Party-to-Candidate Contribution Limits in San Diego City Elections

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To: Members of the San Diego City Council
From: Thad Kousser, Associate Professor of Political Science, University of California, San Diego (for identification purposes only)
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Policy Question: Should the City of San Diego limit the size of contributions from parties to candidates for city elections? If so, what should the size of these limits be, both in district elections and in citywide contests?

Summary of Report: This report reviews the goals of campaign finance limits and the current legal context in which candidates, parties, and the funders of San Diego city elections operate before laying out the pros and cons of enacting a limit on party-to-candidate contributions. Given the distinctive role played by parties in local elections and the many alternative avenues through which parties can help candidates, a case could be made for leaving these contributions unlimited. There are also compelling reasons to enact limits, especially if parties can be used as a conduit to circumvent limits on individual contributions to candidates, thus opening the door to corruption or its appearance. If Councilmembers wish to enact a limit, this report lays out the constitutional tests that courts are likely to apply to judge them, and provides comparisons with the limits in place in large cities in the rest of the nation as possible benchmarks.

Policy Recommendation: In order to balance preserving associational and free speech rights, as well as supporting robust political competition, against the goal of preventing the circumvention of individual-to-candidate limits at a level that could lead to corruption or its appearance, the Council should consider enacting party-to-candidate contribution limits of $10,000 in city council contests and $20,000 in mayoral and city attorney contests (per election, indexed to inflation, and applied in aggregate to all party committees).

I. Competing Goals in Campaign Finance Regulation: Policymakers and courts have pursued multiple goals in creating campaign finance laws in the United States, and sometimes the pursuit of one goal comes at the cost of another. Here are several commonly espoused goals that Councilmembers may wish to keep in mind, along with caveats about how pursuing one might need to be balanced against harming another goal:

- **Preventing Corruption (or the appearance of corruption).** In the landmark *Buckley v. Valeo* (1976) case, the Supreme Court identified this as the compelling

governmental interest that could justify curtailing free expression by limiting campaign contributions. Recognizing this points out the tradeoff between preventing corruption and limiting speech, perhaps motivating policymakers to set limits at levels that prevent corruption yet still allow for effective expression and political competition.

- **Freedom of Expression.** The courts have consistently held that campaign spending is necessary for candidates, individuals, interest groups, and parties to exercise their First Amendment rights. While limits on contributions have been upheld, judges and many policymakers are cautious about imposing burdens on the free speech and associational rights of all actors.[1]

- **Electoral Competitiveness.** Because incumbent officeholders running for reelection have so many electoral advantages – both in their name recognition and their perquisites of office – their opponents need to raise significant funds to challenge them effectively. Tight limits on contributions and laws that discourage expenditures could harm the chances of challengers and lead to less competitive elections.

- **Transparency of Exchanges**. It is important for voters, journalists, and other observers to know where campaign money comes from and where it goes. Direct contributions from parties to candidates are reported quite transparently, but tight limits on these sorts of exchanges could have the perverse effect of pushing contributions away from paths that make the donor-to-recipient relationship clear and toward paths – including independent expenditures by groups that are not as readily identifiable as parties – in which it is obscured from voters. Efforts to curb corruption through tight party-to-candidate limits could motivate donors to pursue these paths and thus reduce transparency. On the other hand, a complete absence of limits on individual-to-party and party-to-candidate contributions could make parties into conduits through which individual-to-candidate contribution limits are circumvented.

II. Current Law provides three ways for parties to influence elections for city office:

1. Through direct contributions from parties to candidates for citywide or district offices, which are currently subject to no limits. This legal regime was set in place by Judge Gonzalez's January 2012 ruling, which effectively resolved the *Thalheimer v. City of San Diego* case. Councilmembers know well the history of San

[1] Supreme Court justices focused on the effect of contribution limits on associational rights rather than free speech in the *Buckley* decision and in the majority opinion written by the Court's more liberal justices in the *Nixon v. Shrink Missouri Government PAC* (2000) case, both of which upheld contribution limits. The limits in question in *Shrink Missouri* applied to contributions from individuals and political committees, ranged from $250 to $1000, depending on the level of office, and were adjusted for inflation. In Justice Kennedy's dissenting opinion in *Shrink Missouri* and in Justice Breyer's plurality opinion in *Randall v. Sorrell* (2006), which struck down Vermont's contribution limits as unconstitutionally low, the emphasis shifted from associational rights to the effect of contribution limits on a candidate's freedom of speech.

Diego's regulation of party-to-candidate contributions. Such contributions had been banned by Section 27.2950 of the San Diego Municipal Election Campaign Control Ordinance (ECCO). After Judge Gonzalez preliminarily enjoined the City from enforcing this ban on February, 2010, the City adopted a $1000 per election limit on party-to-candidate contributions (ECCO Section 27.2934(b)). Judge Gonzalez overturned this limit in her 2012 ruling.

How can parties raise the funds that they ultimately contribute to candidates? Current San Diego Municipal Code (27.2934(b)) requires that funds that parties may draw upon to make these contributions may only be raised in attributed contributions of $500 or less from individuals for a contribution to a city council candidate or $1000 or less for a candidate for citywide office (and may not come from non-individuals such as corporations, labor unions, and other interest groups). Judge Gonzalez's 2012 ruling treated this attribution requirement as enforceable. If enforceable, this requirement could prevent individuals from circumventing the City's individual-to-candidate contribution limits by making large donations to parties, which would then pass the money on to candidates. However, Professor Rick Hasen's memorandum points out the grave legal concerns about the enforceability of this attribution limit. The California Republican Party contends that the state's disclosure laws applicable to political parties preempt the City's requirement that political parties file reports attributing their candidate contributions to individual contributions of no more than $500/$1000, and the Ethics Commission believes that this is a reasonable interpretation of state law. There are additional concerns about the practicality of establishing a clear paper trail for attributed contributions, given frequent transfers between state and federal party accounts. It appears that parties will be able to raise large sums from individuals in order to finance party-to-candidate contributions, which today are unlimited.

Both parties have made immediate and significant use of this contribution avenue. During the 2012 election cycle, the Republican Party contributed $800,000 to a mayoral candidate and a total of $75,000 to two City Council candidates, while the Democratic Party contributed $237,575 to a mayoral candidate and a total of $37,500 to two City Council Candidates.

2. Through communication with party members. Parties may spend unlimited sums communicating with their members – voters who have registered with their party – during the course of an election. Citywide, 272,293 of San Diego's 626,807 registered voters are Democrats (40.2%), and 182,884 are Republican (27.0%).[2] To make these communications, parties can engage in a broad range of campaigning and grassroots mobilization activities: sending direct mail to their members, calling them, knocking on their doors, and urging them to post lawn signs supporting a candidate. Because parties may raise funds for these purposes from any source and may directly coordinate with candidates on member communications, they energetically exercise this route to advocacy. Combining

[2] These figures are taken from a March 1, 2013 analysis of registration run by the San Diego County Registrar of Voters.

the city council and mayoral elections held from 2004 to 2012, the Republican Party spent $4.1 million on member communications and Democrats spent $1.9 million.[3] A party's ability to make these communications is protected in state statute (California Government Code 85703), which prevents local governments from banning or limiting such expenditures.

3. Through independent expenditures on behalf of – though not coordinated with – candidates. Judge Gonzalez ruled in 2012 that parties can make unlimited independent expenditures, can raise funds for these expenditures from both individuals and non-individuals (such as corporations, labor unions, and other interest groups), and that parties can solicit unlimited sums for this purpose. While parties may not coordinate this spending with candidates, the fact that parties can coordinate their member communications with candidates gives them a familiarity with candidate messages and strategies that can render this prohibition moot. In the 2012 election cycle, the only reported party independent expenditures were the $124,355 that the San Diego County Democratic Party spent to oppose a mayoral candidate, the $13,813 that it spent to oppose a City Council candidate, and the $1,512 that the Democratic State Central Committee spent to support a mayoral candidate.

III. Should Contributions from Parties to Candidates be Limited? Given the many alternate avenues through which parties can influence elections for city office in San Diego, valid arguments could be made to place a tight limit on direct contributions to candidates, or to leave this route entirely unlimited. Here are potential rationales behind each approach.

1. Reasons to leave party-to-candidate contributions unlimited:
   a. Parties play a distinct role in financing campaigns, contributing in order to help their members win close elections rather than to influence the behavior of incumbents in office. This is clear both in studies of party giving at the state and national level, as well as from recent patterns in San Diego. A quantitative analysis in the leading book on state campaign finance, "demonstrates, once again, that party organizations make contributions in such a way as to gain or maintain a majority in the legislature (i.e., giving mostly to competitive races and nonincumbents), a tendency that sets them apart from other contributors. … Whereas PACs, corporations, and individuals tend to contribute to the advantage incumbents have in campaign fund raising (see chapter 9), political parties' contribution patterns make it possible for some challengers to have the money to run in competitive races."[4] This is similar to the strategy that the federal Democratic Congressional Campaign Committee pursued in the 2006

[3] These totals are calculated from the election-by-election estimates of member communication expenditures from 2004-2012 provided to me by Ethics Commission Executive Director Stacey Fulhorst, and by 2012 financial activity summaries for each candidate produced by the Ethics Commission.

[4] From Anthony Gierzynski and David A. Breaux, 1998, "The Financing Role of Parties," in Joel A. Thompson and Gary F. Moncrief, *Campaign Finance in State Legislative Elections* (Washington, DC: Congressional Quarterly, Inc.), pp. 200, 204.

congressional elections of focusing party money on competitive races.[5] In San Diego, when parties were free to make unlimited contributions during the 2012 general election, both parties focused their activity on the most competitive seat, District 1.[6] Because parties direct their contributions to close districts rather than to incumbent officeholders, *severely limiting party contributions could aid incumbents and reduce electoral competitiveness*.

b. Because of parties' distinct goals and giving patterns, party contributions are *less likely to bring corruption or its appearance*. Since parties do not focus their funds on current officeholders in the way that other contributors do, their patterns of giving do not appear aimed at influencing incumbents' policy decisions. Parties try to change election outcomes, rather than to swing a specific city council vote. Additionally, parties generally represent broader interests than individuals or interest groups do. If they raise the funds to make party-to-candidate contributions from a coalition of many party members giving small amounts – the fundraising pattern that the City's attribution requirement was designed to create – then it will be hard to charge than any recipient of a party contribution has been "bought and sold" by a narrow interest. Yet it is important to note that if the attribution requirement is indeed unenforceable, allowing parties to receive large individual contributions and to then pass them along to voters, this point would be moot and party contribution patterns could become consistent with narrow interest giving money in order to influence policy decisions.

c. Party-to-candidate contributions *follow a transparent path that makes a candidate's allegiances and backers clear*. Journalists and watchdogs can use public records compiled by the City Clerk to see who funds these contributions and where the money goes. Voters know what the "name brand" of a party means, allowing them to learn more about where a candidate stands from a party contribution than they can learn, for example, from contributions by groups such as "Unite Here San Diego," "San Diego Works!," or "San Diegans for Healthy Neighborhoods and a Strong Economy."

2. <u>Reasons to limit party-to-candidate contributions:</u>

a. Because parties already have the ability to support their favored candidates through member communications and independent expenditures, *they have plentiful opportunities to exercise their freedom of expression*. If direct contributions were the only way for parties to play a role in elections, then a party could legitimately argue that a tight restriction would reduce its voice to a whisper. Yet city elections in California in the post-*Citizens United* era offer parties two bullhorns to make their voices heard to party registrants and to all voters. The openness of the surrounding legal context means that a reasonable limit on party-to-candidate

[5] See John Sides, Daron Shaw, Matt Grossman, and Keena Lipsitz, 2012, *Campaigns and Elections: Rules, Reality, Strategy, Choice* (New York: W. W. Norton and Company), p. 109.

[6] In District 1 in 2012, the San Diego County Democratic Party contributed $24,000 to Sherri Lightner and spent $106,420 upon member communications on her behalf, while the Republican Party of San Diego County contributed $20,000 to Ray Ellis and spent $229,690 on member communications in this race.

contributions will not close off opportunities for parties to exercise their freedom of speech and associational rights.

b. If the City's attribution requirement is unenforceable, then imposing no limits on parties opens the door to the circumvention of individual-to-candidate contribution limits. Donors who want to influence candidates could use the party as their conduit, making massive contributions to parties that could then be given directly to candidates. As Professor Hasen's memorandum describes, it appears that at least one donor made use of this avenue with a $65,000 contribution to a party that was followed by a $65,000 party-to-candidate contribution in the 2012 elections. To prevent this type of circumvention, Councilmembers should consider setting limits low enough that, if individuals use parties as simple conduits, the resulting contributions would not be large enough to bring corruption or its appearance.

IV. If Councilmembers Favor a Limit, How Should it be Constructed? If Councilmembers do wish to enact a limit, they face the dual tasks of constructing one that meets San Diego's campaign finance policy goals at the same time that it withstands constitutional scrutiny. Balancing competing policy goals requires resolving a debate among competing values: setting a limit that prevents corruption, stops the circumvention of other limits, and preserves the transparency of financial exchanges while at the same time allowing parties to compete with each other and to exercise their First Amendment rights is a tough trick. Withstanding court scrutiny is also a challenge, since courts have upheld some limits on party-to-candidate contributions while striking down others.[7] The courts have, however, provided guidance about the key tradeoff that policymakers must grapple with and the "danger signs" that would cause them to overturn a limit.

The *Randall v. Sorrell* (2006) Test. Because contribution limits infringe upon First Amendment speech protections, they must be "closely drawn" to meet their objectives. The 2006 *Randall v. Sorrell* decision provides the clearest articulation of what a closely drawn party-to-candidate contribution limit should look like (or, rather, what they should *not* look like). When the Supreme Court struck down Vermont's party-to-candidate contribution limits, the plurality opinion written by Justice Breyer applied a fundamental balancing test and noted five danger signs present in Vermont's limits. While this plurality opinion may not be binding, it offers a clear test to judge party-to-candidate limits. This test requires lawmakers to balance between, on the one hand, "the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates," and, on the other, "the need to prevent the use of political parties 'to circumvent contribution limits that apply to individuals.'" (*Randall* at 258-59) Judge Gonzalez made multiple references to this balance when she struck down San Diego's $1000 per election party-to-candidate contribution limit in 2012. She also compared the size of San Diego's limit to limits in other

[7] In the *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (2001) case, the Supreme Court upheld a $5000 limit on party-to-candidate contributions in congressional elections that was coupled with larger ($33,780 to $67,560) caps on coordinated expenditures. In *Randall v. Sorrell* (2006), the Court struck down party-to-candidate contribution limits of $200 to $400 in Vermont state elections.

large U.S. cities, and looked at *Randall's* five danger signs (three of which were present in San Diego's limit).

Comparison to Limits in Other Cities. While the courts have not relied exclusively on the size or per capita impact of contribution limits to assess their constitutionality, Supreme Court justices and Judge Gonzalez have considered these relevant factors. Table 1 below provides three ways to compare San Diego's limits: their amount, their per resident impact, and their per voter impact.[8] All of these comparisons are done at the citywide level rather than in districts. In each comparison, I report the mean as well as the median limit across large cities. The median case provides a better representation of a "typical case" than a mean (or "average") does when one or two outlying cases skews the distribution. Since Jacksonville's very high party-to-candidate contribution limits of $50,000 (nearly five times the next highest limit) is an outlier, medians rather than means provide the most faithful summary of typical patterns across cities.

A. *Total Amount*: To make an apples-to-apples comparison, I look at total size of the party-to-candidate contribution limits per election, rather than per cycle. San Diego's overturned limits, then, would have imposed a $1000 per election limit. Chicago, Indianapolis, and Columbus impose no limits on party contributions. In the eleven cities that do impose limits, limits range from $350 per election in Austin to $50,000 in Jacksonville. The mean amount is $9,198 per election and the median is $4,950.[9]

B. *Total Amount per Resident*: San Diego is a relatively large city, so dividing each city's contribution limit by the size of the city's population provides a better sense of how to compare the costs of reaching voters through broadcast media in a city. Contribution limits range from $0.0003 per resident in Los Angeles to $0.06 in Jacksonville, with a mean of $0.0084 and a median of $0.0011. Given San Diego's population, a limit of the same per capita size would be $11,025 per election to match the mean city level and $1,382 to match the median city.

C. *Total Amount per Voter*: Even in two cities with the same population, the size of city electorates can vary radically based on the number of ineligible voters living in a city and, critically, the timing of elections. Gathering data on the number of voters in the most recent mayoral contest in other large cities shows that San Diego, which combines its regularly scheduled mayoral races with state and federal contests, has much higher turnout rates than Los Angeles and cities in Texas, which hold mayoral contests off of the even-year electoral cycle. More voters means more costs for campaigns in their direct mail expenses and field organization. Using the per voter size of limits and extrapolating from the size

[8] Supreme Court decisions do not provide crystal clear guidance on whether to make per capita or per voter comparisons. While the plurality opinion in *Randall v. Sorrell* (2006) compares the size of Vermont's limits to limits in congressional districts and Missouri limits on a per capita and per citizen basis (using the data sources that it could easily obtain), it considers campaign costs as one of the factors that justify striking down a Vermont limit that was actually *higher*, relative to population size, than the Missouri limit which it had upheld.

[9] This is the limit in New York, the only city which imposes a total "per cycle" contribution limit rather than limits for each election.

of San Diego's electorate in 2012, the city could set a limit on party contributions of $29,277 per election to match the mean city contribution limit and $6,203 to match the median city.

Party-to-Candidate Limits in the Largest U.S. Cities

City	Limit (per election)	Population (2010)	Limit per Resident	Mayoral Votes Cast	Limit per Voter
New York	$4,950	8,175,133	$0.0006	1,154,802	$0.0043
Los Angeles	$1,000	3,792,621	$0.0003	285,658	$0.0035
Chicago	No Limit	2,695,598		590,357	
Houston	$10,000	2,099,451	$0.0048	123,620	$0.0809
Philadelphia	$11,500	1,526,006	$0.0075	180,443	$0.0637
Phoenix	$10,880	1,445,632	$0.0075	169,085	$0.0643
San Antonio	$1,000	1,327,407	$0.0008	76,020	$0.0132
San Diego	TBD	1,307,402		469,932	
Dallas	$10,000	1,197,816	$0.0083	55,711	$0.1795
San Jose	$1,000	945,942	$0.0011	134,320	$0.0074
Jacksonville	$50,000	821,784	$0.0608	192,592	$0.2596
Indianapolis	No Limit	820,445		180,317	
San Francisco	$500	805,235	$0.0006	197,242	$0.0025
Austin	$350	790,390	$0.0004	58,228	$0.0060
Columbus	No Limit	787,033		179,032	
Mean	$9,198		$0.0084		$0.0623
Median	$4,950		$0.0011		$0.0132

Sources: Contribution limits taken table produced by Ethics Commission Executive Director Stacey Fulhorst in March, 2012, population figures taken from 2010 Census, and 2009-2011 mayoral votes cast collected from appropriate election administrator websites. San Diego's votes cast come from the 2012 contest.

Two Levels of Limits? All of these comparisons are done at the citywide level, but Councilmembers may wish to set smaller party-to-candidate contribution limits in district races than in the citywide mayor's race and in city attorney contest. Running citywide requires candidates to reach out to far more voters and to campaign in a larger geographic area, yet does not open the door to a larger base of party contributors because contributions are likely to come only from a single party. Candidate spending in the November, 2012 elections shows just how expensive a citywide campaign can be, compared with district races. The two candidates in the mayoral runoff spent $7.4 million, nearly fives times as much as

the candidates in most expensive city council races (the 1st Council District, which featured $1.6 million in combined spending). This ratio was even larger (over ten-to-one) in the last prior open mayoral contest. The 2005 special mayoral election featured a total of $4.7 million in spending by seven candidates, while the race held at the same time for the open 2nd Council District (a competitive seat with a large number of voters) saw approximately $430,000 in combined spending by ten candidates.[10]

Potential Danger Signs. Set forth in Randall, these five tests will guide judicial scrutiny of any party-to-candidate contribution limits.

#1. Are the limits so low that they "significantly restrict the amount of funding available for challengers to run competitive campaigns"? (*Randall*, at 253) My analysis of the correlation between individual contribution limits and city council incumbent reelection rates across the largest California cities found no link between these types of limits and competitiveness (Declaration of Thad Kousser in Support of City's Reply, *Thalheimer v. City of San Diego*). However, because parties behave differently than individual donors, concentrating their funds on the most competitive seats, a strict restriction on party contributions may indeed reduce the potential for electoral competitiveness. Asking whether a specific limit is so low that it prevents competitive challenges to incumbents is an important question. In her 2012 ruling, Judge Gonzalez answered this question in a surprising way. She noted that when parties were allowed to make unlimited contributions in 2010, the Republican Party made a $20,000 contribution to a single City Council candidate, greater than the $1000 limit that was later enacted. It is true that, had the limit been in place, the funds available to this candidate (Lorie Zapf) would have been reduced. But it does not follow that Zapf would have been unable to run a competitive campaign against Howard Wayne, the Democrat contesting this open seat. A $1000 party limit would have prevented him from receiving $17,000 from the Democratic Party, a near wash in terms of affecting electoral competition.

Perhaps there is another way to judge how large a limit should be in order to give challengers an opportunity to run a competitive election: by comparing how much parties gave in that contest to the total sums spent by each candidate. This is the test performed in *Randall* (at 253). Under this test, if the $1000 limit had been in effect in 2010, it would have reduced Zapf's expenditures (which totaled $117,380 in the June election) by 16.2% and Wayne's (which totaled $167,050) by 9.6%. In the November 2012 elections, challenger Ray Ellis took on incumbent Sherri Lightner in District 1, the sort of challenger vs. incumbent race for a competitive district in which parties often concentrate their spending. The Republican Party contributed $20,000 to Ellis, while the Democratic Party contributed $24,000 to Lightner.

Yet because each candidate raised large sums in direct contributions from other sources, *it would be difficult to argue that restricting the parties in this race would have significantly restricted the amount of funding available to each candidate to run a competitive campaign*. Using the

[10] The campaign finance figures in this paragraph and the next paragraph come from campaign finance reports provided to me by Ethics Commission Executive Director Stacey Fulhorst.

same test as above, if the $1000 limit had been in effect in 2012, it would have reduced Ellis' contributions (which totaled $634,622 in the election cycle) by 3.0% and Lightner's (which totaled $360,099) by 6.4%. Notably, a tight party contribution limit of $1000 would have curtailed the incumbent's fundraising more than the challenger's. Councilmembers could set a less restrictive limit that allows challengers to mount effective campaigns, even if the new limit does not give parties to opportunity to give exactly as much as they would wish to give under no limits. And because making a direct contribution to a candidate is only one of the three routes that parties may use to advocate in elections, their ability to spend unlimited sums on member communications and through independent expenditures gives them the ability to fund credible challengers through many avenues.

#2. Are the party-to-candidate limits the same size as the limits on contributions from other types contributors, an equivalence that fails to recognize the "constitutional importance of associating in political parties to elect candidates"? (*Randall* at 256) One danger sign for Vermont's limits on party contributions was that because they were the same as the limits on individual contributions, party members were prevented from associating with one another to help elect candidates. Parties could not effectively combine many small individual contributions and focus them on "whichever candidates the party believes would best advance its ideals and interests." (*Randall* at 257) Applying this test to San Diego's $1000 party limit and comparing it to the $500 individual-to-candidate contribution limit at the time, Judge Gonzalez observed that, "The City's limit on contributions is merely twice that of individuals." To pass muster, then, a party limit must exceed the size of the individual limit by a multiple that is greater than two.

#3. Does the limit count the value of volunteer services in its definition of a contribution? (*Randall* at 259) The overturned $1000 limit in San Diego did not do so, and Judge Gonzalez noted this in favor of the City's defense.

#4. Is the limit indexed to inflation? The overturned $1000 limit in San Diego (ECCO Section 27.2934) was indexed to inflation, and Judge Gonzalez noted this in favor of the City's defense.

#5. Does the record of legislative action to set the limit contain "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described"? (*Randall* at 261) Councilmembers and the City Council must consider and make explicit the City's legitimate interest in limiting party-to-candidate contributions. Are the City's broad anti-circumvention and anti-corruption interests sufficient here?

As Professor Hasen's memorandum notes, the recent history of San Diego city politics has seen multiple instances of elected officials resigning due to corruption charges. The City has an interest in preventing future corruption or its appearance. The current legal regime opens up a potential avenue to corruption. If an individual would like to give a large contribution to a candidate's campaign, which may be the most efficient and visible way to attempt to gain influence over policy, that individual could use a party as a conduit in the absence of any party-to-candidate limit. Enacting no limit whatsoever would leave the City's individual-to-candidate limits open to an obvious path of circumvention. This path could be

closed if Councilmembers adopt a limit that is low enough so that a contribution, sent through a party to a candidate, could not be construed as corrupting.

Assuming that the City's attribution requirement was enforceable, Judge Gonzalez cast doubt upon the anti-corruption justification, pointing to the special role played by parties. She wrote that, "the Court cannot say, for example, that a Republican politician is necessarily 'corrupt' – or that there is an appearance of corruption – just because that politician votes to pass issues supported by the Republican Party after he or she takes office. To the contrary, that is the exact purpose of our political party system." Yet because the attribution requirement appears unenforceable, the type of corruption that Councilmembers may wish to guard against is not responsiveness to the broad interests of a party but to the narrow interests of a single donor.

Regardless of what limit the Council wishes to impose upon party-to-candidate contributions, no limit is likely to withstand judicial scrutiny unless the City provides firm justification that balances, "the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates," against "the need to prevent the use of political parties 'to circumvent contribution limits that apply to individuals.'" (*Randall*, at 258-59) After laying out this test, Judge Gonzalez stated in her 2012 ruling that, "At this time, the Court cannot say whether a $5000 or $20,000 limit on contributions by political parties would be sufficient to pass the constitutional muster under Randall. Whatever the new limit the City decides to enact it would be required to demonstrate that it seriously engaged in the required balancing of the interests set forth above."

A New Example of Acceptable Limits? In a case that is currently under appeal,[11] a February 24, 2012 initial ruling by the U.S. District Court for the District of Montana (*Lair v Murry*) relies on the precedent in *Randall* and draws on *Thalheimer* to uphold limits on aggregate party contributions in Montana state elections of $18,000 for governor and lieutenant governor, $2,600 for public service commissioner, $1,050 for state senators, and $650 for any other public officer. These limits are adjusted for inflation and between five and 36 times as large as the limits imposed on individuals and political action committees for the same offices. Montana has a population of 989,415, and had a gubernatorial election turnout of 479,264 in 2012.

Policy Recommendation: Parties play an important role in San Diego politics, allowing a legitimate expression of the shared political interests of their members and concentrating their resources on the most competitive political contests. Yet if the City places no reasonable limit on party-to-candidate contributions while at the same time it imposes individual-to-candidate limits, there is a great risk that parties could become conduits for a few individuals who wish to circumvent these limits. This in turn would bring a risk of corruption or its appearance, which the City has a valid interest in preventing.

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[11] Although a U.S. District Court ruling declared all of these limits unconstitutional on October 10, 2012 and enjoined them against enforcement, an October 15th decision in the Ninth Circuit Court of Appeals stayed the order pending the state's appeal, concluding that "we believe that the state is likely to succeed on appeal."

I recommend that Councilmembers enact a party-to-candidate contribution limit that is high enough to keep elections competitive and to preserve the associational and free speech rights of voters, parties, and candidates, yet low enough to prevent the circumvention of individual-to-candidate limits at a level that could lead to corruption or its appearance. **Based on San Diego's broader campaign finance regime and upon what cities of similar sizes and electorates have enacted, councilmembers could consider limiting party-to-candidate contributions to $10,000 in city council contests and $20,000 in mayoral and city attorney contests.** These limits are larger than those that I recommended to the Ethics Commission in April 2012, because the closest 2012 city contests – which were fought in the November general election, rather than in primaries as in the past – featured such high turnout. If this trend continues, then it makes sense to support higher limits (pegging San Diego's limits to the *per voter* size of limits in other large American cities) so that parties may help candidates reach a larger electorate.

These would be limits on contributions per election, should be indexed to inflation, and should apply in aggregate to all party committees. Limits set at these levels would parallel the City's individual-to-candidate limits contained in §27.2935(a) by being twice as large in citywide contests as in district contests. For each type of election, parties would be able to give twenty times as much to candidates as an individual making a maximum contribution, giving parties the ability to pool the resources of many like-minded donors. These limits would be larger than limits in comparable cities, where the median citywide limit is $4,950, or $6,203 when adjusted for the size of city electorates. Still, councilmembers may judge that they are tight enough to prevent corruption, because anyone seeking to circumvent individual-to-candidate limits would only be able to contribute $10,000 or $20,000, a sum that may be too small to exert significant policymaking influence. Parties operating under such limits could still play a large role San Diego politics through member communications, independent expenditures, and direct contributions, while not becoming conduits to circumvent other critical parts of the City's campaign finance regime.