Docket No. 10-55322 (L), 10-55324, 10-55434

In the

United States Court of Appeals

For the

Ninth Circuit

PHIL THALHEIMER, ASSOCIATED BUILDERS & CONTRACTORS PAC,
Sponsored by Associated Builders and Contractors, Inc., San Diego Chapter,
LINCOLN CLUB OF SAN DIEGO COUNTY,
REPUBLICAN PARTY OF SAN DIEGO COUNTY and JOHN NIENSTEDT, SR.,

Plaintiffs-Appellees / Cross-Appellants,

v.

CITY OF SAN DIEGO,

Defendant-Appellant / Cross-Appellee.

Appeal from a Decision of the United States District Court for the Southern District of California, No. 09-CV-02862 · Honorable Irma E. Gonzalez

SECOND BRIEF ON CROSS-APPEAL

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Corporate Disclosure Statement

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None.

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Introduction

The City of San Diego ("the City") has banned its residents, political parties, and businesses from exercising their First Amendment right to engage in political speech and association through certain forms of contributions and independent expenditures. It cannot constitutionally do so.

The First Amendment guarantees all Americans the right to speak and associate when it commands that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend I.[1] Despite this imperative, government restricts speech. For its speech restrictions to be constitutional, the government must demonstrate that it has a constitutionally permissible interest in regulating First Amendment activity, and that the regulation is constitutionally tailored to that interest. *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387-88 (2000). San Diego has not meet this burden.

This case involves a coalition of individuals and associations ("the Coalition") seeking to engage in political speech and association. Phil Thalheimer wants to spend his own money right now to announce his possible candidacy for city council. He also wants to solicit and spend contributions from both

[1]The First Amendment guarantees not only freedom to speak, but also freedom to associate. *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). It has been incorporated to apply to State and local governments through the Fourteenth Amendment. *Gitlow v. People of State of New York,* 268 U.S. 652, 666 (1925).

individuals and non-individuals, right now, for the same purpose. But the City's laws prevent Mr. Thalheimer from soliciting or spending any money—including his own—more than 12 months before the primary election. He cannot solicit or spend any money, including his own, prior to June, 2011. Nor can he solicit, accept, or spend contributions from non-individuals at any time.

The City's laws also prevent the Republican Party of San Diego (RPSD) from making contributions to its own candidates. They severely hamper the Lincoln Club and Associated Builders and Contractors PAC in their efforts to make independent expenditures by banning spending money derived from non-individuals' contributions or contributions in excess of $500. And the City's laws keep John Neinstedt from making contributions to candidates and independent expenditure committees in the amounts he would like.

The Coalition wants to exercise the free speech and associational rights guaranteed its members under the First Amendment and seeks preliminary injunctive relief.

Jurisdictional Statement

This action arises under 42 U.S.C. § 1983, 42 U.S.C. § 1973 et. seq., and the First and Fourteenth Amendments to the United States Constitution. It was brought by the coalition, who seek to exercise their First Amendment rights. The

district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). It granted in part and denied in part the Coalition's Preliminary Injunction Motion on February, 16, 2010. (SER 26.)[2]

The City timely appealed under F.R.A.P. 4(a)(1)(A) on March 5, 2010. (SER 176, Doc. 49.) The Coalition timely cross-appealed under F.R.A.P. 4(a)(3) on March 19, 2010 (SER 39-40; 175, Doc. 64.) This Court has jurisdiction over appeals of preliminary injunction orders under 28 U.S.C. §§ 1292(a)(1) and 1294(1).

Issues

I. Whether the district court erred in declining to preliminarily enjoin the contribution window by misapplying Supreme Court precedent and also applying the correct legal standard in an implausible and illogical way. (SER 74, ¶ 1; 26,¶ 3.)

II. Whether the district court erred in declining to preliminarily enjoin the entity contribution ban by misapplying supreme court precedent. (SER 75, ¶ 3; 27, ¶ 5.)

III. Whether the district court properly enjoined the IE source ban because it applied the correct legal standard to the facts before it. (SER 75, ¶ 4;

[2]References to the Coalition's Supplemental Excerpts of Record are designated as "SER" throughout their brief.

26, ¶ 1.)

IV. Whether the district court properly enjoined the party contribution ban because it applied the correct legal standard to the facts before it. (SER 75, ¶ 3; 26, ¶ 5.)

Statement Of The Case

The Coalition filed its Verified Complaint (SER 102-134) and Motion for Preliminary Injunction (SER 73-75) in the United States District Court for the Southern District of California on December 21, 2009, naming as defendants the City and various officials, sued in their official capacities. (SER 181, Doc. 1, 3.) The Coalition challenged five provisions of the San Diego Municipal Election Campaign Control Ordinance ("ECCO"): **(1)** Section 27.2935, which imposes limits of $500 on contributions to candidates; **(2)** Section 27.2936, which establishes independent expenditure limits on committees, including political parties (the "IE source ban"); **(3)** Section 27.2938, which bans solicitation or acceptance of contributions prior to 12 months before the primary election (the "contribution window"), and prohibits candidates from spending their own money in support of their candidacy more than 12 months before the primary; **(4)** Section 27.2950, which bans contributions from political parties to their own candidates and bans candidates from soliciting or accepting contributions from organizations

(the "party contribution ban"); and **(5)** Section 27.2951, which bans accepting contributions from non-individuals for certain political speech activity (the "entity contribution ban").

The parties jointly moved to dismiss all defendants except the City. (SER 181, Doc. 6.) The court granted the motion, subject to the dismissed defendants being bound by all the court's rulings. (SER 181, Doc. 9.)

The district court heard oral argument on the Coalition's motion for preliminary injunction on February 1, 2010 (SER 179, Doc. 25.) On February 16, 2010, the court issued its Order enjoining the party contribution ban, the IE source ban, and Section 27.2938 as applied to a candidate spending his own money.[3] (SER 26-27.) The court denied the preliminary injunction motion as to the contribution window, the entity contribution ban, and Section 27.2935.[4] In an order dated February 19, 2010, the court clarified its February 16, 2010, Order, explaining its ruling had the effect of enjoining the City from preventing independent expenditure committees from accepting contributions from non-individuals. (SER 176, Doc. 46.)

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[3]The City does not appeal its injunction as to this portion of Section 27.2938.

[4]The Coalition has not appealed the district court's preliminary determination as to Section 27.2935.

The City timely appealed the court's order as to the party contribution ban and the IE source ban on March 5, 2010. (SER 176, Doc. 48, 49.) The Coalition timely cross-appealed the court's order as to the contribution window and the entity contribution ban on March 19, 2010. (SER 39-40; 175, Doc. 64.)

Statement of Facts

Plaintiff Phil Thalheimer is a resident of San Diego. (SER 104, ¶ 9; 110, ¶ 50.) He has previously been a candidate for city council in Council District 1. (SER 104, ¶ 9; 110, ¶ 50.) He is preparing for a possible run for City Council in 2012, either in District 1 or in a new District, if it is created next June and he lives within its boundaries. (SER 104, ¶ 9; 111, ¶ 55; 112, ¶ 59.)

Council District 1 is served by Council Woman Sherry Lighter. (SER 112, ¶ 58.) She will likely run as the incumbent in the 2012 election. (SER 112, ¶ 58.) Mr. Thalheimer is not certain that he would run against an incumbent because he may not be able to raise the finances needed to mount an effective campaign against an incumbent, due to the contribution limits imposed by the ECCO. (SER 112, ¶ 60.) Still, he is preparing for a possible candidacy, either in District 1 or a new District if it is created. (SER 112, ¶ 59.)

In preparation for his possible candidacy, Mr. Thalheimer has created a committee and would like to use his own money to begin advertising his potential

candidacy. (SER 112, ¶ 61.) He would like to create a website, print flyers, and/or mail letters to build name-recognition among the electorate and excitement for his potential campaign. (SER 112-13, ¶¶ 62, 64.) He would do so, except the Ethics Commission interprets ECCO § 27.2938(a) as prohibiting a candidate from using his own money to advocate for his own campaign more than a year prior to the primary election. (SER 112-13, ¶ 63.) Mr. Thalheimer would also like to begin soliciting money for his possible council run in 2012. (SER 112, ¶ 61.) He would do so, but for ECCO § 27.2938(a), which makes it unlawful for him to solicit or accept contributions prior to the twelve months preceding the primary election. (SER 112, ¶ 61.)

Mr. Thalheimer intends to solicit contributions from diverse types of contributors, including some who may be owners of their own businesses. (SER 113, ¶ 65.) As sole proprietors, some of these potential contributors co-mingle their personal money and their business money in their business checking account. (SER 113, ¶ 65.) He also wants to solicit and accept contributions from trusts and various business entities. (SER 113, ¶ 65.) He would do so, except ECCO §§ 27.2950 and 27.2951 make it unlawful to solicit or accept contributions from any person that is not an individual, or to accept a check drawn on a business account. (SER 113, ¶ 65.)

Plaintiff ABC PAC is a committee formed by Associated Builders &

Contractors, Inc. San Diego Chapter to advance the merit shop philosophy through political action. (SER 104, ¶ 10.) ABC PAC receives contributions from non-individuals in amounts greater than $500. (SER 108, ¶ 40.) It would like to use the full amount of these contributions for independent expenditures, and solicit and accept other contributions from other contributors in whatever amounts they want to give, and use as much of those contributions as possible for the purpose of making independent expenditures. (SER 108-09, ¶¶ 39, 40.) It would do so, but for ECCO § 27.2936, which limits independent expenditures to an amount not greater than what can be attributed to contributions of $500 or less from individual (human) contributors. (SER 109, ¶ 40.)

Plaintiff 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." (SER 109, ¶ 42.) In furtherance of that mission, Lincoln Club makes independent expenditures as defined in ECCO § 27.2903 in support of candidates who agree with its core philosophy. (SER 105, ¶ 13.) It wants to make independent expenditures 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. (SER 109-10, ¶ 45.) It would do so, but for the law. (SER 110, ¶ 45.) It also wants to solicit and accept contributions from non-individual contributors in whatever amounts they want to give, and use as much of those contributions as possible for the purpose of making independent expenditures. (SER 110, ¶ 46.) It would do so, if the law allowed. (SER 104, ¶ 10.)

Plaintiff Republican Party of San Diego County ("RPSD") is San Diego's local organization for the Republican Party. (SER 105, ¶ 14.) RPSD actively supports Republican candidates for local offices. (SER 110, ¶ 48.) RPSD would like to give financial support to Republican candidates for local office in San Diego, and make coordinated expenditures with their candidates, and would do so, but for ECCO § 27.2950, which bans contributions from organizations (including political parties) to candidates. (SER 110, ¶ 49.)

Plaintiff John Nienstedt is registered to vote in San Diego. (SER 105, ¶ 15.) He has contributed in the past to candidates. (SER 113, ¶ 67.) He intends to contribute financially to the candidate(s) of his choice in upcoming San Diego city council and citywide elections. (SER 105, ¶ 15.) He would like to contribute more than $500 to these candidates, and would do so, but for ECCO § 27.2935, which imposes a contribution limit of $500 per candidate per election. (SER 113, ¶ 67.) He would also like to contribute to a committee that makes independent expenditures, and have his contribution used to support his chosen candidate.

(SER 105, ¶ 15; 114, ¶ 69.) But ECCO § 27.2935(a) makes it unlawful for him to contribute more than $500 total to candidates, and then make a contribution to a committee and earmark it for independent expenditures in support of his chosen candidate. (SER 114, ¶ 69.) He would do so, but for this law. (SER 105, ¶ 15; 114, ¶ 69.)

Mr. Nienstedt also supports a candidate whose primary is more than a year away. (SER 114, ¶ 70.) He would like to contribute money to this candidate's campaign now, and would do so, but for ECCO § 27.2938(a) which makes it unlawful for candidates to "accept contributions prior to the twelve months preceding the primary election for the office sought." (SER 114, ¶ 70.)

Summary Of The Argument

This Court reviews an interlocutory appeal of a preliminary injunction order under the abuse of discretion standard. In particular, it reviews de novo whether the district court applied an erroneous legal standard, made erroneous findings of fact, or applied the correct legal standard either illogically or without factual basis. Any of these constitute an abuse of discretion. The district court properly applied the relevant facts and appropriate law to determine that the entity contribution ban and the party contribution ban should be preliminarily enjoined. However, the district court's refusal to preliminarily enjoin the contribution window and the IE

source ban was an abuse of discretion.

The contribution window bans the making, soliciting, accepting or spending of contributions to candidates more than a year before a primary. In analyzing the success of the Coalition's challenge to the contribution window, the district court held that the contribution window served the *quid pro quo* anticorruption interest first recognized in *Buckley* and was thereby constitutional. However, *Buckley*'s anticorruption interest applied only to large contributions, not any and all contributions, regardless of size; and, the City eliminated large contributions through its regular contribution limits. Moreover, the district court presumed, without factual evidence, that the contribution window serves this anticorruption interest. The contribution window directs when individuals may exercise their right to associate without being directed towards combating *quid pro quo* corruption. The facts do not suggest otherwise. And as consequence, *Buckley*'s anticorruption interest is not applicable. The district court misapplied *Buckley* and presumed facts to conclude it would not enjoin the contribution window challenge.

Likewise, the district court misapplied *Beaumont* and *Citizens United* to the entity contribution ban, which bans candidates from accepting contributions from non-individuals. The district court found the entity ban likely to be constitutional under *Beaumont*, which upheld a similar ban on corporate contributions. But *Beaumont*, which may not survive *Citizens United*, allowed the ban *only* because

there were alternative avenues for corporations to participate as a contributor. San Diego has no such alternative avenues. And the most recent Supreme Court pronouncement on corporate political speech, *Citizens United*, forbids discrimination on the basis of the corporate identity of the speaker. By not recognizing these principles, the district court applied an erroneous legal standard to the entity contribution ban and declined to enjoin its enforcement.

While it erred in denying preliminary injunction of the contribution window and the entity contribution ban, the district court employed the correct legal standard—intermediate scrutiny—with sufficient facts before it, to enjoin the IE source ban. The IE source ban bars independent expenditures whose funding is derived from non-individuals or from contributions in excess of $500. The City contends that, under a heightened preliminary injunction standard, the Coalition offered insufficient evidence that they are harmed by the IE source ban. They also allege that further discovery on the interests involved is warranted and that the district court erroneously applied strict scrutiny analysis.

The Coalition, in its Verified Complaint, alleges that ABC PAC and Lincoln Club desire and intend to make independent expenditures, and to solicit, accept, and use contributions for their independent expenditures from entities and in amounts expressly prohibited by the IE source ban. Likewise, Mr. Nienstedt expresses a desire and intent to contribute in excess of $500 to independent

expenditure committees and wants the committees to be able to use his full contribution for independent expenditures, which they cannot do under the IE source ban. That they are not able to exercise these speech and association rights without violating the law is sufficient evidence of harm for this pre-enforcement challenge. And delaying relief to the Coalition as it seeks to preserve the status quo of open discourse under the First Amendment while the City conducts discovery to determine why it passed its own law is unwarranted. The district court, applying intermediate scrutiny, properly enjoined the IE source ban.

Likewise, the district court used the correct legal standard—intermediate scrutiny—with sufficient facts before it, to enjoin the party contribution ban. The party contribution ban prevents political parties from making contributions to their candidates or making coordinated expenditures with them. The Republican Party of San Diego wants to make such contributions and expenditures, but cannot under the law. The district court correctly recognized that under Supreme Court precedent, a complete ban on party contributions threatens the right of individuals to associate in political parties. The district court found that the party contribution ban's nature and effect paralleled that of one held unconstitutional by the Supreme Court in *Randall*. Applying this binding precedent to the facts at hand, the district court properly enjoined the party contribution ban.

Argument

Standard Of Review

All of the issues on appeal and cross-appeal arise out of the district court's preliminary injunction order. (SER 75-76, ¶¶ 1-7.) The Ninth Circuit reviews a district court's grant or denial of preliminary injunctions for abuse of discretion. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A decision based on an erroneous legal standard or clearly erroneous findings of fact is an abuse of discretion. *Id*. Failure to identify the correct legal rule is an abuse of discretion. *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010). Applying the correct legal standard in an illogical or implausible way, or without factual support from the record, is also an abuse of discretion. *Id*. This standard of review is applicable to all issues before this Court.

I. The District Court Erred By Declining To Preliminarily Enjoin The Contribution Window.

A. The District Court Misapplied *Buckley* And Its Progeny To The Contribution Window.

ECCO § 27.2938(a) ("the contribution window") bans donors from making—and candidates soliciting, accepting, or spending—contributions more than a year before the primary. Because the contribution window is a limit on contributions, it is subject to intermediate scrutiny; that is, it must be "closely

drawn" to a "sufficiently important interest." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Otherwise, it is unconstitutional. *Id.*

Buckley and its progeny establish that the only interest sufficiently important to undergird contribution limits is the interest in preventing *quid pro quo* corruption and its appearance. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 909 (2010). The Supreme Court has rejected every other interest the government has offered to justify infringing speech and association. Thus, equalizing differing viewpoints is not a sufficiently important objective. *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759, 2773 (2008). Similarly, an informational interest in identifying the sources of support and opposition for political positions or candidates could not justify burdening First Amendment activity. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). Likewise, the desire to prevent "distorting effects" due to the influence of wealth accumulated through the corporate form cannot sustain limits on First Amendment activity. *Citizens United*, 130 S.Ct. at 902, 905 (2010). Nor can the desire to prevent influence over candidates, access to them, or ingratiation with them. *Id*. at 910.

The only interest ever found sufficiently important to justify contribution limits is the interest in preventing real or apparent *quid pro quo* corruption.[5] And

[5]The Supreme Court has also found an anticircumvention interest sufficient to undergird contribution limits. *See, e.g.*, *Fed. Election Comm'n v. Colorado*

Buckley and its progeny explain that only *large* contributions implicate that interest, for only *large* contributions give rise to corruption or its appearance. *Citizens United*, 130 S.Ct. at 901 ("large contributions 'could be given to secure a political quid pro quo'") (*quoting Buckley*, 424 U.S. at 26); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138 (2003) ("large financial contributions" can lead to corruption and its appearance); *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 393 (2000) ("large contributions" can corrupt and create an appearance of corruption); *Buckley*, 424 U.S. at 28 (noting that the challenged $1,000 contribution limit "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *id*. at 45 (The "dangers of actual or apparent quid pro quo arrangements" are presented by "large contributions").

In declining to enjoin the contribution window, the district court noted that the City "has an interest in preventing 'the actuality and appearance of corruption resulting from *large* individual financial contributions.'" (SER 14) (emphasis added) (*quoting Buckley*, 424 U.S. at 26)). And the court "accept[ed] the City's

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Republican Federal Campaign Committee, 533 U.S. 431, 456 (2001). However, the anticircumvention interest is not a separate interest, but only exists as part of the anticorruption interest by addressing the potential circumvention of constitutional limits on contributions in order to engage in *quid pro quo* corruption. *Id*.

assertion that the limit furthers its anticorruption interest." (SER 16.) Yet under *Buckley* and its progeny, the anticorruption interest cannot undergird the contribution window. The City already addressed that interest when it eliminated large contributions by enacting its $500 contribution limit in ECCO § 27.2935. Since contributors may no longer make large contributions, the City cannot rely on the anticorruption interest to substantiate the contribution window.

Thus, while the court was correct that the City has an interest in preventing the corruption associated with *large* contributions, the court erred by improperly applying this legal standard to the contribution window. San Diego no longer allows *large* contributions. And, small contributions are not corrupting, no matter when they are made—it is *large* contributions that have the potential for *quid pro quo* corruption. *Buckley*, 424 U.S. at 26-28. Banning contributions made up to the contribution limit more than a year before the primary cannot further the City's anticorruption interest in limiting large contributions.

Even if this were not true, *quid pro quo* corruption is less likely to occur the more distant in time the election is, because the need for contributions to fund candidate speech increases as the election draws near. When the election is a year (or more) away, the voters are not as interested in the election as they are when the election is close at hand. Consequently, although candidates for office always feel pressure to raise money, the pressure is less intense when the election is far off

than when it is near at hand, and candidates are scrambling to raise all the money they can to fund their campaign speech.

Consequently, as the time for the election approaches and candidates feel the pressure to raise as much money as possible to fund their political message to the electorate, the temptation to engage in *quid pro quo* is greatest. Yet, the contribution window does not ban contributions when the temptation for *quid pro quo* corruption is greatest, but when it is least likely.

The district court appeared to recognize this fact, yet implausibly held that banning contributions when they are least likely to cause corruption and channeling them to the time period when they are most likely to cause corruption furthers the City's anticorruption interest. (SER 15) (stating that "[t]he 12-month window furthers the government's anticorruption interest by channeling contributions to a time period during which the risk of an actual quid pro quo or the appearance of one runs highest"). This is an illogical and implausible application of intermediate scrutiny.

The contribution window has nothing to do with preventing corruption. Rather, it rather has everything to do with decreeing *when* people may exercise their right to associate. No interest can justify this. Had the district court correctly applied *Buckley* and its progeny, it would have found that the contribution window does not serve the City's anticorruption interest. The district court should have

found that the Coalition was likely to succeed on the merits as to their challenge to the contribution window. The district court appears to have applied the correct legal standard of intermediate scrutiny, but in an illogical and implausible way that is inconsistent with the facts regarding the contribution window. Because the court abused its discretion, this Court should reverse the district court's decision and remand this case with instructions that the district court should preliminarily enjoin the contribution window's enforcement.

B. The District Court Presumed, Without Evidence, That The City Had An Interest In The Contribution Window.

The district court presumed, in the face of evidence to the contrary, that the City had a "sufficiently important interest" in the contribution window. It also presumed that the contribution window was closely drawn to the interest. Under this Court's precedent, the district court presumptions are reversible error.

The government always bears the burden of demonstrating that its contribution limits satisfy intermediate scrutiny. *Nixon*, 528 U.S. at 387–88 (noting that contribution limits are constitutional "if the Government demonstrated" they satisfied intermediate scrutiny) (*quoting Buckley*, 424 U.S. at 25). *See also Wisconsin Right to Life v. Fed. Election Comm'n*, 546 U.S. 410, 464 (2006) ("*WRTL II*") ("the Government must prove" that laws that burden speech satisfy scrutiny); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786

(1978) (same).

This Court has likewise recognized that if the government regulates contributions, it must establish both that it has an interest in doing so, and that the regulation is closely drawn to the interest. In *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003), this Court held that contribution limits may be sustained only "if the State *demonstrates* a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. at 1109 (emphasis added). And in *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007) this Court held that it is reversible error for a district court to find an anticorruption interest where the government has not presented evidence of such.

Under both Supreme Court and Ninth Circuit precedent, the City bears the burden of demonstrating a constitutionally cognizable interest that the contribution window serves. Yet, the district court did not require it to do so. Instead, the court "accept[ed] the City's assertion that the [contribution window] furthers its anticorruption interest," (SER 16), despite the fact that the evidence before the court indicated that the City had fully addressed its corruption interest by eliminating large corruptions.

This Court's decision in *Citizens for Clean Gov't*, 474 F.3d 647, is on point. *Citizens* involved a challenge to contribution limits in recall elections. *Id*. at 653.

The government asserted that the limits were needed to serve an anticorruption interest. *Id*. at 653. Yet, the government offered no evidence of a corruption problem that the limits could address. *Id*. Instead, the evidence before the court indicated that there was neither corruption nor the potential for such. *Id*. at 653–54.

Despite the government's failure to meet its burden of demonstrating an interest furthered by its contribution limits, the trial court "appeared to determine as a matter of law" that the government had such an interest. *Id*. at 653. On appeal, this Court held that it is reversible error for a district court to presume a governmental interest in regulating contributions. *Id*. District courts must require that the government actually demonstrate its interest in laws burdening First Amendment rights. *Id*. at 653–54. Whether the government has an interest is a question of fact, not law, and the government must present evidence that infringing First Amendment freedoms is necessary. *Id*.

The court below likewise erred when it "accept[ed] the City's assertion that the [contribution window] furthers its anticorruption interest." (SER 16.) The City offered no evidence that allowing small, already-limited $500 contributions more than a year before the primary would encourage *quid pro quo* corruption. Rather, the evidence before the court indicated that the contribution window did not further a corruption interest, since the large contributions that can give rise to *quid*

pro quo corruption had already been eliminated through ECCO § 27.2935's $500 contribution limits. By presuming otherwise, in the complete absence of evidence supporting the government's position, and in the face of evidence cutting against it, the court abused its discretion. This Court should reverse the district court's decision and remand this case with instructions that the district court preliminarily enjoin the contribution window's enforcement.

II. The District Court Erred In Declining To Enjoin The Entity Contribution Ban By Misapplying Supreme Court Precedent.

ECCO § 27.2951 ("the entity contribution ban") prohibits candidates accepting contributions from non-individuals. The district court held that this ban was likely constitutional, because it furthered an anticircumvention interest. (SER 23.) In doing so, the court misapplied Supreme Court precedent. First, it failed to recognize that under *Citizens United*, government may not discriminate on the basis of the corporate identity of the speaker. Second, the district court did not understand that the Court in *Beaumont* upheld a similar ban on corporate contributions *only* because other avenues were present for *corporations* to make contributions. The district court thus applied an erroneous legal standard to the entity contribution ban. This Court should reverse the district court's decision.

Citizens United stands for the proposition that the government may not suppress First Amendment activity on the basis of the identity of the speaker. 130

S.Ct. at 913. Regulations that distinguish among speakers by allowing First Amendment activity by some, but not others, are constitutionally impermissible. *Id*. at 898. *See also Bellotti*, 435 U.S. at 784 (Same). There is simply no basis for the idea that the government may impose political speech restrictions on disfavored speakers. *Citizens United*, 130 S.Ct. at 899. Rather, government must treat all First Amendment actors the same. *Id*.

The entity contribution ban does not do that. Rather, it allows some persons to make contributions to candidates, but not others. It makes this distinction solely on the identity of the person who wants to make the contribution. Individuals may make contributions. Entities may not. This is impermissible: *Citizens United* does not allow the City to completely ban speech and association on this basis. Because the entity contribution ban prohibits the First Amendment activity of non-individuals solely because of their identity in contravention of *Citizens United*, the court erred by finding it likely to be constitutional.

Moreover, the district court mistakenly concluded that the entity contribution ban was supported by the Supreme Court's decision in *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) (SER 22-23,) which found that a ban on corporate contributions furthered the government's anticircumvention interest. 539 U.S. at 160. This is a misapplication of Supreme Court precedent, for three reasons.

First, it is doubtful that *Beaumont*'s holding that it is permissible to ban corporate political speech and association because the speaker is a corporation survives *Citizens United*'s insistence that the government is forbidden to discriminate among speakers solely on the basis of their identity. 130 S.Ct. at 913. Because the district court did not recognize that, it applied an erroneous legal standard to the entity contribution ban.

Second, it is equally doubtful that *Beaumont*'s reasoning regarding circumvention survives *Citizens United*. The district court mistakenly thought that "*Citizens United* did not address this [anticircumvention] rationale. . . . and the validity of that rationale was not affected by *Citizens United*[.]" (SER 23.) However, in *Citizens United*, the Court considered whether to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld a ban on corporate political speech in part by relying upon an anticircumvention interest. *Id*. at 664. The *Citizens United* Court concluded that "*Austin* is undermined" because "[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." *Citizens United*, 130 S.Ct. at 912. *Citizens United* thus discredited the anticircumvention interest by explaining that attempts to prevent circumvention are underinclusive to the interest, because such regulations can never effectively prevent circumvention. To the extent that the government relies on that interest to undergird its regulation of First Amendment

activity, the regulation is "undermined." Yet the district court relied on that undermined interest, alone, to uphold the entity contribution ban. In doing so, the court applied an erroneous legal standard.

Finally, even if *Beaumont*'s holding and anticircumvention interest survive *Citizens United*, the district court misapplied *Beaumont* to the entity contribution ban. The *Beaumont* Court upheld a ban on direct corporate contributions to candidates, because corporations were able to make contributions through their PACs. *Beaumont*, 539 U.S. at 149. *See also McConnell*, 540 U.S. at 204 (same). The City, however, does not provide a PAC-like exception to allow non-individuals to make contributions to candidates. Such a complete ban on an entity's First Amendment activity is impermissible. The Supreme Court held in *Buckley* that allowing smaller contributions was a necessary outlet when the government sought to ban large contributions. *Buckley*, 424 U.S. at 28. A complete ban on political speech and associational rights—with no permissible outlet—is not allowed. *Citizens United*, 130 S.Ct. at 911; *Dallman v. Ritter*, 225 P.3d 610, 632 (Col. 2010).

The district court thus misapplied key Supreme Court precedent to the entity contribution ban. Because it applied an erroneous legal standard, it wrongly concluded that the Coalition was not likely to succeed on the merits of their challenge to the entity contribution ban. (SER 23.) Had the court properly applied

Supreme Court precedent, it would have found that the Coalition met each of the *Winter* preliminary injunction standards. This Court should reverse the district court's decision and remand this case with instructions that the district court preliminarily enjoin the contribution window's enforcement.

III. The District Court Properly Enjoined The IE Source Ban Because It Applied The Correct Legal Standard To The Facts Before It.

A. The District Court Properly Considered The Facts Presented To It.

The City argues in its principal brief that the Coalition did not present sufficient evidence to establish that their speech and association rights were burdened by the IE source ban. (Appellant's Br. at 24.) The City's assertion is incorrect. The Coalition put forward sufficient evidence to establish each of the factors necessary for a preliminary injunction to issue as to the IE source ban. The court therefore did not err in granting preliminary injunctive relief.

1. Courts May Grant Preliminary Injunctions On The Basis Of Verified Complaints.

The City incorrectly asserts that the Coalition's Verified Complaint was an insufficient basis for the district court to grant preliminary injunctive relief. (*Id*. at 28-29.) But a Verified Complaint is "treated as an affidavit to the extent that the complaint is based on personal knowledge and sets forth facts admissible in evidence and to which the affiant is competent to testify." *Lew v. Kona Hosp.*, 754

F.2d 1420, 1423 (9th Cir. 1985). And preliminary injunctions may be granted on the basis of affidavits. *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953). So Verified Complaints present a sufficient basis of facts for preliminary injunctive relief to issue, so long as the facts averred are sufficient to meet the preliminary injunction standard.

Because the Coalition averred sufficient facts, preliminary injunctive relief could issue as to each of the laws the Coalition challenged.

2. Preliminary Injunctions May Issue Prior To Discovery Being Conducted.

The City asserts that the court erred by granting a preliminary injunction before "[f]ull factual development, with discovery, including a full airing of [the Coalition's] burdens and the City's substantial state interests." (Appellant's Br. at 31.) This, however, is wrong on three counts.

First, the City misunderstands what is required for preliminary injunctive relief to issue. A preliminary injunction is a preliminary remedy, taking place prior to final adjudication on the merits. So parties do not have to prove their case in full to merit a preliminary injunction. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Instead, parties seeking injunctions must only demonstrate (1) that they are likely to succeed on the merits; (2) that they will suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips

in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, S. Ct. 365, 374-75 (2008). Because the Coalition established those factors, preliminary relief should issue.

Second, the City had the opportunity to put whatever evidence it wanted before the court. The City filed numerous declarations and exhibits in the court below. (*See, e.g.*, SER 180, Doc. 14) (included 14 exhibits and 2 declarations). Yet it did not offer any evidence that it had a constitutionally permissible interest in the IE source ban. If the City wanted to explain the "substantial state interests" in the IE source ban it claims to have, it should have done so. It is, after all, the City's burden to substantiate its interest—both at the trial on the merits, and at the preliminary injunction stage. *Nixon*, 528 U.S. at 387–88; *WRTL II*, 546 U.S. at 464; *Bellotti*, 435 U.S. at 786; *Citizens for Clean Gov't*, 474 F.3d at 653 (government's burden at preliminary injunction stage).

The City should not be allowed to delay the Coalition's speech and association so it can have time to attempt to "discover" its interest in its law. Rather, before the City infringed First Amendment freedoms by enacting the IE source ban, it should have determined it had a constitutionally cognizable interest in doing so. Had it done so, it could have presented its interest to the district court at the preliminary injunction stage. That the City did not first determine it had a constitutionally cognizable interest prior to enacting the IE source ban

demonstrates the unconstitutionality of the ban; for, the constitutional imperative is "Congress shall make no law." And when government does "make law" abridging speech, it may only do so when it has a constitutionally congnizable interest, and its law is properly tailored to its interest.

Finally, the City fails to recognize that if preliminary injunctions are to be meaningful, they often must issue *prior* to conducting discovery. *Eichorn v. AT & T Corp.*, 489 F.3d 590, 593 (3d Cir. 2007) (noting that in many cases the case is won or lost with the preliminary injunction, because "only that remedy will prevent the case becoming moot while discovery proceeds"). Consequently, in the Ninth Circuit as elsewhere, preliminary injunctions are often determined "at an early stage of the litigation, before the defendant has had the opportunity to undertake extensive discovery or develop its defenses." *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 714 (9th Cir. 2007).

In the Ninth Circuit, it is not reversible error for a court to decide a preliminary injunction motion prior to discovery, when in the court's judgment such discovery is not needed. *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969). That is especially true where—as in this case—the complaining party did not move the court for permission to conduct discovery. *Stanley v. University of Southern California*, 13 F.3d 1313, 1326 (9th Cir. 1994). At no time did the City ask the court for time to conduct discovery.

The City cannot now claim that the court abused its discretion by not allowing it to do something it never asked to do. Nor should it claim that the court abused its discretion by granting the preliminary injunction motion on the basis of the record before it, when the City had opportunity to put whatever evidence it wanted before the court. It was not an abuse of discretion for court to decide the preliminary injunction motion on the basis of the evidence before it.

3. The Coalition Presented Sufficient Facts For A Preliminary Injunction To Issue.

In its brief, the City seems surprised that "[the Coalition], *before any trial on the merits or development of a factual record*, sought a preliminary injunction . . . ." (Appellant's Br. at 9) (emphasis in original). Yet the purpose of a preliminary injunction "is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas*, 451 U.S. at 395.

The City wrongly suggests that the Coalition failed to establish that the IE source ban burdened its speech and association rights. (Appellants's Br. at 27-31.)

But the Coalition presented sufficient evidence to the court in its Verified Complaint for the court to decide its motion. Specifically, the Coalition averred in its Verified Complaint that:

- ABC PAC wants to solicit, accept, and use contributions received from non-individuals to make independent expenditures, in whatever amount their contributors wish to contribute. They would do so, but for the law that prohibits them. (SER 108-09, ¶¶ 39-40.)

- Lincoln Club wants to solicit, accept, and use contributions from both individual and non-individual contributors, in amounts greater than $500, to make independent expenditures. They would do so, but for the law that prohibits them. (SER 109-10, ¶¶ 45-46.)

- Mr. Nienstedt would like to contribute $500 to candidates of his choice, and still be able to contribute to independent expenditure committees, and have his contribution used to support his chosen candidate(s). He would do so, but the law will not let him. (SER 113-14, ¶¶ 68-69.)

These facts establish that the members of the Coalition want to engage in protected First Amendment activity, and would do so, but for the IE source ban. The City does not dispute these facts. (Appellant's Br. at 29.) These facts were sufficient for the court to find that the Coalition met the preliminary injunction standard.

The City relies on *Citizens for Clean Gov't* to suggest that the court erred by granting a preliminary injunction without the Coalition developing a full factual record. (Appellant's Br. at 25-26.) The City is correct that *Citizens* "reminded the district courts of the importance of resolving campaign finance challenges on the basis of evidence." (*Id*. at 25.) But this admonition was directed toward the *Government's* burden to establish its interest in infringing First Amendment rights. It said nothing about a burden on those who want to exercise their First Amendment freedoms to establish a detailed factual record. Rather, *Citizens* commands that the Government may not rest upon "hypotheticals" when it demonstrates its sufficiently important interest in a contribution limit, but must assert actual harms that its limit is designed to prevent, and must show that its limit is closely drawn to the interest. *Citizens for Clean Gov't*, 474 F.3d at 653.

Even if the *Citizens for Clean Gov't* standard were applied to the Coalition, they meet it. The Coalition did not assert "hypothicals." Rather, it asserted specific First Amendment activity its members want to engage in, explained that the law will not allow them to do so, and affirmed that it will suffer irreparable harm in the absence of preliminary injunctive relief. Thus, the Coalition meets the *Citizens for Clean Gov't* standard, and the court did not err by granting preliminary injunction in the absence of a fully developed record.

The City likewise cites *Randall v. Sorrell*, 548 U.S. 230 (2006) for the

proposition that injunctive relief cannot issue absent a fully developed factual record. Before the *Randall* Court decided Vermont's contribution limit was unconstitional, it reviewed a detailed trial record. (Appellant's Br. at 26.) But *Randall* was not an appeal of a preliminary injunction, but of a final adjudication. *Landall v. Sorrell*, 382 F.3d 91, 96 (2d Cir. 2004). Thus on appeal, the Supreme Court reviewed the trial record. This does not mean, however, that a preliminary injunction cannot issue absent a detailed trial record. Rather, injunctions issue when those seeking them satisfy the *Winter* factors. Because the Coalition did, the court did not abuse its discretion in granting preliminary injunctive relief.

B. The District Court Properly Applied The Relevant Law.

1. The Correct Injunction Standard Was Applied.

The City also alleges that the district court "erred in not taking into account the fact that [the Coalition was] asking for a change in the status quo." (Appellant's Br. at 31.)[6] The City mistakenly believes that its law is the status quo. (*id*.), and that the Coalition sought a "mandatory" injunction[7] to change the status

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[6]The City makes this allegation in connection with the IE source ban. They do not raise it in connection with the party contribution ban. However, the analysis in this section applies equally to all of the laws the Coalition challenged, including those that the district court did not enjoin.

[7]A "mandatory" injunction disrupts the status quo by compelling someone to take some particular affirmative action. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). For instance, in *Stanley*

quo. (*Id*. at 32.) From that mistaken proposition, the City concludes that the district court erred by not holding the Coalition to a higher preliminary injunction standard (*Id*.) (*citing Anderson v. U.S.*, 612 F.2d 1112 (9th Cir. 1979) (requiring heightened standard for mandatory preliminary injunctions).

The City is incorrect. The status quo is not the City's law. Rather, the status quo is the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." And the Coalition did not seek a "mandatory" injunction compelling the City to do something. Rather, the Coalition sought a "prohibitory" injunction[8] to preserve the status quo by prohibiting the City from enforcing its unconstitutional law.[9]

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v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994), the movant sought a mandatory injunction to force the University to hire her. *Id*. at 1320. The status quo was an open University job position; and, the movant sought to change the status quo by compelling the University to fill the job opening with her. And, in *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150 (9th Cir. 2006), the movants sought to force another to turn over certain documents to them. *Id*. at 1158. The status quo was that the nonmovant had the documents, and the movant did not; and, the movants sought to change the status quo by compelling the other party to give the documents to them.

[8]In contrast with a mandatory injunction, a "prohibitory" injunction does not compel anyone to do anything. Rather, a prohibitory injunction prohibits a party from taking action. It therefore preserves the status quo. *Marlyn Nutraceuticals*, 571 F.3d at 878.

[9]Thus, even if the district court was incorrect when it stated that the Ninth Circuit does not have a different standard for mandatory injunctions (SER 31), this was harmless error, because the Coalition did not seek a mandatory injunction. *See infra* at 40.

The district court applied the *Winter* standard for preliminary injunctions (SER 4.) Because the Coalition did not seek to change the status quo, but rather to preserve it, the district court was correct to decline to apply a heightened preliminary injunction standard. This Court should affirm the district court's decision to preliminarily enjoin the party contribution ban and the IE source ban.

a. Preliminary Injunction Standards Involving First Amendment Freedoms Must Reflect Constitutional Principles.

Preliminary injunction standards involving First Amendment freedoms must reflect our constitutional principles that "[i]n a republic . . . the people are sovereign," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted). *WRTL II* requires that we recall that we deal with the First Amendment, which mandated that "'Congress shall make no law . . . abridging the freedom of speech,'" 127 S. Ct. at 2674, and that "[t]he Framers' actual words put these cases in proper perspective." *Id.* So "no law," i.e., "freedom of speech," is the constitutional default and must be the overriding presumption where free expression is at issue.

This "no law" default means that when determining the status quo in a prohibitory injunction, as sought here, the status quo to be preserved is "freedom

of speech," i.e., the state of the law *before* a challenged provision or policy regulating speech or association was set in place. When a regulation is challenged as unconstitutional, that *regulation* has altered the status quo. The status quo is "the last, uncontested status which preceded the pending controversy." *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879. "The purpose of a preliminary injunction is to preserve the status quo as it exists or *previously existed* before the acts complained of, thereby preventing irreparable injury or gross injustice." *Slott v. Plastic Fabricators, Inc.*, 167 A.2d 306 (Pa. 1961) (emphasis added). The government must not be permitted to bootstrap a purported "status quo" and an enforcement interest by altering the status quo with a regulation of debatable constitutionality and then asserting that preliminary injunctions must be denied because the new regulation is the status quo and the government has an an interest in enforcement.

Because the presumption "freedom of speech" when laws are challenged as impermissible under the First Amendment, First Amendment protections must be incorporated into the preliminary injunction standards, and not limited to merits consideration. So, for example, if intermediate scrutiny applies, as here, the preliminary injunction burden shifts to the City to prove the elements of intermediate scrutiny, just as the City will have that burden on the merits:

The Government argues that, although it would bear the burden of

> demonstrating a compelling interest as part of its affirmative defense at trial on the merits, the [plaintiff] should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction. This argument is foreclosed by our recent decision in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). In *Ashcroft*, we affirmed the grant of a preliminary injunction in a case where the Government had failed to show a likelihood of success under the compelling interest test. We reasoned that '[a]s the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, respondents [the movants] must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [enforcing the Act].' Id., at 666. That logic extends to this case; here the Government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong, but that can make no difference. The point remains that the burdens at the preliminary injunction stage track the burdens at trial.

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006). *See also Citizens for Clean Gov't*, 474 F.3d 647 (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing).

Because the government bears the burden of proving the elements of scrutiny at the preliminary injunction stage, no deference or favorable presumption must be afforded the regulation of speech in preliminary injunction balancing. This is required by the "freedom of speech" presumption and also because the government bears the burden of "demonstrating" its interest in regulating speech, and that its regulation is properly tailored to the interest. *Nixon*, 528 U.S. at 387–88 (requiring that the Government "demonstrate[]" that contribution limits satisfy intermediate scrutiny if they are to be held

constitutional); *WRTL II*, 127 S. Ct at 2664 (the Government must prove that the challenged regulation satisfies scrutiny).

This necessary incorporation of First Amendment protections into preliminary injunction standards requires that in determining the balance of harms and the public interest, courts must apply *WRTL II*'s requirement that "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *Ctr. for Individual Freedom v. Ireland*, 613 F.Supp.2d 777, 808 (S.D.W.Va., 2009) (*quoting WRTL II*, 127 S. Ct. at 2669) (applying principle to consideration of public harm).

And, the City cannot assert that, because its election is near, laws related to its election should not be enjoined.[10] Where a law is unconstitutional or likely so, there is no authority for it to exist or operate just because an election is near. In fact, proximity to a time of high public interest argues against allowing a law restricting political speech and association to remain in effect. The fact that a First Amendment case may be filed near an election favors the plaintiff, not the defendant in the preliminary injunction balancing, because freedom of political speech and association are most important when public interest in an election is highest. Such heightened interest may fall near an election, and speakers may take

[10]The City did not assert this in its Appellant's Br., but did assert it in its *Motion for Immediate Stay* (176, Doc 50.)

advantage of that interest to communicate their message. *WRTL II*, 127 S. Ct. at 2667-68.

To penalize people who suddenly see a need to exercise their First Amendment right to associate to amplify their speech, *Buckley*, 424 U.S. at 22, is to ignore the "freedom of speech" presumption. Under the First Amendment, there is no reason that citizens cannot just suddenly associate and speak—whenever they want. There is no prescience requirement, mandating people to know months in advance that they will want to speak. Nor are First Amendment protections limited to long-established groups. Nor do First Amendment rights diminish near the peak of the election cycle. Speech in temporal and topical proximity to an election enjoys the highest protection. *Buckley*, 424 U.S. at 14 ("'constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office'" (citation omitted)). Any delay in filing a challenge may not be held against the would-be speaker because it "could . . . have delayed because it did not arrive at a plan to exercise its rights to speak until relatively recently." *Center for Individual Freedom*, 613 F.Supp. 2d at 807.

In sum, where freedom of speech and association is involved, our most cherished constitutional rights are involved, as is the fundamental right of the sovereign people to participate in self-governance. The high constitutional protections for speech and association reflect that fact. The preliminary injunction

standards and permissible interests to consider must reflect that high protection. It is not constitutionally permissible to employ the same preliminary-injunction standards that might be applied to maintaining the status quo in a fuss between neighbors over fence construction. Nor is it constitutionally permissible to hold a movant seeking to exercise First Amendment freedoms to a higher standard, as the City suggests. The court did not err in finding that the Coalition satisfied the preliminary injunction standard. This Court should affirm its decision.

b. The City Is Wrong To Assert That *Anderson* Required The District Court To Employ A Heightened Preliminary Injunction Standard.

Because the City mistakenly believes that its law is the status quo, the City cites *Anderson*, 612 F.2d 1112, with its discussion concerning a heightened standard for mandatory injunctions that seek to change the status quo, for the proposition that the court should have imposed a heightened preliminary injunction standard on the Coalition. (Appellant's Br. at 32-33.) But, the Coalition did not seek a mandatory injunction to compel the City to act and thereby change the status quo. It sought a prohibitory injunction to prohibit the City from taking action to enforce its unconstitutional law and thereby restore the status quo of free speech and association. Consequently, *Anderson* does not control, but is inapposite, and the City is mistaken to rely upon it for the proposition that the

Coalition should have been held to a higher standard for a preliminary injunction to issue.

Thus, even though the district court was likely incorrect when it stated that the Ninth Circuit does not have a different standard for mandatory injunctions (SER 31), this was harmless error, because the Coalition had not sought a mandatory injunction. Prohibitory preliminary injunctions like the one the Coalition received, however, do not require a heightened preliminary injunction standard. *Stanley*, 15 F.3d at 1320. Thus, the court applied the right preliminary injunction standard to the Coalition's motion, and this Court should affirm its decision.

2. Intermediate Scrutiny Was Properly Applied.

The City asserts that the district court applied strict scrutiny to the IE source ban. (Appellant's Br. at 34-35.) Yet, the district court stated in its Order granting preliminary injunction as to the IE source ban that the Coalition was "likely to succeed in demonstrating that the City's limit is not 'closely drawn' to a 'sufficiently important interest,'" which is the intermediate scrutiny standard. (SER 9.)

The court then found it "implausible" that contributions to independent expenditure committees can give rise to real or apparent corruption. (SER 10-11.)

It grounded its decision in *Citizens United*, 130 S. Ct. at 909, which held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption," as well as *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 291, 293 (4th Cir. 2008), which struck contribution limit as applied to committees making only independent expenditures, and *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 11 (D.C. 2009), which struck a regulation requiring nonprofit political committees to use federal money accounts to pay for their independent expenditures. (SER 10.)[11]

The court then explained that the Supreme Court has determined that independent expenditures are noncorrupting: "individuals, candidates, and ordinary political committees have the right to make 'unlimited independent expenditures.'" (SER 11) (*quoting Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996). After distinguishing the cases the City relied upon, (SER 12-14,) the court concluded that without some evidence from the City, it did not accept the City's assertion that contributions to independent expenditure committees are corrupting. (SER 14.)

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[11]Subsequent to the court's Order, the D.C. Circuit decided *Speechnow.org v. Fed. Election Comm'n*, __ F.3d __, 2010 WL 1133857 (D.C. Cir 2010), in which the court held that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption[,]" so "the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *Id*. at *6-7.

The district court did not abuse its discretion, but applied the proper legal standard of intermediate scrutiny to the IE source ban, and properly considered both precedential and persuasive opinions from other courts.

The court clarified that it applied intermediate scrutiny in its *Order Denying Defendant's Motion For An Immediate Stay* when it stated, "This statement [that the Coalition was likely to succeed in demonstrating that the City's limit is not likely to be 'closely drawn' to a 'sufficiently important interest'] from the Court's Order should make clear - although the City asserts in its reply that it is not clear - that the Court was applying the level of scrutiny applicable to contribution limits." (SER 31 n.4.)

All the City's arguments that contribution limits do not directly restrict speech, and that intermediate scrutiny is the proper standard for evaluating contribution limits (Appellant's Br. at 36-40) are immaterial, for the district court applied intermediate scrutiny. Further, the fact that the Coalition argued for a strict scrutiny standard is likewise immaterial (Appellant's Br. at 39), because the district court did not apply strict scrutiny—it applied intermediate scrutiny. (SER 9, 31 n.4.)

Finally, the City's argument that the court reached the wrong decision under intermediate scrutiny (Appellant's Br. at 40–55,) even if true should not lead this Court to reverse the district court, because the district court applied the proper

legal standard. Under this Court's precedent, this Court should only reverse the district court if the court applied an erroneous legal standard. *Am. Trucking Ass'ns*, 559 F.3d at 1052. It did not, but applied intermediate scrutiny.

The City does not have a plausible argument that the court applied the wrong standard. Rather, the City simply does not like the result the court reached in applying the proper standard. The City may perhaps be under the impression that courts cannot find contribution limits unconstitutional when they apply intermediate scrutiny. (Appellant's Br. at 35 n.12) (stating that if the court had applied intermediate scrutiny, "it never would have granted the relief sought by [the Coaliton]; instead [, because the court did grant relief,] it looks like the court applied strict scrutiny"). Yet, the Supreme Court has invalidated contribution limits on the basis of intermediate scrutiny. *Randall*, 548 U.S. at 247, 262. If the City believes that intermediate scrutiny must always result in upholding contribution limits, it is mistaken.

The district court did not abuse its discretion, so this Court should therefore affirm the district court's decision.

IV. The District Court Properly Enjoined The Party Contribution Ban.

A. The District Court Properly Considered The Facts Presented To It.

The City argues in its principal brief that the Coalition did not present

sufficient evidence to establish that their speech and association rights were burdened by the party contribution ban. (Appellant's Br. at 56.) The City's assertion is incorrect. Rather, the Coalition put forward sufficient evidence to establish each of the factors necessary for a preliminary injunction to issue as to the party contribution ban. The court therefore did not err in granting preliminary injunctive relief.

The City suggests that the Coalition's statements in its verified complaint are insufficient to establish that the party contribution ban burdened the RPSD. (*Id*.) In its verified complaint, the RPSD averred that it "would like to give financial support to Republican candidates for local office in San Diego, and make coordinated expenditures with their candidates, and would do so, but for ECCO § 27.2950, which bans contributions from organizations (including political parties) to candidates." (SER 110, ¶ 49.) This factual averment is enough to show that the RPSD wants to engage in protected First Amendment activity, but the party contribution ban prevents it from doing so. The party contribution ban therefore burdens and chills the RPSD's speech and association.

The City next proposes that the party contribution ban "is not much of a burden at all[]" because the RPSD is able under the law to engage in unlimited communications with registered Republicans. (Appellant's Br. at 56.) This, however, both misunderstands the First Amendment and misses the point. The

RPSD wants to engage in political speech and association that is at the very core of the First Amendment. Yet, the party contribution ban will not permit it to. The fact that the City allows the RPSD to engage in *some* protected activity does not cure the party contribution ban's constitutional defect. It is constitutionally impermissible for the City to prohibit the RPSD from making contributions to its candidates. *Colorado II*, 533 U.S. at 453. The party contribution ban is thus a heavy—and impermissible—burden on the RPSD's right to engage in political speech and association. The City is wrong to suggest otherwise.

B. The District Court Applied The Proper Legal Standard To The Party Contribution Ban.

1. The Court Need Not Reach This Issue.

The City incorrectly argues that the court erred by finding that political parties have a constitutional right to make contributions to their candidates. (Appellant's Br. at 57.)

As an initial matter, the Court need not reach this issue. The City does not allege that the district court based its decision on an erroneous legal standard or clearly erroneous findings of fact, as the Ninth Circuit's abuse of discretion standard requires. *Am. Trucking Ass'ns*, 559 F.3d at 1052. Rather, the City asserts that because neither the Supreme Court nor the Ninth Circuit has ever held that political parties have a constitutional right to make contributions to their

candidates, it was error for the district court to find such a right. Put another way, the City suggests that it is error for a district court to ever reach a decision that has not been reached by a higher court. If this were true, a district court would be paralyzed when confronted with an issue of first impression.

For the City to demonstrate that the court applied the wrong legal standard, it would have to show either that (1) the court did not apply intermediate scrutiny, which is the proper legal standard for evaluating contribution limits; or (2) the court held contrary to precedent. But, neither the Supreme Court nor this Court has ever held that political parties can be banned from making contributions to their candidates. Thus, the court's holding that political parties have that right is not contrary to precedent. And, the district court applied intermediate scrutiny to the party contribution ban. (SER 20) ("Plaintiffs have demonstrated that they are likely to prevail on their argument that a complete prohibition on political party contributions is not 'closely drawn' to the City's interest."). Thus, the district court did not apply an erroneous legal standard. This Court should find that the district court did not abuse its discretion.

2. The First Amendment Protects The Right Of Political Parties To Make Contributions.

Even if this Court considers whether the district court erred by finding that political parties have the right to make contributions to their candidates, this Court

should reach the same conclusion: the district court did not err, but applied the proper legal standard.

The Supreme Court recognized the important role political parties play in our society when it noted that our "representative democracy" would be "unimaginable" without the ability of citizens to band together in political parties in order to "promot[e] among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Indeed, the First Amendment protects the ability of citizens to associate in political parties to advance their political goals. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). Inherent in this right of citizens to band together in political parties is the corresponding right of political parties to make contributions to their candidates. It is "the accepted understanding" that political parties magnify their members' speech by combining their contributions and broadcasting their common political message more widely than the individual members could do on their own. *Colorado II*, 533 U.S. at 453. Part of the way political parties accomplish this feat is with "speech coordinated with a candidate." *Id.*

A complete ban of political party contributions is thus constitutionally unacceptable, because of the unique role parties play in allowing citizens to engage in political association by pooling their resources to elect candidates. Someone who does not know the positions of any of the candidates for office may

wish to donate to a political party with which he agrees, and trust that they will make contributions to the candidates that espouse that party's philosophy. But when political parties cannot adequately make contributions to their candidates, the right of citizens to freely associate for political purposes is threatened. *Randall*, 548 U.S. at 256. Further, limits on individuals' contributions are but a "marginal" restriction on speech only because political parties are able to make contributions to their candidates. *Id*. at 256–57 (*quoting Buckley*, 424 U.S. at 20–22). If parties could not make contributions, limits on individuals' contributions would be even more burdensome and problematic than they already are. *Randall*, 548 U.S. at 256–57.

In *Randall*, the Supreme Court considered whether Vermont's contribution limits for state-wide offices were constitutional. Vermont imposed the same limit on political parties as it imposed on individuals. *Id*. at 238. The Court was troubled by this fact, for five reasons. First, placing the same limit on parties that apply to individuals threatened individuals' right to associate in a political party to elect candidates. For that right of association to be meaningful, political parties must be able to contribute *more* than individuals can. *Id*. at 256. Second, identical contribution limits for parties and individuals "severely inhibit[ed] collective political activity" by preventing political parties from using small-donor contributions to provide meaningful help to their candidates. This frustrates the

objectives of small donors to effectively pool their money to make a difference politically. *Id*. at 257–58. Third, by frustrating the aims of small donors, the identical contribution limits discouraged small donors from participating in the political process by associating with others in political parties. *Id*. at 257. Fourth, the choice to have identical limits gave "no weight at all" to the constitutional imperative "to allow individuals to participate in the political process by contributing to political parties that help elect candidates." *Id*. at 258–59. Last, the identical contribution limits "would reduce the voice of political parties . . . to a whisper." *Id*. at 259 (internal quotation and citation omitted).

Vermont's limits on political parties, which allowed the parties to contribute up to the low, individual limits, were held unconstitutional in *Randall*. *Id*. at 256. The party contribution ban, which completely eliminates contributions from political parties, is likely to be held unconstitutional as well. It does not just reduce the voices of political parties to a whisper; it silences them altogether.

The party contribution ban thus impermissibly burdens the speech and associational rights of the RPSD and others similarly situated to them, and is not closely drawn to a sufficiently important interest as the First Amendment requires. *Nixon*, 528 U.S. at 387-88 (2000). The government simply has no constitutionally cognizable interest that would justify completely banning contributions from the political parties to their own candidates. The desire to prevent access, influence,

and ingratiation are not sufficient to justify restricting First Amendment rights. *Citizens United*, 130 S. Ct. at 910. The interest in preventing *quid pro quo* corruption, or its appearance, is the only constitutionally permissible interest in limiting contributions. *Id*. at 910.[12] And there is no credible *quid pro quo* corruption interest to undergird the party contribution ban, as there is no plausible risk that political parties will corrupt their own candidates.

The government may have an anti-circumvention interest in limiting contributions from political parties, to ensure that individuals do not engage in *quid pro quo* corruption, or create its appearance, by circumventing constitutional limits on individual contributions. *Colorado II*, 533 U.S. at 456 n.18. However, a complete ban on party contributions cannot be closely drawn to that interest, because it keeps political parties from making contributions with *any* donations it receives—even donations that are significantly below the individual contribution limit, and pose no legitimate risk of circumvention. A donation of $10 to a political party can hardly be said to be an attempt to circumvent individual contribution limits. Yet, the party contribution ban prevents the RPSD from using a $10 donation to make a contribution to its candidates, even though it raises no true risk of circumvention. The restriction is not closely drawn to the

[12] *See supra* at 15-18.

anticircumvention interest, but is overinclusive to that interest.

The party contribution ban is also constitutionally overbroad. In the First Amendment context, "The showing that a law punishes a 'substantial' amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). In a First Amendment facial challenge, however, a showing that the law is overbroad may be sufficient to invalidate its enforcement. *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1191 n. 6 (2008). Because the party contribution ban prohibits "substantially" more First Amendment activity than can be justified by any interest, it is overbroad.

Even if the government has an interest in restricting First Amendment activity, "an outright ban on corporate political speech . . . is not a permissible remedy." *Citizens United*, 130 S. Ct. at 911. If that is true for *corporations*, how much more must it be true for political parties—the associations through which individuals associate to magnify their political speech. The complete ban on political party contributions is thus not permissible, but is overbroad.

Additionally, the party contribution ban prevents political parties from making contributions with *all* donations, no matter how small—even those small

donations of only a few dollars that could not possibly be given to circumvent individual contribution limits. This thus restricts substantial amounts of First Amendment activity, without a constitutionally permissible interest in doing so.

3. The Court Applied The Proper Legal Standard.

In granting the preliminary injunction, the district court properly considered the relevant law summarized above. *See supra*, Part IV.B.2. The court concluded that the situation in San Diego paralleled that in *Randall* by (1) threatening the right to associate in a political party; (2) not giving proper weight to individuals' interest in contributing to parties so that the parties can make contributions to candidates; (3) restricting the parties' ability to make coordinated expenditures; and (4) keeping the parties from using small-donor contributions to provide meaningful help to their candidates. (SER 20.) The court then noted that, while "the City also argues that the contribution limit does not prevent parties from making independent expenditures . . . and engaging in other party-building and candidate support activities[,] . . . this does not address the complete inability of parties to assist candidates they support by engaging in coordinated spending." (*Id.*)

In so holding, the district court did not err, but properly applied the law to the party contribution ban. In doing so, it found that the Coalition was likely to

succeed on the merits. (*Id*.) The court did not therefore apply an erroneous standard of law. This Court should affirm its judgment.

Conclusion

For the foregoing reasons, this Court should reverse the district court, finding the district court's denial of the Coalition's preliminary injunction request of the contribution window and the entity contribution ban to be an abuse of discretion. It should remand those issues with instructions to enter preliminary injunction for the Coalition. Also, this Court should affirm the district court's grant of the Coalition's preliminary injunction request as to the party contribution ban and the IE source ban.

April 30, 2010

Respectfully Submitted,

s/ Joe La Rue

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Certificate Of Compliance

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 12,295 words.

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Statement Of Related Cases

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

Request For Oral Argument

The Coalition requests oral argument. This case involves complex issues of constitutional law that would benefit from a thorough examination.

Certificate Of Service

I hereby certify that on April 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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