requirements on any construction project. They also support ballot measures that encourage local control of prevailing wage decisions, and candidates and ballot measures that otherwise help advance their merit shop apprentice programs. Additionally, they inform their

1 members of critical political issues that impact their freedom to work in a merit shop community.

2 **(3) Plaintiff Lincoln Club**

3 12. Lincoln Club is an influential organization of politically like-minded business and
4 civic leaders throughout the county. It is properly registered with the State of California as a
5 political action committee. Its mission is to advance leadership that shares their commitment to
6 fiscally responsible public policy, the expansion of economic opportunity, and an enhanced quality
7 of life throughout San Diego County.

8 13. In furtherance of its mission, Lincoln Club makes independent expenditures in
9 support of, or opposition to, candidates of its choice.

10 **(4) Plaintiff San Diego County Republican Party**

11 14. Plaintiff Republican Party of San Diego County ("RPSD") is San Diego's local
12 organization for the Republican Party.

13 **(5) Plaintiff John Nienstedt**

14 15. Mr. Nienstedt is a life-long resident of San Diego. He is registered to vote in San
15 Diego, and actively supports candidates for office that he feels would be good for San Diego and
16 the interests he cares about. He intends to contribute the full amount allowed by law to the
17 candidate(s) of his choice in upcoming San Diego city council and/or citywide elections. He also
18 wants to contribute to a committee that makes independent expenditures in support of the candidate
19 of his choice, but cannot, because of the challenged law.

20 **B. Defendants**

21 16. Together, all the defendants as enumerated below shall be called "defendants" or
22 "City."

23 **(1) The City of San Diego**

24 17. As a Charter City, San Diego has the authority to make and enforce its own
25 municipal laws. CALIFORNIA CONSTITUTION, Art. 11, Sec. 5(a).

26 18. All of the laws challenged in this lawsuit are laws of the City of San Diego, and part
27

of the San Diego Municipal Election Campaign Control Ordinance (ECCO). They have been enacted by the governing body of the City of San Diego, and apply to activities in San Diego.

19. The City of San Diego is thus a proper defendant to this lawsuit.

Statement of Facts

20. The San Diego Municipal Election Campaign Control Ordinance (“ECCO”) governs elections and related activity in San Diego.

21. ECCO was added to the San Diego Municipal Code on April 10, 1973. It defines its “purpose and intent” as follows:

It is the purpose and intent of the City Council of the City of San Diego in enacting this division 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 the 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.

Facts Related to Plaintiff ABC PAC

22. ABC PAC makes independent expenditures, as that term is defined in ECCO, § 27.2903.²

²ECCO § 27.2903 defines “independent expenditure” as follows:

Independent expenditure means any expenditure made by any person in connection with a communication that:

- (a) expressly advocates the nomination, election, defeat, or recall of a clearly identified candidate; or
- (b) expressly advocates the qualification, passage, or defeat of a clearly identified measure; or

23. ABC PAC wants to solicit, accept, and use contributions received from non-individuals, such as trusts, corporations and other business entities, for their independent expenditures in support of, or opposition to, candidates of their choice. They would do so, but for ECCO § 27.2936(b).

24. For the past several years, ABC PAC has received contributions from contributors in excess of \$500. They would like to use the full amount of these contributions for independent expenditures. They would also like to solicit and accept other contributions from other contributors in amounts greater than \$500, and use as much of those contributions as possible for the purpose of making independent expenditures. They would do so, but for ECCO § 27.2936, which limits their independent expenditures to an amount not greater than what can be attributed to contributions of \$500 or less from individual (human) contributors.

Facts Related to Plaintiff Lincoln Club

25. The Lincoln Club's vision "is one of a county wherein taxes are low, government is small and accountable, children receive a world-class education, regulations are reasonable and business is encouraged."³

26. The Lincoln Club's mission "is to advance free market principles and ideas by recruiting, endorsing, and financing business-friendly candidates and ballot measures that reflect our commitment to responsible public policy, the expansion of economic opportunity, and an enhanced quality of life throughout San Diego County."⁴

27. The Lincoln Club "identifies and supports candidates, elected officials, and policies at every level of government. [They] measure these leaders and issues based on [their] core

(c) taken as a whole and in context, unambiguously urges a particular result in a City election.

³Lincoln Club of San Diego: "Vision and Mission," available at <http://web.memberclicks.com/mc/page.do?orgId=lcsdc&sitePageId=49488> (last visited November 20, 2009).

⁴*Id.*

philosophy of a fiscally responsible government.”⁵

28. Lincoln Club makes independent expenditures as that term is defined in ECCO § 27.2903 in support of, or opposition to, candidates of its choice.

29. Lincoln Club wants to make independent expenditures in support of candidates in amounts greater than can be attributed “to an individual in an amount that does not exceed \$500 per candidate per election,” as ECCO § 27.2936(b) requires. It would do so, but for the law.

30. Lincoln Club also wants to solicit, accept, and use contributions received from non-individuals, such as trusts, corporations and other business entities, for their independent expenditures in support of, or opposition to, candidates of their choice. They would do so, but for ECCO § 27.2936(b).

Facts Related to Plaintiff Republican Party of San Diego (RPSD)

31. In California, political parties are permitted to make unlimited contributions to local candidates where local law does not impose limitations. CALIFORNIA GOVERNMENT CODE § 85312.

32. RPSD has an active program to endorse and support local candidates using member communications and where available, direct contributions.

33. In anticipation of the upcoming November election, RPSD would like to make contributions *right now* in amounts greater than \$1,000 to Republican candidates for local office in San Diego, and make coordinated expenditures with their candidates in amounts greater than \$1,000, and would do so, but for ECCO § 27.2950, which bans contributions from organizations (including political parties) to candidates, and ECCO § 27.2934 (effective June 17, 2010), which limits political party contributions to each of their candidates to \$1,000 per election. (The new version of ECCO is available at <http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division29.pdf> (*last visited* July 28, 2010.)) RPSD would like to make its contributions regardless of whether the contributions are attributable to contributions from individuals in amounts

⁵Lincoln Club of San Diego: “Fact Sheet,” *available at* <http://web.memberclicks.com/mc/page.do?orgId=lcsdc&sitePageId=49480> (*last visited* November 20, 2009).

not exceeding \$500—that is, RPSD wants to make its contributions to its candidates, regardless of the source or amount of the contribution it uses to fund its contributions. RPSD would do so, but for ECCO § 27.2936(b), which forbids general purpose recipient committees (which includes political parties) making contributions in amounts that are not attributable to an individual in an amount that does not exceed \$500 per candidate per election, and the Ethics Commission’s authoritative interpretation and enforcement position of that statute (attached as Exhibit 6), which specifically applies it to political parties. RPSD would immediately make its planned contributions to its candidates in amounts greater than \$1,000 and from sources not attributable to contributions from individuals in amounts not exceeding \$500, but for the challenged law. RPSD would also like to engage in materially similar activity in the future.

Facts Related to Plaintiff Phil Thalheimer

34. Mr. Thalheimer is a resident of San Diego. He has previously been a candidate for city council in Council District 1.

35. A ballot question will be put to San Diego’s voters next June, 2010, giving them the opportunity to decide whether to add a ninth city council seat to their city council.⁶ This is a result of the passage of “Proposition B” in June 2008, which asked, “Shall the voters approve an amendment to the Charter to require the City Council to submit to voters at the June 2010 election Charter amendments making the Strong Mayor form of government permanent; adding a Council seat; and, when the ninth seat is filled, increasing the Council votes required to override a mayoral veto?”⁷

36. The overwhelming support Proposition B received last June, with over 76% of the

⁶ See Gene Cubbison, *Voters to Decide on City Council Addition*, nbcсандiego.com (October 14, 2009) (available at <http://www.nbcсандiego.com/news/politics/-Number-Nine-New-SD-Council-District-a-Ballot-Question-64301472.html>) (last visited November 3, 2009) (attached as Exh. 1).

⁷ See Smart Voter Summary, *Proposition B—Permanency Of The Strong Mayor Form Of Governance, City of San Diego* (available at <http://www.smartvoter.org/2008/06/03/ca/sd/prop/B/>) (last visited November 3, 2009) (attached as Exh. 2).

1 electorate agreeing that the question of a new Council seat should be put to the voters,⁸ makes Mr.
 2 Thalheimer optimistic that a new council district will be created. If so, its first council member will
 3 be elected in 2012.

4 37. If the voters decide to create a new council seat, the Redistricting Commission will
 5 have to determine the boundaries for the district. The City Charter requires San Diego to create a
 6 Redistricting Commission at the beginning of each decade, in order to evaluate and adjust the
 7 boundaries of city council districts to reflect changes in population. Charter, Art. II, §§ 4 – 5.1
 8 (*available at* <http://docs.sandiego.gov/citycharter/Article%20II.pdf>) (last visited November 3,
 9 2009)).

10 38. According to the City of San Diego Redistricting Commission’s website, “The
 11 Charter requires that districts be comprised of contiguous territory and made as equal in population
 12 as shown by the census reports, and as geographically compact as possible. It also requires that the
 13 districts shall, as far as possible, be bounded by natural boundaries, street lines, and/or City
 14 boundary lines. ... The next Commission is expected to begin its work in 2010.”⁹

15 39. Mr. Thalheimer believes that if the voters decide to create a new city council district,
 16 it is likely that he will live within its boundaries. Because this would be a new seat, there would
 17 not be an incumbent in the election. Mr. Thalheimer is considering running for the seat, if in fact
 18 it is created and he lives within the district.

19 40. Regardless of whether the voters create a new city council district, the Redistricting
 20 Commission will still evaluate and adjust the boundaries of city council districts to reflect changes
 21 in population. Charter, Art. II, §§ 4 – 5.1¹⁰

23 ⁸*Id.*

24 ⁹City of San Diego Redistricting Commission, *available at*
 25 <http://www.sandiego.gov/redistricting/about.shtml#bound> (last visited November 16, 2009)).

26 ¹⁰Charter, *available at* <http://docs.sandiego.gov/citycharter/Article%20II.pdf> (last visited
 27 November 3, 2009)).

1 41. Mr. Thalheimer believes it is likely that he will still live within Council District 1
2 after the Redistricting Commission finishes its work, if a new ninth district is not created.

3 42. Council District 1 is served by Council Woman Sherry Lighter. She will likely run
4 as the incumbent in the 2012 election.

5 43. Despite the fact that running against an incumbent presents additional challenges
6 because of her name recognition as an elected official and the current limits and prohibitions on
7 contributions candidates are able to solicit and accept, Mr. Thalheimer is considering running for
8 city council again out of Council District 1, if the voters do not create a new ninth district.

9 44. However, he is not certain that he would run against an incumbent, because his past
10 experience makes him believe that he may not be able to raise the finances needed to mount an
11 effective campaign under the contribution limits imposed by ECCO.

12 45. In preparation for these contingencies, Mr. Thalheimer has created a committee and
13 would like to begin soliciting money to be placed in account for a possible council run in 2012.
14 However, he is prohibited from doing so by ECCO § 27.2938(a), which provides that “It is unlawful
15 for any candidate or controlled committee seeking elective City office to solicit or accept
16 contributions prior to the twelve months preceding the primary election for the office sought.” Mr.
17 Thalheimer would solicit contributions for his campaign, but for this law.

18 46. Mr. Thalheimer also wants to use his own money to begin advertising his potential
19 candidacy so as to build name-recognition among the electorate and excitement for his potential
20 campaign.

21 47. However, he cannot do so, because the Commission interprets ECCO § 27.2938(a)
22 as prohibiting a candidate from contributing his own money to his own campaign more than a year
23 prior to the primary election.¹¹

24 48. Thus, Mr. Thalheimer is not allowed to do such things as create a website, print
25

26 ¹¹See San Diego Ethics Commission Informal Advice Letter No. IA06-11, (December 5,
27 2006), at 2, *available at* http://www.sandiego.gov/ethics/pdf/IA06_11.pdf (last visited August 10,
2009) (attached as Exh. 3).

flyers, or mail letters to announce his candidacy and garner name recognition, even though he would use his own money to do so. Mr. Thalheimer would spend his own money to engage in these types of activities, but for the Commission's interpretation of this law.

49. Mr. Thalheimer intends to solicit contributions from diverse types of contributors, including some who may be owners of their own businesses. As sole proprietors, some of these potential contributors co-mingle their personal money and their business money in their business checking account. However, Mr. Thalheimer is barred by ECCO §§ 27.2950 and 27.2951 from accepting contributions from business checking accounts, even if the account is that of a sole proprietor.¹²

50. In addition, Mr. Thalheimer wants to solicit and accept contributions from trusts and various business entities. He would do so, but for ECCO § 27.2950, which makes it unlawful to solicit or accept contributions from organizations.

Facts Related to Plaintiff John Nienstedt

51. Mr. Nienstedt is a life-long resident of San Diego, and is registered to vote in San Diego. He has contributed in the past to candidates with whom he agreed on the issues and who he believed would be good for San Diego. He intends to contribute financially to the candidate(s) of his choice in upcoming San Diego city council and citywide elections.

52. Mr. Nienstedt would like to contribute more than \$500 to candidates he likes in upcoming election cycles. He would do so, but for ECCO § 27.2935, which imposes a contribution limit of \$500 per candidate per election.

53. In addition to contributing to candidates he supports, Mr. Nienstedt would also like to contribute to a committee that makes independent expenditures, and have his contribution used to support his chosen candidate. But, ECCO § 27.2935(a) makes it unlawful for him to contribute more than \$500 total to candidates, and then make a contribution to a committee and earmark it for

¹²In addition to the code provisions cited, *see* San Diego Ethics Commission Informal Advice Letter No. IA03-05 (June 17, 2003), *available at* <http://www.sandiego.gov/ethics/pdf/ia03-05.pdf> (last visited November 4, 2009) (attached as Exh. 4).

1 independent expenditures in support of his chosen candidate. He would do so, but for this law.

2 54. Mr. Nienstedt supports a candidate whose primary is more than a year away. He
3 would like to contribute money to this candidate's campaign now, and would do so, but for ECCO
4 § 27.2938(a) which makes it unlawful for candidates to "accept contributions prior to the twelve
5 months preceding the primary election for the office sought."

6 **Count 1**
7 **ECCO § 27.2938(a)**
8 **Ban on Candidates Spending Their Own Money More Than a Year Before the Primary**

9 55. Plaintiffs re-allege and incorporate by reference all of the allegations contained in
10 all of the preceding paragraphs.

11 56. Plaintiff Phil Thalheimer wants to spend his own money to prepare materials to
12 announce his potential candidacy and begin to garner name recognition among the electorate. He
13 would do so, but for ECCO § 27.2938(a), as construed and enforced by the Commission.

14 57. ECCO § 27.2938(a) provides:

15 It is unlawful for any candidate or controlled committee seeking
16 elective City office to solicit or accept contributions prior to the
17 twelve months preceding the primary election for the office sought.

18 58. The Commission construes this language to mean that a candidate is prohibited from
19 using even *his own money* for any activity that would announce or assist his campaign more than
20 12 months prior to the primary election.¹³

21 59. Because it is more than 12 months before the primary, Mr. Thalheimer cannot spend
22 his own money in ways that would further his campaign.

23 60. Specifically, the Commission has stated that:

24 An individual may not spend personal funds in support of his or her
25 candidacy prior to [12 months prior to the primary], unless such spending is
26 solely related to "exploratory" activities. Such activities involve gathering
27 information that an individual may use to decide whether or not to run for
28 office. Activities designed to promote an individual's qualifications or

26 ¹³See San Diego Ethics Commission Informal Advice Letter No. IA06-11, (December 5,
27 2006), at 2, *available at* http://www.sandiego.gov/ethics/pdf/IA06_11.pdf (last visited August 10,
2009) (attached as Exh 3).

1 otherwise advocate that individual's bid for elective office are not
2 considered "exploratory."¹⁴

3 The Commission has also stated:

4 An individual may not spend personal funds prior to [12 months prior to the
5 primary], on literature if that literature expressly or *impliedly* advocates for
6 his or her election. For example, a person's list of qualifications or
7 achievements need not mention a particular elective office or election date
8 in order to imply that the person is qualified for office.¹⁵

9 61. This interpretation acts as an impermissible expenditure limit on candidates who
10 want to spend their own resources in support of their candidacies.

11 62. Limits on candidates' expenditures of their personal funds are unconstitutional. *Id.*
12 at 54. *Buckley v. Valeo*, 424 U.S. 1, 52–54 (1976); *Davis v. Fed. Election Comm'n*, 554 U.S. ___,
13 128 S.Ct. 2759, 2771 (2008) (noting that candidates have a First Amendment right to "engage in
14 unfettered political speech" and to do so "robustly"); *Randall v. Sorrell*, 548 U.S. 230, 236 (2006)
15 (stating that "well-established precedent" leads to the result that limits on how much a candidate
16 may spend necessarily violate the First Amendment).

17 63. ECCO § 27.2938(a) impermissibly places a legislative limit on Mr. Thalheimer's
18 ability to speak on behalf of his own candidacy. It burdens and chills the speech rights of Mr.
19 Thalheimer and all other candidates similarly situated. It cannot pass applicable scrutiny, and is
20 overbroad. It is therefore unconstitutional, both facially and as applied to the plaintiffs.

21 **Count 2**
22 **ECCO § 27.2938(a)**

23 **Ban on Contributions to Candidates More Than a Year Before the Primary**

24 64. Plaintiffs re-allege and incorporate by reference all of the allegations contained in
25 all of the preceding paragraphs.

26 65. Plaintiff Phil Thalheimer is considering a run for City Council in 2012, and has
27 formed a committee for that purpose. The primary for this race is more than 12 months from now.

28

¹⁴*Id.* at 2 (emphasis in original).

¹⁵*Id.*

1 66. Mr. Thalheimer wants to solicit and accept contributions to his campaign now, and
2 would do so, but for ECCO § 27.2938(a), which makes it “unlawful for any candidate or controlled
3 committee seeking elective City office to solicit or accept contributions prior to the twelve months
4 preceding the primary election for the office sought.” Mr. Thalheimer also wants to spend some of
5 the contributions he would solicit and accept, if allowed, *now*, rather than waiting until a year before
6 his primary. He would do so, but for this law.

7 67. Mr. Nienstedt wants to contribute financially to the candidate(s) of his choice now,
8 rather than waiting until within a year of the primary. He would do so, but for ECCO § 27.2938(a).

9 68. The Supreme Court recognized contribution limits “implicate fundamental First
10 Amendment interests.” *Buckley*, 424 U.S. at 23. *See also Randall v. Sorrell*, 548 U.S. 230, 241
11 (2006) (same). The Court identified those interests as the freedoms of “political expression” and
12 “political association.” *Buckley*, 424 U.S. at 15. Contributions serve as “a general expression of
13 support for the candidate and his views.” *Id.* at 21. “Making a contribution, like joining a political
14 party, serves to affiliate a person with a candidate.” *Buckley*, 424 U.S. at 22. Contribution limits
15 are thus only permissible if the government demonstrates that the limits are “closely drawn” to
16 match a “sufficiently important interest.” *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at
17 25).

18 69. ECCO’s complete ban on contributions prior to 12 months before the primary
19 impermissibly burdens and chills the speech and associational rights of Mr. Nienstedt and other
20 contributors, as well as Mr. Thalheimer and other candidates. ECCO § 27.2938(a) is not closely
21 drawn to a sufficiently important interest, and so cannot pass constitutional scrutiny. It is also
22 unconstitutionally overbroad, burdening substantially more associational and speech rights than
23 are justified by the proffered anti-corruption interest. ECCO § 27.2938(a) is therefore
24 unconstitutional, both facially and as applied to the plaintiffs.

Count 3
ECCO § 27.2935(a)
\$500 Total Limit on Contributions in Support of Candidates

70. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

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

72. Mr. Nienstedt intends to contribute to candidate(s) of his choice for city council in the 2010 election cycle. He would like to make a contribution greater than \$500 to the candidate(s) of his choice, and would do so, but for ECCO § 27.2935.

73. Mr. Nienstedt would also like to contribute to a committee that makes independent expenditures in support of the candidates of his choice. However, because he intends to contribute the maximum amount allowed to the candidates (and would like to contribute more than that, if allowed by law to do so), he cannot contribute to committees that support those candidates. This is because ECCO § 27.2935(a) makes it unlawful for him to contribute more than \$500 total to candidates and committees that support them. Thus, if he gives \$500 to a candidate, as he is allowed by law to do, he cannot contribute anything to committees that support that candidate.

74. Plaintiff Phil Thalheimer is considering a run for City Council in 2012. He wants to begin soliciting and accepting contributions to place in account as he prepares for this contingency. He would like to solicit and accept contributions greater than the \$500 limit imposed by ECCO § 27.2935, and would do so, but for the law.

75. Mr. Thalheimer is an experienced candidate, who has run competitively for election to city council before.

76. If the council districts are not re-drawn, Mr. Thalheimer will likely be running

1 against an incumbent. Based on his past experience, Mr. Thalheimer believes that the contribution
 2 limits imposed by ECCO § 27.2935 will prevent him from mounting an effective campaign against
 3 an incumbent, and thus are “too great” of a “constitutional risk[] to the democratic electoral
 4 process.” *Randall*, 548 U.S. at 248–49.

5 77. Contribution limits must be “closely drawn” to a “sufficiently important interest,”
 6 or else they abridge First Amendment freedoms. *McConnell v. FEC*, 540 U.S. 93, 231 (2003);
 7 *Buckley* 424 U.S. at 25.

8 78. The only interest so far found sufficiently important to justify limits on contributions
 9 to candidates and their campaigns is the interest in preventing corruption and the appearance of
 10 corruption associated with *large* contributions. *McConnell*, 540 U.S. at 138; *Nixon v. Shrink Mo.*
 11 *Gov't. PAC*, 528 U.S. 377, 393 (2000) (“*Shrink PAC*”); *Federal Election Comm'n v. National Right*
 12 *to Work Comm.*, 459 U.S. 197, 198–199, and n. 1 (1982); *Buckley*, 424 U.S. at 26–27. There is no
 13 corruption interest in San Diego that would justify limits this low. One of the commissioners has
 14 suggested that the Commission really does not know the “basis” for contribution limits in San
 15 Diego.¹⁶

16 79. Another commissioner suggested that limits were needed because, without them,
 17 there would be an “appearance” of corruption.¹⁷

18 80. The Ethics Commission discussed what the appropriate contribution limit should be,
 19 in order to eliminate the appearance of corruption while still allowing candidates to amass the
 20 resources necessary to mount effective campaigns, from at least November 2007 until taking a vote
 21
 22
 23

24
 25 ¹⁶City of San Diego Ethics Commission, Minutes for Meeting of Thursday, May 8, 2008, at
 26 4 (*available at* <http://www.sandiego.gov/ethics/minutes/080508.pdf>) (last visited December 15,
 2009) (attached as Exhibit 5).

27 ¹⁷*Id.* at 5.

1 in May 2008.¹⁸ They heard testimony concerning what limit would accomplish their goals.¹⁹

2 81. The Ethics Commission voted in May, 2008 to recommend contribution limits of
3 \$1,000 to the City Council for approval. The motion carried, with four of the six commissioners
4 who voted voting in favor.²⁰

5 82. Thus, the body that is responsible “to monitor, administer, and enforce the City’s
6 governmental ethics laws[and] propose new governmental ethics law reforms”²¹ considered
7 testimony and debated for at least 7 months what the appropriate contribution limit should be. And,
8 that body determined that a \$1,000 contribution limit would eliminate the appearance of corruption.

9 83. The \$500 contribution limit imposed by ECCO § 27.2935 is thus not closely drawn
10 to a sufficiently important interest, but is overinclusive (reaching more speech than the interest will
11 justify). It is also constitutionally overbroad, because it burdens “substantially” more associational
12 and speech rights than are justified by the proffered anti-corruption interest. *Broadrick v. Oklahoma*,
13 413 U.S. 601, 612 (1973).

14 84. When limits are too low, as they are here, there must be some *special* justification
15 for them if they are to have the potentiality of being upheld as constitutional. *Randall*, 548 U.S. at
16 261. Yet, there is no justification, special or otherwise, for the low limits imposed by ECCO §
17 27.2935.

18 85. The limits in ECCO § 27.2935 also mute the voice of political parties like RPSD,
19 since they completely ban contributions from political parties to their candidates. The Court in
20 *Randall* found the limits unconstitutional when they merely limited the political parties to the *same*

22 ¹⁸*Id.* at 4.

23 ¹⁹*Id.* at 5.

24 ²⁰*Id.* at 6.

25
26 ²¹San Diego Municipal Code, Ch. 2, Art. 6, Div. 4, § 26.0401 (*available at*
27 <http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art06Division04.pdf>) (last visited
December 15, 2009).

1 *contribution amount* as individuals. *Id.* at 256. ECCO § 27.2935, on the other hand, *bans* party
2 contributions altogether.

3 86. The limits also impede the ability of challengers like Mr. Thalheimer to mount
4 effective campaigns against incumbents.

5 87. The limits therefore fail the so-called *Randall*-analysis set down by the Court in
6 *Randall v. Sorrell*, and should be held unconstitutional.

7 88. The limits also impermissibly limit the amount one may contribute to independent
8 expenditure committees. One may only contribute \$500, total, to candidates and committees that
9 support them. Thus, if Mr. Nienstedt supports candidate X, and gives him the full amount allowed,
10 he may not then make a contribution to a committee for the purpose of making independent
11 expenditures in support of candidate X.

12 89. The regulation of contributions to independent expenditure committees “does not
13 fit within the anti-corruption rationale, which constitutes the sole basis for regulating campaign
14 contributions and expenditures.” *Emily’s List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009). Indeed,
15 “[T]he Court has *never* held that it is constitutional to apply contribution limits to political
16 committees that make solely independent expenditures.” *North Carolina Right to Life, Inc. v. Leake*,
17 525 F.3d 274 (4th Cir.2008) (*NCRL III*). *See also Emily’s List*, 581 F.3d at 11 (quoting with
18 approval *NCRL III*).

19 90. Thus, the contribution limits imposed by ECCO § 27.2935 simply cannot stand.
20 They impermissibly burden and chill the speech and associational rights of Mr. Nienstedt and other
21 contributors, as well as Mr. Thalheimer and other candidates, as well as Lincoln Club and other
22 committees that make independent expenditures. They are not closely drawn to a sufficiently
23 important interest, and so cannot pass constitutional scrutiny. They are also overbroad, burdening
24 substantially more associational and speech rights than are justified by the proffered anti-corruption
25 interest.

26 91. Even if the contribution limits imposed by ECCO § 27.2935 were not overbroad, and
27 were closely drawn to a sufficiently important interest, they would still fail constitutional scrutiny

1 because they “impose burdens upon First Amendment interests that (when viewed in light of the
 2 statute’s legitimate objectives) are disproportionately severe.” *Randall*, 548 U.S. at 237. They both
 3 prevent candidates from amassing the resources necessary to mount an effective campaign and also
 4 magnify the advantages of incumbency to the point where they put challengers to a significant
 5 disadvantage.

6 92. ECCO § 27.2935 is therefore unconstitutional, both facially and as applied to the
 7 plaintiffs.

8 **Count 4**
 9 **ECCO §§ 27.2950 and 27.2951**
 10 **Ban on Political Party Contributions to Their Candidates**

11 93. Plaintiffs re-allege and incorporate by reference all of the allegations contained in
 12 all of the preceding paragraphs.

13 94. RPSD would like to give financial support to Republican candidates for local office
 14 in San Diego, and make coordinated expenditures with their candidates, and would do so, but for
 15 ECCO § 27.2950, which bans contributions from organizations (including political parties) to
 16 candidates, and ECCO § 27.2951, which makes it unlawful for the RPSD to write a check from its
 17 account for a contribution.

18 95. The Supreme Court has recognized that when limits on what a party may contribute
 19 to its own candidates are too severe, the right to associate in a political party is threatened. *Randall*,
 20 548 U.S. at 256. Such limits “severely limit the ability of a party to assist its candidates’ campaigns
 21 by engaging in coordinated spending . . . [a]nd, to an unusual degree, [] discourage those who wish
 22 to contribute small amounts of money to a party” *Id.* at 257. Severe limits on the
 23 contributions of political parties to their own candidates “reduce the voice of political parties . . .
 24 to a whisper.” *Id.* at 259.

25 96. The limits in *Randall* were held unconstitutional when the political parties were
 26 limited to contributing the same amount as an individual could. *Id.* at 256. ECCO § 27.2935, on
 27 the other hand, *bans* party contributions altogether.

97. ECCO § 27.2950's prohibition on contributions from political parties to their own candidates thus impermissibly burdens the speech and associational rights of RPSD and others similarly situated to them. It is not closely drawn to a sufficiently important interest, and so cannot pass constitutional scrutiny. It is also unconstitutionally overbroad, burdening substantially more associational and speech rights than are justified by the proffered anti-corruption interest.

98. The ban on contributions from political parties to their own candidates contained in ECCO §§ 27.2950 and 27.2951 is therefore unconstitutional, both facially and as applied to the plaintiffs.

Count 5
ECCO §§ 27.2950 and 27.2951
Ban on Soliciting and Accepting Soliciting Contributions from Non-Individuals

99. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

100. In addition to barring political parties from contributing to their own candidates, ECCO § 27.2950 also makes it unlawful for candidates like Mr. Thalheimer to solicit or accept contributions from any person other than an individual.

101. Mr. Thalheimer wants to solicit contributions from organizational entities such as partnerships, limited liability partnerships, sole proprietorships, and trusts. Mr. Thalheimer also wants to accept any contributions that are offered from such non-human entities. He would both solicit and accept contributions from non-human entities, but for ECCO §§ 27.2950 and 27.2951, which make it unlawful both for him to solicit and accept such contributions, and for the business entities to offer them.

102. The Supreme Court has recognized that “the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.” *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500–01 (1985). This is because state law grants corporations special advantages, such as “favorable treatment of the accumulation and distribution of assets” which “enhance their ability

1 to attract capital and deploy their resources.” *Austin v. Michigan Chamber of Commerce*, 494 U.S.
 2 652, 658–59 (1990). However, the Court has affirmed that “the mere fact that corporations may
 3 accumulate large amounts of wealth” is not sufficient justification for restricting the ability of
 4 corporations to participate in the political process; rather, the justification comes from “the unique
 5 state-conferred corporate structure that facilitates the amassing of large treasuries.” *Id.* at 660.

6 103. Sole proprietorships, partnerships, limited liability partnerships, limited liability
 7 corporations taxed as partnerships and trusts do not possess the “unique state-conferred corporate
 8 structure” that the Supreme Court has found justifies restricting corporate contributions to
 9 candidates.

10 104. The complete ban on soliciting and accepting contributions from organizational
 11 entities is not closely drawn to a sufficiently important interest, and so cannot pass the applicable
 12 scrutiny. It is also overbroad.

13 105. The ban on soliciting and accepting contributions from non-human and business-
 14 entities contained in ECCO §§ 27.2950 and 27.2951 is therefore unconstitutional, both facially and
 15 as applied to the plaintiffs.

16 **Count 6**
 17 **ECCO §§ 27.2936**
 18 **Expenditure Limits for Independent Expenditures Made by Committees**

19 106. Plaintiffs re-allege and incorporate by reference all of the allegations contained in
 20 all of the preceding paragraphs.

21 107. ECCO § 27.2903 defines a *general purpose recipient* committee as “any
 22 [individual/organization] that receives contributions totaling \$1,000 or more during a calendar year
 23 to support or oppose more than one candidate or measure,” and “is not controlled by a candidate.”

24 108. Lincoln Club meets the definitional requirements for a general purpose recipient
 25 committee: It solicits and receives contributions totaling at least \$1,000, uses some of the money
 26 it receives to make independent expenditures to support or oppose more than one candidate or
 27 measure, and is not controlled by a candidate.

1 109. ECCO § 27.2936(a) allows general purpose recipient committees like Lincoln Club
2 to participate in City candidate elections by using contributions from individuals, “subject to the
3 contribution limits established by this section.”

4 110. ECCO § 27.2936(b) makes it “unlawful” for general purpose recipient committees
5 like Lincoln Club “to use a contribution for the purpose of supporting or opposing a candidate
6 unless the contribution is attributable to an individual in an amount that does not exceed \$500 per
7 candidate per election.”

8 111. Lincoln Club wants to make independent expenditures in support of candidates in
9 amounts greater than can be attributed “to an individual in an amount that does not exceed \$500 per
10 candidate per election,” as ECCO § 27.2936(b) requires. It would do so, but for the law.

11 112. Further, Lincoln Club is even more limited in the expenditures they may make than
12 what might at first appear to be the case. For instance, if Contributor A gives \$100 to Lincoln Club,
13 and Contributor B gives \$900 to Lincoln Club, they are not allowed to spend the full amount for
14 independent expenditures, even though \$1000 divided by 2 equals \$500 that *could* be attributed to
15 each of their 2 contributors. Rather, because Contributor A did not actually contribute \$500, they
16 cannot attribute any money to him beyond the \$100 he contributed. So, Lincoln Club would only
17 be able to spend \$600 on independent expenditures for the candidate of their choice (the \$100
18 contribution of Contributor A, and the first \$500 contributed by Contributor B).

19 113. Advocacy accomplished by means of independent expenditures is political speech
20 that is protected by the First Amendment. *Buckley*, 424 U.S. at 48. Such speech is at the very *core*
21 of the First Amendment. *F.E.C. v. National Conservative Political Action Committee*, 470 U.S.
22 480, 496 (1985) (“*NCPAC*”) (“There can be no doubt that the [independent] expenditures at issue
23 in this case produce speech at the core of the First Amendment.”). A limit on independent
24 expenditures therefore “heavily burdens *core* First Amendment expression.” *Buckley*, 424 U.S. at
25 48 (emphasis added).

26 114. Expenditure limits are subject to strict scrutiny; that is, they must be narrowly
27 tailored to a compelling interest. *See, e.g., F.E.C. v. Colorado Republican Federal Campaign*

1 *Committee*, 533 U.S. 431, 440 (2001) (*Col. Rep. II*); *NCPAC*, 470 U.S. at 496. *See also Lincoln*
 2 *Club of Orange County v. City of Irvine, CA*, 292 F.3d 934, 937 (9th Cir. 2002).

3 115. The Supreme Court has repeatedly found independent expenditure limits
 4 unconstitutional, because they cannot pass strict scrutiny. *Buckley*, 424 U.S. at 51, *NCPAC*, 470
 5 U.S. at 501, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 608 & 618
 6 (1996) (*Col. Rep. I*).

7 116. The expenditure limit on committees making independent expenditures imposed by
 8 ECCO § 27.2936(a) and (b) impermissibly burdens and chills the speech rights of Lincoln Club,
 9 and cannot pass the strict scrutiny requirement. It is also unconstitutionally overbroad, burdening
 10 substantially more associational and speech rights than are justified by the proffered anti-corruption
 11 interest.

12 117. ECCO § 27.2936 is therefore unconstitutional, both facially and as applied to the
 13 plaintiffs.

14 **Count 7**
 15 **ECCO §§ 27.2936, 27.2951**
 16 **Ban on Using Funds From Trusts and Organizations For Independent Expenditures**

17 118. Plaintiffs re-allege and incorporate by reference all of the allegations contained in
 18 all of the preceding paragraphs.

19 119. ECCO § 27.2936(b) makes it unlawful for committees to spend contributions for
 20 independent expenditures, unless the contribution is attributable to an *individual*.

21 120. Further, ECCO § 27.2951(a) makes it unlawful for committees to accept
 22 contributions “drawn against a checking account or credit card account unless such account belongs
 23 to one or more individuals in their individual capacity,” while ECCO § 27.2951(c) clarifies that this
 24 only applies to contributions the committee uses to participate in city candidate elections, including
 25 making independent expenditures in support of, or opposition to, candidates.

26 121. Thus, Lincoln Club and ABC PAC cannot use contributions from trusts, corporations
 27 and other business entities to support or oppose the candidates of their choice, nor can they accept

1 such contributions if they are to be used for independent expenditures.

2 122. Lincoln Club still makes independent expenditures from the contributions they
3 receive from individuals. However, they want to also use contributions received from non-
4 individuals, such as trusts, corporations and other business entities, for their independent
5 expenditures in support of, or opposition to, candidates of their choice. They would do so, but for
6 ECCO § 27.2936(b).

7 123. ABC PAC receives the bulk of its contributions from businesses. Consequently, it
8 does not currently make independent expenditures in support of, or opposition to, candidates of its
9 choice. ABC PAC wants to make such expenditures, and would do so, but for ECCO §
10 27.2936(b)'s prohibition against using money that cannot be attributed to individuals.

11 124. Under current Supreme Court precedent, the government may limit for-prohibit
12 corporate independent expenditures. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652
13 (1990). But, the Supreme Court is currently considering whether to overrule *Austin* (and
14 *McConnell*'s reliance upon it) to the extent *Austin* permitted the Government to limit for-profit
15 corporations' and unions' expenditures.²²

16 125. If the Supreme Court overturns *Austin* so that governments may not constitutionally
17 limit the amount of money corporations may spend for independent expenditures, then by extension
18 ECCO §§ 27.2936(b) and 27.2951(a), which prohibit independent expenditure committees from
19 using corporate and other business-entity funds to make independent expenditures, should likewise
20 be held unconstitutional.

21 ²²See Order 08-205, *Citizens United v. Federal Election Commission* (June 29, 2009),
22 available at <http://www.supremecourtus.gov/orders/courtorders/062909zr.pdf> (last visited December
23 8, 2009). The Order reads in pertinent part as follows:

24 This case is restored to the calendar for reargument. The parties are directed to file
25 supplemental briefs addressing the following question: For the proper disposition of
26 this case, should the Court overrule either or both *Austin v. Michigan Chamber of*
27 *Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election*
Comm'n, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of
the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?

1 126. Even if the Supreme Court does not overrule *Austin*, ECCO §§ 27.2936(b) and
2 27.2951(a) still are not closely drawn to a sufficiently important interest, but are overinclusive in
3 that they burden more speech and associational rights than can be justified by the City's interest.

4 127. ECCO §§ 27.2936(b) and 27.2951(a) are also overbroad—that is, they burden
5 substantially more associational and speech rights than are justified by any compelling interest.
6 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

7 128. The Supreme Court has recognized that “the compelling governmental interest in
8 preventing corruption support[s] the restriction of the influence of political war chests funneled
9 through the corporate form.” *FEC v. National Conservative Political Action Committee*, 470 U.S.
10 480, 500–01 (1985). This is because state law grants corporations special advantages, such as
11 “favorable treatment of the accumulation and distribution of assets” which “enhance their ability
12 to attract capital and deploy their resources.” *Austin v. Michigan Chamber of Commerce*, 494 U.S.
13 652, 658–59 (1990). However, the Court has affirmed that “the mere fact that corporations may
14 accumulate large amounts of wealth” is not sufficient justification for restricting the ability of
15 corporations to participate in the political process; rather, the justification comes from “the unique
16 state-conferred corporate structure that facilitates the amassing of large treasuries.” *Id.* at 660.

17 129. Trusts, sole proprietorships, partnerships, limited liability partnerships, limited
18 liability corporations taxed as partnerships, and APCs do not possess the “unique state-conferred
19 corporate structure” that the Supreme Court has found justifies restricting corporate contributions
20 to candidates.

21 130. The complete ban on using contributions from non-human and business-entities in
22 order to make independent expenditures thus impermissibly burdens and chills the speech rights
23 of Lincoln Club and ABC PAC and cannot pass the applicable scrutiny. They are also overbroad.
24 ECCO §§ 27.2936(b) and 27.2951(a) should therefore be held unconstitutional, both facially and
25 as applied to the plaintiffs.

Count 8
ECCO § 27.2934(b)

\$1,000 Limit on Contributions from Political Parties to Candidates

131. Plaintiffs re-allege and incorporate by reference all of the allegations contained in

all of the preceding paragraphs.

132. In this Count, the Plaintiffs challenge ECCO 27.2934(b), which provides:

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

133. The First Amendment requires that citizens be allowed to “pool their resources and make the advocacy more effective” through contributing to political parties. *Fed. Election Comm’n v. Colorado Republican Fed. Campaign Committee*, 533 U.S. 431, 453 (2001) (“Colorado II”) (*quoting Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 637 (1996) (“Colorado I”) (Thomas, J., concurring in judgment and dissenting in part)). Political parties must therefore be allowed to make contributions that are sufficiently robust, when compared with contributions by others, to ensure that the right to political association within political parties and the special role of the political party in American society is not threatened. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (explaining that political parties exist to allow citizens to band together to elect candidates); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (same). **Federal law** recognizes this principle; for example, it allows individuals to make contributions of \$2,400 to Senate candidates for the 2010 election,²³

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

1 while allowing political parties to make direct cash contributions of \$42,600²⁴—almost 18 times
 2 the individual limit. Plus, political parties also get to make coordinated expenditures with their
 3 candidates, above the contribution limits, in amounts that vary according to the population of the
 4 state in question but range from \$87,000 for Senate candidates in Alaska and Delaware to
 5 \$2,395,400 for Senate candidates in California.²⁵ Thus, the total amount political parties may
 6 contribute to their candidates for Senate ranges from \$129,600 to \$2,438,000, which is between 54
 7 and 1,015 times the \$2,400 that individuals may contribute. **California law** also recognizes this
 8 principle; for example, it allows individuals to contribute \$3,900 to candidates for state legislature,
 9 while allowing political parties to make *unlimited* contributions to their candidates.²⁶

10 134. San Diego law, however, has failed to recognize the principle that political party
 11 contributions to candidates must be sufficiently robust, as compared with individual contributions
 12 to candidates, to ensure that the special role of political parties is not threatened. The City's \$1,000
 13 party contribution limit is but twice the individual contribution limit. This \$1,000 party contribution
 14 limit is sufficiently low to "threaten[] harm to . . . the right to associate in a political party[,]"
 15 *Randall*, 548 U.S. at 256, "severely limit the ability of a party to assist its candidates' campaigns
 16 by engaging in coordinated spending[,] *id.* at 257, "discourage those who wish to contribute small
 17 amounts of money to a party," *id.*, and "severely inhibit political parties from using contributions
 18 by small donors to provide meaningful assistance to any individual candidate," *id.* at 258. The limit
 19 is "so radical in effect as to render political association ineffective, drive the sound of a candidate's
 20

21 ²⁴2 U.S.C. 441a(h) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See*
 22 "Contribution Limits for 2009-10," *available at* <http://www.fec.gov/info/contriblimits0910.pdf> (*last*
 23 *visited* July 29, 2010).

24 ²⁵2 U.S.C. 441a(d)(3)(A) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See*
 25 "Coordinated Party Expenditure Limits for 2010 Senate Nominees," *available at*
 26 http://www.fec.gov/info/charts_441ad_2010.shtml (*last visited* July 29, 2010).

27 ²⁶*See* California Fair Political Practices Commission, "California Contribution Limits
 28 Fast Facts," *available at* <http://www.fppc.ca.gov/bulletin/Contriblimit2008update.pdf-#search=%22contribution%20limits%22> (*last visited* July 29, 2010).

voice below the level of notice, and render contributions pointless.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000) (*Shrink*). It therefore “undermine[s] . . . the potential for robust and effective discussion of candidates and campaign issues by . . . political parties.” *Buckley*, 424 U.S. at 29.

135. The challenged \$1,000 party contribution limit is “too low and too strict to survive First Amendment scrutiny.” *Randall*, 548 U.S. at 248. It is therefore unconstitutional as applied to the SDRP, and on its face, because it violates First Amendment free speech and association guarantees.

Count 9
ECCO § 27.2936(b)
Party Contribution \$500 Attribution Requirement

136. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

137. In this Count, the Plaintiffs challenge ECCO § 27.2936(b), which forbids all general purpose recipient committees²⁷ 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. The Ethics Commission has authoritatively interpreted this provision as applying to contributions to candidates made by political parties. (*See City of San Diego Ethics Commission Memorandum* (June 8, 2010) (attached as Exh. 6.)) This \$500 attribution requirement functions as a limit on the amount of money that political parties may raise and use to fund their contributions to, and coordinated expenditures with, their candidates.

138. Because of the special role political parties fulfill in our society and their special purpose as a mechanism for protected political association (*see supra* Count 8), limits on contributions to political parties must be sufficiently robust, when compared with limits on other’s

²⁷Political parties qualify as general purpose recipient committees, which are defined as “any [individual/organization] that receives contributions totaling \$1,000 or more during a calendar year to support or oppose more than one candidate or measure,” and “is not controlled by a candidate.” ECCO § 27.2903.

contributions, to allow citizens to band together in political parties to effectively elect candidates. When limits on contributions to political parties are too low, they “threaten[] harm to . . . the right to associate in a political party[.]” *Randall*, 548 U.S. at 256, and “severely limit the ability of a party to assist its candidates’ campaigns by engaging in coordinated spending[.]” *id.* at 257. **Federal law** recognizes this principle. For instance, an individual may make a contribution of \$2,400 to candidates for federal office in 2010,²⁸ but may make a contribution of \$30,400 per year to national political parties,²⁹ and the political parties can use the full amount of that contribution to fund its contributions and coordinated expenditures, subject to the limits discussed in Count 8. **California law** likewise recognizes this principle. For example, it allows individuals to make contributions of \$3,900 to candidates for the state legislature, but unlimited contributions to the state political party, which may then use up to \$32,400 of the person’s contribution to support state candidates.³⁰

139. San Diego law, however, has failed to recognize the principle that limits on contributions to political parties must be sufficiently robust, as compared with individual contributions to candidates, to ensure that the special role of political parties is not threatened. The \$500 attribution requirement is *identical* to what an individual may contribute to a candidate. This renders it sufficiently low to “threaten[] harm to . . . the right to associate in a political party[.]” *Randall*, 548 U.S. at 256, “severely limit the ability of a party to assist its candidates’ campaigns by engaging in coordinated spending[.]” *id.* at 257, “discourage those who wish to contribute small amounts of money to a party,” *id.*, and “severely inhibit political parties from using contributions

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

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

³⁰See California Fair Political Practices Commission, “California Contribution Limits Fast Facts,” available at <http://www.fppc.ca.gov/bulletin/Contriblimit2008update.pdf-#search=%22contribution%20limits%22> (last visited July 29, 2010).

1 by small donors to provide meaningful assistance to any individual candidate,” *id.* at 258. The limit
 2 is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s
 3 voice below the level of notice, and render contributions pointless.” *Nixon v. Shrink Missouri*
 4 *Government PAC*, 528 U.S. 377, 397 (2000) (*Shrink*). It therefore “undermine[s] . . . the potential
 5 for robust and effective discussion of candidates and campaign issues by . . . political parties.”
 6 *Buckley*, 424 U.S. at 29.

7 140. The \$500 attribution requirement also unconstitutionally restricts the contributions
 8 the political parties may use to fund their contributions to their candidates to that which comes
 9 *individuals*, thereby banning corporations, labor organizations and other entities from contributing
 10 to political parties for the purpose of supporting candidates. This ban on corporate contributions
 11 subverts the holdings in *Citizens United* that (1) the only constitutionally cognizable interest in
 12 limiting political speech and association is the anticorruption interest, *Citizens United v. Fed.*
 13 *Election Comm’n*, 558 U.S. ___, 130 S.Ct. 876, 901 and 913 (2010); (2) the corporate form poses
 14 no corruption risk, *id.* at 909; and (3) a complete ban on corporate political speech is not
 15 permissible, *id.* at 911. It also runs afoul of *Buckley*’s holding that *limitations* on contributions are
 16 permissible *precisely because* they still “permit[] the symbolic expression of support evidenced by
 17 a contribution[,]” *Buckley*, 424 U.S. at 21, and because *limitations* allow persons to “assist to
 18 a limited but nonetheless substantial extent in supporting candidates and committees with financial
 19 resources[,]” *id.* at 28. Finally, the attribution requirement’s ban on corporate and entity
 20 contributions does not comport with the one case, *Beaumont*, which upheld a ban on direct
 21 contributions from corporations and labor unions, because the law allowed those entities to make
 22 contributions—including contributions to political parties to fund their contributions to
 23 candidates—through PACs. *FEC v. Beaumont*, 539 U.S. 146, 162-63 (2003).³¹

24
 25 ³¹The Corporations believe *Beaumont* should be revisited and overruled in light of *Citizens*.
 26 *Beaumont*’s holding that a ban on general-fund corporate contributions is permissible was based on
 27 its belief that the PAC-option allowed for corporate expressive activity. 539 U.S. at 162-63. But
 28 *Citizens* held that a PAC is a separate legal entity from the corporation that creates it, so the PAC-
 option *cannot* allow for corporate expressive activity. 130 S.Ct. at 897. Further, *Beaumont* found

141. The challenged \$500 attribution requirement is “too low and too strict to survive First Amendment scrutiny.” *Randall*, 548 U.S. at 248. It is therefore unconstitutional as applied to the SDRP, and on its face, because it violates First Amendment free speech and association guarantees.

Prayer for Relief

WHEREFORE, the Plaintiffs respectfully ask this Court for the following relief:

1. Declare that ECCO § 27.2938—which the Commission construes and enforces as a ban on candidates using their own money in furtherance of their campaigns more than a year in advance of the primary election—is unconstitutional, both facially and as applied to the plaintiffs, and enjoin its enforcement. In the alternative, if the Court finds that ECCO § 27.2938 does not actually prohibit candidates from using their own money in furtherance of their campaigns more than a year in advance of the primary election, declare the Commission’s enforcement position unconstitutional, both facially and as applied to the plaintiffs, and enjoin them from implementing it against candidates using their own money.

2. Declare that ECCO 27.2938—which prohibits candidates from soliciting, accepting, and spending contributions, and donors from contributing, more than a year before the primary—is unconstitutional, both facially and as applied to the plaintiffs, and enjoin its enforcement.

3. Declare that ECCO § 27.2935—which imposes a \$500 limit on the amount one may contribute to a candidate, and also imposes a \$500 total amount that one may use to support a candidate (including earmarked contributions to independent expenditure committees)—is unconstitutional, both facially and as applied to the plaintiffs, and enjoin its enforcement.

4. Declare that ECCO §§ 27.2950's and 27.2951's ban on political parties making

three interests supporting the ban, two of which were invalidated, and one discredited, by *Citizens*. Compare *Beaumont*, 539 U.S. at 154 (antidistortion and shareholder-protection interests), with *Citizens*, 130 S.Ct. at 903-08 (invalidating antidistortion interest), 911 (invalidating shareholder-protection interest). Compare also *Beaumont*, 539 U.S. at 155 (anticircumvention interest), with *Citizens*, 130 S.Ct. at 912 (regulations are always underinclusive to the anticircumvention interest). *Beaumont* thus rests on a now-rejected premise (that PACs can engage in expressive activity for the organization that creates them) and discredited reasoning.

1 contributions to their candidates is unconstitutional, both facially and as applied to the plaintiffs,
2 and enjoin its enforcement.

3 **5.** Declare that ECCO § 27.2950's ban on soliciting and accepting contributions from
4 non-individuals, and ECCO § 27.2951's ban on accepting contributions that are not drawn from an
5 account belonging to an individual unconstitutional, is unconstitutional, both facially and as applied
6 to the plaintiffs, and enjoin their enforcement.

7 **6.** Declare that ECCO § 27.2936(b), which imposes limits on committees' independent
8 expenditures and contributions from political parties, by requiring them to be attributable to
9 contributions from individuals of \$500 or less, is unconstitutional, both facially and as applied to
10 the plaintiffs, and enjoin its enforcement.

11 **7.** Declare that ECCO § 27.2936(b), which requires that all money used to make
12 independent expenditures be attributable to *individuals*, is unconstitutional, both facially and as
13 applied to the plaintiffs, and enjoin its enforcement.

14 **8.** Declare that ECCO § 27.2934(b), which imposes a \$1,000 limit on contributions
15 from political parties to their candidates, is unconstitutional both facially and as applied to the
16 plaintiffs, and enjoin its enforcement.

17 **9.** Grant costs and attorneys fees pursuant to any applicable statute or authority and
18 especially 42 U.S.C. § 1988; and

19 **10.** Any other relief this Court in its discretion deems just and appropriate.
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August 9, 2010

Respectfully Submitted,

s/ Joe La Rue

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Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel for Plaintiffs

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

Verification

I, William Baber, declare as follows:

1. I am an attorney, and am over eighteen years of age.
2. I am the Director of Government Affairs for ABC PAC.
3. I have personal knowledge of ABC PAC and its activities, including those set out in the foregoing Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
4. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning ABC PAC and its past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on July 27, 2010.




William Baber,
Director of Government Affairs
Associated Builders & Contractors PAC
sponsored by Associated Builders &
Contractors, Inc. San Diego Chapter
13825 Kirkham Way
Poway CA 92064

I, C. April Boling, declare as follows:

1. I am over 18 years of age.
2. I am the Treasurer of the Republican Party of San Diego County.
3. I have personal knowledge of the Republican Party of San Diego County and its activities, including those set out in the foregoing Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
4. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning the Republican Party of San Diego County and its past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on July 28, 2010.



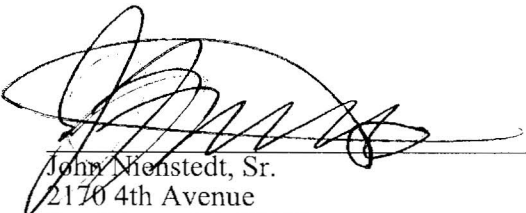
C. April Boling,
Treasurer
Republican Party of San Diego County
5703 Oberlin Drive, Suite 107
San Diego, CA 92121

Verification

I, John Nienstedt, Sr., declare as follows:

1. I am over 18 years of age.
2. If called upon to testify, I would competently testify as to the matters concerning me stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on July 29, 2010.



John Nienstedt, Sr.
2170 4th Avenue
San Diego, CA 92101

Verification

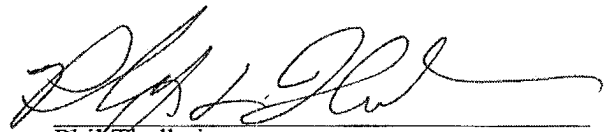
I, Phil Thalheimer, declare as follows:

1. I am over 18 years of age.

2. If called upon to testify, I would competently testify as to the matters concerning me stated herein.

3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on July 27, 2010.



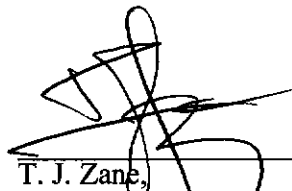
Phil Thalheimer
3924 Arroyo Sorrento Rd
San Diego, CA 92130

Verification

I, T. J. Zane, declare as follows:

1. I am over 18 years of age.
2. I am the Executive Director of the Lincoln Club of San Diego County.
3. I have personal knowledge of the Lincoln Club of San Diego County and its activities, including those set out in the foregoing Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
4. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Verified Complaint concerning the Lincoln Club of San Diego County and its past and intended activities are true and correct to the best of my knowledge and understanding.

Executed on July 19, 2010.



T. J. Zane,
President & CEO
The Lincoln Club of San Diego County
7185 Navajo Road, Suite P
San Diego, CA 92119