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13 **UNITED STATES DISTRICT COURT**

14 **THE SOUTHERN DISTRICT OF CALIFORNIA**

13 PHIL THALHEIMER; ASSOCIATED BUILDERS &)
14 CONTRACTORS PAC SPONSORED BY)
15 ASSOCIATED BUILDERS & CONTRACTORS,)
16 INC. SAN DIEGO CHAPTER; LINCOLN CLUB OF)
17 SAN DIEGO COUNTY; REPUBLICAN PARTY OF)
18 SAN DIEGO; and JOHN NIENSTEDT, SR.,)

17 Plaintiffs,

18 v.

19 CITY OF SAN DIEGO; CITY OF SAN DIEGO)
20 ETHICS COMMISSIONERS RICHARD M.)
21 VALDEZ, CHAIR, W. LEE BIDDLE, GUILLERMO)
22 ("GILL") CABRERA, CLYDE FULLER, DOROTHY)
23 LEONARD, and LARRY S. WESTFALL, ALL SUE)
24 IN THEIR OFFICIAL CAPACITY; THE)
25 HONORABLE JERRY SANDERS, MAYOR OF)
26 SAN DIEGO, SUED IN HIS OFFICIAL CAPACITY;)
27 JAN GOLDSMITH, CITY ATTORNEY FOR CITY)
28 OF SAN DIEGO, SUED IN HIS OFFICIAL)
CAPACITY; AND ELIZABETH MALAND, CITY)
CLERK OF SAN DIEGO, SUED IN HER OFFICIAL)
CAPACITY,)

Defendants

CASE NO. 09CV2862IEG

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THE CITY OF SAN DIEGO'S
MOTION FOR IMMEDIATE STAY
OF ENFORCEMENT OF PORTIONS
OF THIS COURT'S FEBRUARY 16,
2010 ORDER AND THIS COURT'S
FEBRUARY 19, 2010 ORDER

Date:
Time: No oral argument requested
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. INTRODUCTION, STATEMENT OF FACTS AND SUMMARY OF ARGUMENT 1

2. LEGAL ARGUMENT 4

 A. THIS COURT HAS THE AUTHORITY TO GRANT A STAY OF PORTIONS OF ITS ORDER GRANTING A PRELIMINARY INJUNCTION AND ITS CLARIFICATION ORDER. 4

 B. THE TRADITIONAL FOUR-PART STANDARD FOR THE GRANT OF A STAY, MOST RECENTLY SET FORTH BY THE SUPREME COURT IN THE NKEN CASE, APPLIES TO THIS COURT'S CONSIDERATION OF THE CITY'S STAY REQUEST 4

 C. UNDER THE NKEN STANDARD, THE CITY IS ENTITLED TO AN IMMEDIATE STAY. 5

 1. The City Has Made a Strong Showing It is Likely to Succeed on the Merits. 5

 2. The City Will Face Irreparable Injury if an Immediate Stay is Not Granted. 9

 3. The Plaintiffs Will Not Be Substantially Injured by the Grant of a Stay 11

 4. The Public Interest Supports the Granting of a Stay 12

 D. AT THE VERY LEAST, THIS COURT SHOULD GRANT A STAY PENDING RESOLUTION OF A STAY REQUEST IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. 12

3. CONCLUSION 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Citizens for Clean Gov’t v. City of San Diego,
474 F.3d 647, 653 (9th Cir. 2007) 6

Citizens United v. Federal Election Commission,
130 S.Ct. 876, 911 (2010) 9, 10

Gonzalez v. Arizona,
485 F.3d 1041, 1050 (9th Cir. 2007) 6

Fed. Election Comm’n v. Beaumont,
539 U.S. 146, 161 (2003) 7

Hilton v. Braunskill,
481 U.S. 770, 776 (1987) 2, 5

Klein v. City of San Clemente
584 F.3d 1196, 1208(9th Cir. 2009) 12

Nken v. Holder,
129 S.Ct. 1749, 1761 (2009) 2, 5

Purcell v. Gonzalez,
549 U.S. 1, 4-5 (2006) 11

Reynolds v. Sims
377 U.S. 533, 585 (1964) 10

Soules v. Kauainans for Nukolii Campaign Comm.
849 F.2d 1176, 1182-83(9th Cir. 2003) 10

Sw. Voter Registration Educ. Project v. Shelly
344 F.3d 914, 919 (9th Cir. 2003) 10

Thurman Industries, Inc. v. Pay ‘N Pak Stores, Inc.
875 F.2d 1369, 1378 (9th Cir. 1989) 8

Virginian Ry. Co. v. U.S.,
272 U.S. 658, 672 (1926) 5

Winter v. Nat’l Res. Def. Council.,
129 S.Ct. 365, 381 (2008) 6

1
2
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25
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28

Statutes and Other Authorities

Federal Rule of Civil Procedure 62 (c) 4

ECCO § 27.2935 5

ECCO § 27.2936 5

ECCO § 27.2938 2

ECCO § 27.2951 4, 5

Non-Published Authorities

Comm. on Jobs Candidate Advocacy Fund v. Herrera
2007 WL 2790351, *3 (N.D. Cal. Sept. 20, 2007) 8

Long Beach Area Chamber of Commerce et al. v. City of Long Beach
(No. 07-55691) 3, 6, 8

McComish v. Bennett
(No. 09A736) 13

McComish v. Brewer
(No. CV-08-1550-PHX-ROS) 13

McComish v. Martin
(No. 10-15165, 10-15166) 13

1 **1. INTRODUCTION, STATEMENT OF FACTS AND SUMMARY OF ARGUMENT**

2 Plaintiffs Phil Thalheimer, Associated Builders & Contractors, Inc. San Diego Chapter,
3 Lincoln Club of San Diego County, San Diego County Republican Party, and John Nienstedt
4 (collectively “Plaintiffs”) challenge as unconstitutional five separate provisions related to
5 contribution limits contained in the San Diego Municipal Election Campaign Control Ordinance
6 (“ECCO”). *See* Plaintiffs’ Verified Complaint at 2; Order Granting in Part and Denying in Part
7 Plaintiffs’ Motion for Preliminary Injunction Filed Feb. 16, 2010 (“Feb. 16 Order”) at 2 (listing
8 five challenged provisions). Plaintiffs sought a preliminary injunction barring the City’s
9 enforcement of these provisions pending a trial on the merits. *See* Plaintiffs’ Motion for
10 Preliminary Injunction at 2-3. Following briefing and oral argument, the Court issued a 27-page
11 opinion and order granting in part, and denying in part, Plaintiffs’ preliminary injunction motion,
12 on grounds that parts of the challenged ECCO provisions, at least as applied to certain entities,
13 violate the First Amendment of the United States Constitution. Feb. 16 Order.

14 In particular, the Court preliminarily enjoined the City’s enforcement of those ECCO
15 provisions barring committees making only independent expenditures in candidate elections from
16 accepting contributions (or spending money received as contributions) exceeding \$500 from
17 individuals. In a further order issued Feb 19, 2010, this Court clarified that independent
18 expenditure committees also may accept contributions for use in City candidate elections from
19 *non-individual* entities, such as corporations and labor unions, and accept payments for the
20 purpose of influencing City candidate elections from the checking and credit card accounts of
21 such entities. Order (1) Granting the City of San Diego’s Ex Parte Motion for Clarification and
22 (2) Granting in Part Plaintiffs’ Request to Preliminarily Enjoin ECCO § 27.2951 (“Feb. 19
23 Order”) at 2.

24 The Court also enjoined enforcement of ECCO provisions barring candidates from
25 soliciting and accepting contributions from political parties, and barring political parties from
26 contributing to candidates from a party’s checking or credit card accounts. Feb. 16 Order at 26-
27 27. However the Court stayed the preliminary injunction as to candidates soliciting or accepting
28 political party contributions “until further notice of the Court, so as to allow the City time to

1 provide an alternative limit on the contributions.”¹ Feb. 16 Order at 26. Finally, the Court
2 enjoined the City from taking any action regarding the Ethics Commission’s enforcement position
3 that ECCO section 27.2938 prohibits candidates from using their own money in furtherance of
4 their campaigns more than 12 months before the primary election.² *Id.*

5 On March 5, 2010, the City submitted a Notice of Appeal from portions of the Court’s
6 February 16, 2010 Order, and a second Notice of Appeal from the Court’s February 19, 2010
7 Order. *See* Notice of Appeal; Preliminary Injunction Appeal (“Notice of Appeal”).³

8 This Court should *immediately* stay those aspects of its order barring enforcement of
9 ECCO provisions related to contributions to independent expenditure committees pending appeal
10 in this case because the City meets the criteria for the grant of a stay and an immediate stay is in
11 the public’s interest.⁴

12 In considering a request for a stay, this Court must consider four factors: “(1) whether the
13 stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether
14 the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
15 substantially injure the other parties interested in the proceeding; and (4) where the public interest
16 lies.” *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009), *quoting Hilton v. Braunskill*, 481 U.S. 770,
17 776 (1987). “The first two factors ... are the most critical.” *Id.*

18 ///

19 ///

20 _____
21 ¹ The Ethics Commission staff has begun assisting the Ethics Commission in making a recommendation to the City
22 Council as to an appropriate limitation for political party contributions. *See* Declaration of Stacey Fulhorst In
23 Support of Defendant City of San Diego’s Motion for Immediate Stay (“Fulhorst Dec.”) at ¶ 5.

24 ² This Court declined Plaintiffs’ motion to enjoin the \$500 contribution limit applicable to individual contribution
25 limits to City candidates; the ban on contributions to candidates by non-individual entities (aside from political
26 parties) and the related ban on candidates’ accepting contributions from non-individual entities’ accounts; and the 12-
27 month temporal limitation on City candidate contributions from individuals to candidates. *Id.* at 26-27.

28 ³ Each Notice of Appeal submitted on March 5, 2010 was styled *Notice of Appeal; Preliminary Injunction Appeal*.
We hereafter refer to the two Notice of Appeals collectively as “Notice of Appeal.”

⁴ The City does not request a stay of the injunction related to contributions by political parties, as this provision is
already stayed by the February 16 order of this Court. Feb. 16 Order, at 26. The City declines to request a stay of the
injunction related to the 12-month provision for self-financed candidates and will not be appealing this aspect of the
Court’s ruling.

1 In this case, all four factors strongly support this Court's granting of a stay.

2 *First*, the City is likely to succeed on the appeal for three reasons: (1) This Court abused
3 its discretion in granting the preliminary injunctions without allowing for adequate factual
4 development as to the City's sufficiently important interests in limiting contributions to
5 independent expenditure committees, and the extent of the burden of such limitations on
6 Plaintiffs' First Amendment rights; (2) This Court abused its discretion in granting a preliminary
7 injunction on this issue while the very same issue is pending before the Ninth Circuit in *Long*
8 *Beach Area Chamber of Commerce et al. v. City of Long Beach* (No. 07-55691); and (3) This
9 Court abused its discretion in incorrectly concluding as a matter of law that contribution limits to
10 independent expenditure committees are unconstitutional.

11 *Second*, the City and its residents will suffer irreparable injury due to the confusion and
12 uncertainty in the law created by the Court's ruling. Nothing less than the integrity of the San
13 Diego electoral process is at stake: under the Court's ruling, foreign individuals, corporations and
14 other entities may contribute unlimited sums to City candidate elections. As a result,
15 modification of current ECCO provisions may be necessary to ensure that voters receive
16 important and timely information about substantial sources of funding for independent
17 expenditures before they cast their votes. This Court properly recognized the havoc that its ruling
18 could have in relation to the new political party limitations, and for that reason it sensibly
19 imposed a temporary stay of its order; similar concerns should have led this Court to stay its
20 ruling as to contributions to independent expenditure committees.

21 *Third*, Plaintiffs will not suffer injury if they must await the end of the current election
22 season before these rules go into effect. The Plaintiffs have ample ways to participate in the
23 election process, including through independent spending, even if the enjoined contribution limits
24 remain in place during the current election season.

25 *Fourth* and finally, for the reasons given above, the public interest supports granting an
26 immediate stay. The Supreme Court and Ninth Circuit have cautioned against preliminary
27 injunctions issued while the election season is already underway.

28 ///

2. LEGAL ARGUMENT

A. THIS COURT HAS THE AUTHORITY TO GRANT A STAY OF PORTIONS OF ITS ORDER GRANTING A PRELIMINARY INJUNCTION AND ITS CLARIFICATION ORDER.

Federal Rule of Civil Procedure 62(c) provides in pertinent part that, “[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.”

Under this standard, this Court has authority to issue a stay suspending portions of the interlocutory injunction issued through its February 16, 2010 order, as well as the Court’s “clarification” and further injunction issued in its February 19, 2010 order. The latter order included a portion that was a new injunction (related to ECCO section 27.2951) and a portion “modify[ing]” the February 16, 2010 injunction. Appeals of both interlocutory orders are already pending. See Notice of Appeal. A stay therefore is within the Court’s discretion under Rule 62(c).⁵

B. THE TRADITIONAL FOUR-PART STANDARD FOR THE GRANT OF A STAY, MOST RECENTLY SET FORTH BY THE SUPREME COURT IN THE NKEN CASE, APPLIES TO THIS COURT’S CONSIDERATION OF THE CITY’S STAY REQUEST.

The Supreme Court recently reiterated and clarified the traditional standard that courts should apply in considering a request for a stay:

[T]hose legal principles [applicable to stay requests] have been distilled into consideration of four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”

⁵ The court did not require the Plaintiffs to post a bond to secure their preliminary injunction ruling. Feb. 16 Order, at 27. Similarly, the City should not be required to post a bond to secure this stay.

1 *Nken*, 129 S.Ct. at 1761, quoting *Hilton*, 481 U.S. at 776 . “The first two factors of the
2 traditional standard are the most critical.” *Id.*

3 A stay is ““an exercise of judicial discretion,’ and ‘[t]he propriety of its issue is dependent
4 upon the circumstances of the particular case.’” *Id.* at 1760-61, citing *Virginian Ry. Co. v. U.S.*,
5 272 U.S. 658, 672 (1926). “[T]he traditional stay factors contemplate individualized judgments
6 in each case.” *Id.* at 1760-61, quoting *Hilton*, 481 U.S. at 777.

7 **C. UNDER THE NKEN STANDARD, THE CITY IS ENTITLED TO AN**
8 **IMMEDIATE STAY.**

9 ***1. The City Has Made a Strong Showing It is Likely to Succeed on the Merits.***

10 Under the ECCO, political committees cannot accept contributions from non-individual
11 entities, such as corporations or labor unions, to support or oppose candidates for City elections.
12 Such committees may accept contributions from individuals, however, up to \$500 per election per
13 candidate.⁶ This Court has preliminarily enjoined enforcement of these provisions of the ECCO
14 as to independent expenditure committees.

15 Though the City directs this stay request to the Court’s orders enjoining three separate
16 ECCO provisions—ECCO §§ 27.2935(a), 27.2936(b), and 27.2951 —the Court’s orders work
17 together to accomplish a single goal: to allow political committees making solely independent
18 expenditures to accept *unlimited* contributions from individuals and *non-individual* entities for
19 use in supporting or opposing candidates in City elections. The Court’s decision to grant
20 preliminary injunctions on these three provisions stemmed from its determination that limits on
21 contributions to independent expenditure committees violate the First Amendment. Feb. 16
22 Order at 9-14.

23 As this Court acknowledged, this constitutional question has divided the courts. *Id.* at 12-
24 13 (discussing cases relied upon by the City holding that contribution limits to independent

25 ⁶ Section 27.2935(a) bars individuals from making contributions in City candidate elections that exceed \$500 to
26 support or oppose a candidate in any single election. Section 27.2936(b) bars general purpose recipient committees
27 from using a contribution for the purpose of supporting or opposing a City candidate unless the contribution comes
28 from an individual and does not exceed \$500 per candidate per election. Section 27.2951 bars an individual from
making, or a committee from accepting, a contribution for a City candidate election drawn from a checking account
or credit card account of a non-individual entity, such as a corporation or labor union.

1 expenditure committees are constitutional). Indeed, the constitutional question is currently before
2 Ninth Circuit in another case. *Long Beach Area Chamber of Commerce et al. v. City of Long*
3 *Beach* (No. 07-55691); *see also* Defendant City of San Diego’s Reply to Amicus Curiae Brief of
4 American Civil Liberties Union of San Diego & Imperial Counties In Support of Plaintiffs
5 (“Reply to ACLU Br.”) at p. 3, n. 4 (City bringing pending *Long Beach* case to the attention of
6 the trial court); Transcript of Motion Hearing Before The Honorable Irma E. Gonzalez United
7 States District Chief Judge (“Tr. Feb. 25 Oral Arg.”) at 48-49 (same).

8 For three reasons, the United States Court of Appeals for the Ninth Circuit is likely to
9 conclude that this Court abused its discretion in granting a preliminary injunction as to these three
10 provisions. *See Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 381 (2008)
11 (abuse of discretion standard applies to review of district court determinations to grant a
12 preliminary injunction). Accordingly, the City meets the first requirement under the *Nken*
13 standard of showing likelihood of success on the merits.

14 *First*, this Court abused its discretion in granting the preliminary injunctions without
15 allowing for adequate factual development. In *Citizens for Clean Gov’t v. City of San Diego*, 474
16 F.3d 647, 653 (9th Cir. 2007), the Ninth Circuit reversed the grant of an injunction because the
17 trial court accepted an argument about state interests justifying a campaign finance claim “as a
18 matter of law.” *Id.* The Ninth Circuit determined that before granting judgment, the district court
19 should have entertained “further factual development” of the claims before adjudicating them. *Id.*
20 at 654. The Ninth Circuit reminded the district courts of the importance of resolving campaign
21 finance challenges on the basis of evidence, not “hypotheticals”: “we again emphasize the
22 importance of factual development” in considering First Amendment challenges to campaign
23 finance laws. *Id.* at 653; *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007)
24 (preliminary injunction in election law case properly denied where legal question required
25 “intense factual inquiry” and plaintiffs had not developed a “full record”).

26 In this case, the City argued that limitations on contributions by independent expenditure
27 committees are justified to prevent corruption and the circumvention of valid contribution limits,
28 under the lower level of scrutiny applicable to contribution limits as recognized by the Supreme

1 Court. *See, e.g. Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161 (2003) (lower level of
2 scrutiny applied to review of federal corporate contribution *ban*); Memorandum of Points and
3 Authorities of Defendant City of San Diego In Opposition to Plaintiffs' Motion for Preliminary
4 Injunction ("Opposition") at 13-16. The City stressed in its Opposition that this Court should not
5 resolve the case without affording the parties an opportunity for factual development as to the
6 City's interests and the burdens on the Plaintiffs, *id.* at 15,⁷ and it noted at oral argument that if
7 this Court granted a preliminary injunction on this issue without factual development on the
8 question, it could undermine voter confidence in San Diego elections. Tr. Feb. 25 Oral Arg. at
9 49-50.

10 In its February 16 Order, this Court recognized the need for factual development in
11 considering the constitutionality of *other* challenged ECCO provisions. Feb. 16 Order at 9
12 ("Because the factual record is not adequately developed, Plaintiffs have not demonstrated a
13 likelihood of success on the merits regarding" their constitutional challenge to the \$500 individual
14 contribution limit to candidates). But on the question of the constitutionality of contribution
15 limits to independent expenditure committees, the Court weighed the lack of factual evidence
16 against the City, not the Plaintiffs. *Id.* at 14 ("In sum, the Court does not accept the City's
17 assertion that contributions to committees making only independent expenditures can corrupt or
18 create the appearance of corruption, at least in the absence of convincing evidence."); *id.* at 10
19 ("in this case, the City has not put forth sufficient evidence to justify its limitation"). Plaintiffs
20 developed no facts, other than those in their verified complaint, to support their claims. The City
21 stands ready to develop facts at a trial on the merits. If the Court was concerned about lack of
22 facts supporting the City's position on the question of the constitutionality of contributions to

23 _____
24 ⁷ "Third, to the extent the constitutional question turns upon evidence that contributions can have a corrupting
25 potential, the question is not amenable to decision at this preliminary stage before factual development. *Cf. N.C.*
26 *Right to Life*, 525 F.3d at 334 (Michael, J., dissenting) ('North Carolina has provided a thorough record of the threat
27 of corruption, the appearance of corruption, and circumvention of election laws that attend the operation of
28 independent expenditure committees'). As with the *Randall* question concerning the *amount* of campaign
contributions, Plaintiffs must rely on facts, not unsupported arguments. They offer no evidence on this question.
(Kousser Decl. at ¶ 3 [noting absence of facts presented by Plaintiffs on this question and describing potential
empirical testing of this question].) Nor do they offer any evidence that the City has another way of insuring that so-
called 'independent' expenditures are truly independent of candidates who can be corrupted by large contributions."

1 independent expenditure committees, it should have given the parties the opportunity to develop
2 these facts before issuing an injunction barring enforcement of the law. Failure to do so was an
3 abuse of discretion.

4 *Second*, this Court abused its discretion in granting a preliminary judgment on this issue
5 while the very same issue is pending before the Ninth Circuit in the *Long Beach* case. The City
6 informed the Court of the pending case in briefing, Reply to ACLU Br. at p. 3, n. 4, and at oral
7 argument. Tr. Feb. 25 Oral Arg. at 48-49. When informed at oral argument that the federal district
8 court considering the same question in the *Herrera* case from San Francisco had stayed
9 consideration of this issue pending the Ninth Circuit's resolution of the *Long Beach* case, this
10 Court sensibly asked whether this Court should do the same. Tr. Feb. 25 Oral Arg. at 53. But in
11 the Court's order, it decided not to wait, adjudicating the claim (without mentioning the pending
12 *Long Beach* case). By failing to wait, this Court risked the City and its residents facing multiple
13 sets of campaign finance rules during the course of the election in the event that the Ninth
14 Circuit's *Long Beach* case upholds the constitutionality of such laws, thereby necessitating a
15 reversal of the relevant portion of this Court's preliminary injunction orders.

16 *Third*, this Court abused its discretion in incorrectly concluding as a matter of law that
17 contribution limits to independent expenditure committees are unconstitutional. *See Thurman*
18 *Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989) ("A district court
19 abuses its discretion ...by applying an incorrect legal standard.").

20 The City will not waste this Court's time by simply reiterating the City's points made and
21 rejected by the Court in its February 16 Order at pages 9-14; the City will have ample opportunity
22 to make these arguments to the Ninth Circuit in due course. We briefly note here only that there
23 are logical inconsistencies between the Court's legal conclusion on the question of the
24 constitutionality of limitations on contributions to independent expenditure committees and its
25 decision upholding the ban on contributions from non-individual entities (aside from political
26 parties) to *candidates*. In the Court's discussion of the latter question at pages 21-23 of the
27 February 16 Order, the Court recognized (1) that states have an important interest in restricting
28 the influence of political war chests funneled through the corporate form; (2) that states have a

1 separate anticircumvention interest in limiting corporate contributions; (3) that judicial deference
2 is warranted in the face of “careful legislative judgments” about the need for campaign finance
3 regulation; and (4) that “[a] ban on direct corporate contributions leaves individual members of
4 corporations free to make their own contributions, and deprives the public of little or no material
5 information” (*quoting Beaumont*, 439 U.S. at 162 n.8).

6 Each of these points mentioned by the Court is legally correct, and together they justify
7 contribution limits to independent expenditure committees as well. Moreover, this Court
8 recognized on page 21 of its February 16 Order that the Supreme Court’s recent *Citizens United*
9 case did not expressly consider the constitutionality of contribution limitations; yet this Court
10 relied heavily upon *Citizens United* in striking down contribution limitations to independent
11 expenditure committees. *Id.* at 10-14.

12 For all three reasons outlined, the City has made a strong showing it is likely to succeed
13 on the merits in its appeal of this Court’s grant of a preliminary injunction related to contribution
14 limitations to independent expenditure committees.

15 **2. *The City Will Face Irreparable Injury if an Immediate Stay is Not Granted.***

16 When this Court held that ECCO provisions barring political parties from making direct
17 contributions to candidates was unconstitutional, Feb. 16 Order at 18-20, the Court recognized
18 that immediate enforcement of a preliminary injunction could wreak havoc on City politics,
19 because there would be no contribution limits for political parties in place. Accordingly, the Court
20 stayed enforcement of its preliminary injunction “so as to allow the City time to provide an
21 alternative limit on the [political party] contributions.” *Id.* at 26.

22 Unfortunately, the care with which the Court considered the havoc which could have
23 ensued by immediate application of its Order did not extend beyond its consideration of the
24 political party limitations. With the preliminary injunctions related to contributions to
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1 independent expenditure committees in immediate effect, the City and its residents will suffer
2 irreparable injury due to the confusion and uncertainty in the law created by the Court's ruling.⁸

3 Nothing less than the integrity of the San Diego electoral process is at stake: under the
4 Court's ruling, an American subsidiary of a foreign corporation potentially could contribute
5 unlimited sums to City candidate elections, all without supplemental disclosure laws that would
6 enhance transparency. *See* Fulhorst Dec. at ¶ 6. If a subsidiary wished to contribute \$10 million
7 to an independent expenditure committee to influence a City candidate election, that information
8 might not get to the voters until after an election, via a form filed in Sacramento.

9 To be sure, the City could and eventually will craft new laws to deal with these issues
10 (assuming this Court's orders stand). But doing so takes time and deliberation, especially given
11 uncertainty about constitutional limitations of new regulations. For example, the Supreme Court
12 in the *Citizens United* case left open the question whether it would be constitutional to bar
13 independent expenditures by foreign corporations. *Citizens United v. Federal Election*
14 *Commission*, 130 S.Ct. 876, 911 (2010) ("We need not reach the question whether the
15 Government has a compelling interest in preventing foreign individuals or associations from
16 influencing our Nation's political process."). In the meantime, as the City sorts out its legal
17 options, the City and its residents face immediate harm.

18 The dangers raise a broader point: "[E]lection cases are different from ordinary injunction
19 cases," *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir, 2003), and
20 federal courts must keep in mind "the special dangers of excessive judicial interference with the
21 electoral process," *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182-83
22 (9th Cir. 1988); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("where an impending
23 election is imminent and a State's election machinery is already in progress, equitable

24 _____
25 ⁸ Since this Court issued its ruling, the San Diego Ethics Commission has worked diligently to update regulations, its
26 publications, and website, and to advise the City Council and the public on the changes brought about by this Court's
27 orders. Fulhorst Dec. at ¶ 7. In addition, the Ethics Commission has not yet had the opportunity to consider new
28 laws to deal with the consequences of this Court's orders outside of constitutional contribution limitations on political
party contributions, and to allow the public and the regulated community to consult on changes to the ECCO. *Id.* at
¶¶ 5, 6, 8. Counsel for the City began preparing this stay application and the materials for appeal as soon as the City
Council determined that the City should pursue a stay and an appeal. Declaration of Dick A. Semerdjian In Support
of Defendant City of San Diego's Motion for Immediate Stay at ¶ 2.

1 considerations might justify a court in withholding the granting of immediately effective relief...
2 In awarding or withholding immediate relief, a court is entitled to and should consider the
3 proximity of a forthcoming election and the mechanics and complexities of state election laws,
4 and should act and rely upon general equitable principles.”).

5 The Supreme Court has counseled against changing rules shortly before an election.
6 *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (in considering granting preliminary relief, a court is
7 “required to weigh, in addition to the harms attendant upon issuance or nonissuance of an
8 injunction, *considerations specific to election cases* and its own institutional procedures. Court
9 orders affecting elections...can themselves result in voter confusion and consequent incentive to
10 remain away from the polls.” (emphasis added)).

11 **3. *The Plaintiffs Will Not Be Substantially Injured by the Grant of a Stay.***

12 In contrast to the irreparable harm which the City’s residents will suffer if this Court
13 declines to grant a stay, a stay will not irreparably harm the Plaintiffs in this case. Any individual
14 can still make unlimited independent expenditures of his own funds in a candidate election. And
15 any corporation and labor union, as well as other entities, are free to engage in independent
16 expenditure campaigns, provided they comply with ECCO disclosure laws which have not been
17 challenged in this case.

18 Moreover, the Court should take note of the fact that ECCO currently allows
19 organizations, including political parties, to make payments for the purpose of communicating
20 with their members without abiding by any contribution limits or source prohibitions. *See*
21 *Fulhorst Dec.* at ¶ 11. In other words, organizations are permitted to accept unlimited
22 contributions from anyone for the purpose of communicating with their members. *Id.* With
23 respect to political parties, all voters registered with a political party are considered “members”
24 for purposes of the member communications rules. *Id.* In addition, organizations that make
25 payments for member communications are permitted to coordinate such expenditures with City
26 candidates. *Id.* Thus, Plaintiff Republican Party of San Diego, may, for example, continue to
27 engage in substantial campaign advocacy, coordinated with the candidate of its choice, even if the
28 stay is granted.

1 **4. *The Public Interest Supports the Granting of a Stay.***

2 For reasons given in Point 2 above, the public interest supports the granting of a stay. The
 3 Court's order stands to cause confusion in the middle of the campaign season, and the immediate
 4 suspension of key ECCO provisions threaten the public's confidence in the honesty and integrity
 5 of the electoral process in San Diego. Though it is true that there is a "significant public interest"
 6 in upholding free speech principles, *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir.
 7 2009), in this case there are important interests on both sides of the equation. A stay of the
 8 Court's orders related to contributions by independent expenditure committees preserves the
 9 integrity of the City's electoral process, while still leaving the Plaintiffs' with ample means of
 10 expressing and paying for their political views.

11 **D. AT THE VERY LEAST, THIS COURT SHOULD GRANT A STAY**
 12 **PENDING RESOLUTION OF A STAY REQUEST IN THE UNITED STATES COURT**
 13 **OF APPEALS FOR THE NINTH CIRCUIT.**

14 Even if this Court disagrees with the City on the question whether the City has
 15 demonstrated the four factors necessary to grant a stay, at the very least this Court should
 16 recognize that reasonable minds may disagree on the question, and in particular that the Ninth
 17 Circuit may agree with the City that a stay of this Court's orders regarding contribution
 18 limitations to independent expenditure committees is in order. Given the strong possibility that
 19 the Ninth Circuit in fact would grant a stay through the pendency of the preliminary injunction
 20 appeal, this Court should at the least grant a short stay lasting long enough for the Ninth Circuit to
 21 consider issuing its own stay. Granting this short stay would create the least confusion for City
 22 voters and others affected by City elections. If this Court grants a stay pending the Ninth
 23 Circuit's consideration, the City would be obligated under Ninth Circuit Rule 27-2 to request a
 24 stay from the Ninth Circuit within seven days of this Court's order.

25 A federal district court in Arizona recently followed a similar procedure in a case
 26 challenging the constitutionality of the "matching funds" portion of Arizona's public financing
 27 program. The Court granted a preliminary injunction enjoining this part of Arizona's law on First
 28 Amendment Grounds, but it granted a short stay of this order: "The injunction against matching

1 funds will be stayed for ten days to allow Defendants to seek additional relief, such as a stay,
2 from the Ninth Circuit.” See *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, Jan. 20, 2010
3 Order, available at: <http://www.goldwaterinstitute.org/case/68> (last visited March 8, 2010).⁹

4 **3. CONCLUSION**

5 For the foregoing reasons, the City respectfully requests that this Court grant an
6 immediate stay as to those portions of the Court’s order relating to contributions to independent
7 expenditure committees. The City requests that this Court issue a stay to remain in effect
8 pending resolution of the appeals in the case. In the alternative, the City requests that this Court
9 issue a stay to remain in effect until the United States Court of Appeals for the Ninth Circuit may
10 rule upon an application for a stay pending appeal addressed to that Court.

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13 Dated: March 8, 2010

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24 ⁹ The Defendants then applied to the Ninth Circuit to extend the stay. A motions panel of the Ninth Circuit extended
25 the stay pending a further ruling from the merits panel in the case. See *McComish v. Martin*, United States Court of
26 Appeals for the Ninth Circuit, Nos. 10-15165, 10-15166, Order, Feb. 1, 2010, available at
27 <http://www.ca9.uscourts.gov/datastore/general/2010/02/03/10-15165.pdf> (last visited March 8, 2010). Justice
28 Kennedy, as Circuit Justice, denied without prejudice plaintiffs’ motion to lift the stay. See *McComish v. Bennett*,
United States Supreme Court, No. 09A736 (Kennedy, J., Chambers Justice), Feb. 16, 2010, available at
<http://www.ca9.uscourts.gov/datastore/general/2010/02/16/09A736McComishvBennett.pdf> (last visited March 8,
2010). The stay remains in effect.