

MEMORANDUM

To: Members of the San Diego City Council

From: Richard L. Hasen, Chancellor's Professor of Law and Political Science, University of California, Irvine (affiliation for identification purposes only)

Re: Setting a Fair and Constitutional Limitation on Political Party Campaign Contributions to City Candidates

Date: May 1, 2013

Introduction and Executive Summary

I am providing this memorandum to give the Council advice about setting a fair campaign contribution limitation applicable to political party contributions to candidates in City elections which would be upheld as constitutional if someone challenged such a limitation on First Amendment grounds. A federal district court in the earlier *Thalheimer* litigation had ruled the City's ban on direct campaign contributions by political parties to candidates unconstitutional, and it later rejected a \$1,000 party-to-candidate contribution limitation which the City enacted in response to the *Thalheimer* ruling.

I conclude that in enacting any new party contribution limitation, the *process* by which the Council enacts the limitation is just as important as the *amount* of the limitation itself. In particular, as directed by the federal court in the earlier litigation, the Council must demonstrate it has balanced competing interests in arriving at a fair limit. On the one hand, the Council should consider that campaign contribution limitations impose restraints on political speech and association protected by the First Amendment. Further, limitations on party contributions which are too low can inhibit competitive elections. On the other hand, the City has strong interests in preventing corruption, the appearance of corruption, and the circumvention of valid campaign contribution limitations. Parties also have many ways to express themselves and spend money in City elections. By holding hearings and consulting experts in the field, including Professor Thad Kousser, political party officers and employees, election experts, and concerned members of the public, and by relying on the extensive evidence collected and put forward by the Ethics Commission, the Council will be in a position to carefully consider these competing interests.

If the Council, after deliberation, adopts the limitation suggested by Professor Kousser in his memorandum (\$10,000 aggregate party contribution limitation for Council elections and \$20,000 aggregate party contribution limitation for city-wide elections), I believe a court is very likely, but not certain, to uphold such limitations as constitutional if challenged. The lower limits initially suggested by the Ethics Commission (\$3,000/\$12,000) upon Professor Kousser's earlier recommendation are less likely to be sustained as constitutional, but they still may be upheld. It is very difficult to predict precisely how a court would react to any new limitation because the *Thalheimer* case is the *only* case in the United States of which I am aware in which a court has held that the First Amendment requires a jurisdiction to give political parties special, and more generous, contribution limitations than those applicable to individuals' contributions to

candidates. Still, the higher the amount of the limitation (especially as compared to the individual contribution limit), the better chances it has for success if challenged. Picking a limitation which is comparable to the approach taken in other jurisdictions greatly increases the chances a court will uphold the limitation.

Upon examining Professor Kousser's memorandum, I believe the Council could justifiably conclude that the \$10,000/\$20,000 limitations, combined with other means for parties to influence City elections (unlimited member communications in coordination with candidates, and unlimited independent expenditures supporting or opposing City candidates) gives ample room for parties to associate and speak about City elections while still furthering the City's valid anti-corruption and anti-circumvention interests. Further, the \$10,000/\$20,000 limitations would place the City in the middle of the pack in comparison to other jurisdictions.

After providing my general constitutional analysis, I further explain that I base my conclusions about the constitutionality of the limitations in part on the Ethics Commission's acknowledgement that the "attribution limitation" contained in City law is likely unenforceable. The City has already repealed the attribution reporting requirement as apparently inconsistent with state law. I suggest that the Council repeal the remaining (unenforceable) attribution requirement.

Finally, I conclude that a single contribution limitation applicable to all levels of the same political party is likely constitutional and consistent with treatment of this issue in other states and localities and under federal law.

Part I of this memorandum gives general background on First Amendment challenges to campaign contribution limitations. Part II explains the political party constitutional question addressed in the *Thalheimer* litigation. Part III applies the *Thalheimer* analysis to the proposed \$10,000/\$20,000 or \$3,000/\$12,000 limitations. Part IV addresses the "attribution" issue. Part V addresses the "aggregation" issue.

I. Campaign Finance Laws and the First Amendment

In 1976, the United States Supreme Court decided *Buckley v. Valeo*,¹ a case which sets forth the basic rules for judging the constitutionality of campaign finance laws when challenged as violating the United States Constitution's First Amendment (guaranteeing the rights of free speech and association). The Supreme Court there recognized that limits on the use of money in campaigns can burden the rights of political speech and expression. On the other hand, such laws may be necessary to prevent corruption and the appearance of corruption. It held that there had to be a balancing of individual rights and governmental interests.

¹ 424 U.S. 1 (1976) (per curiam). In citing cases below, I have not given detailed "pin cites" to the particular pages in which the Supreme Court and other courts reached particular issues. I can provide this more detailed information to the Council upon request.

The *Buckley* court drew a distinction between laws which limit spending and those which limit contributions to candidates. As to *spending* (including money spent independent of any candidate or her committee), the Court held that such laws can seriously burden First Amendment rights. Accordingly, the Court held that expenditure limits must satisfy “strict scrutiny” to be constitutional: the law must be narrowly tailored to satisfy a compelling state interest. In contrast, laws limiting the amount that one can *contribute* to candidate impose lesser burdens on First Amendment rights. Accordingly, the Court held that contribution limits must satisfy a lesser, “exacting scrutiny” in which the limits are “closely drawn” to further sufficiently important state interests. The *Buckley* Court then upheld a number of federal contribution limitations and struck down a number of federal spending limitations. A key point the Court set out in *Buckley* is that contribution limitations could be justified by an interest in preventing corruption or the appearance of corruption but that independent spending could not be justified by such an interest to the extent that spending was truly independent. Significantly the Court also rejected the argument that campaign spending laws could be justified by a need to equalize spending or level the playing field. It found such equalization ideas “wholly foreign” to the First Amendment and it is clear that the Council should not consider ideas such as “leveling the playing field” in determining whether or not to pass new limits.

Campaign finance law since *Buckley* has been complex—it one of the most complex areas of constitutional law. The Court’s cases in this area have vacillated between periods of deference to legislative judgments about the need for campaign finance limits and periods of deep skepticism (such as the period of the Roberts Court in which we now live).² Nonetheless, the key distinction in *Buckley* between the lesser standard for judging the constitutionality of contribution limits and the stricter standard for judging the constitutionality of spending limits in candidate elections has so far stood the test of time. The Supreme Court’s recent controversial case of *Citizens United v. Federal Election Commission*,³ for example, which struck down a spending limit applied to independent corporate spending in candidate elections, went out of its way to say it was not interfering with the lower standard which applies to the review of contribution limitation laws. The Court since *Citizens United* has reaffirmed the lesser standard applicable to review of challenged contribution limitations.⁴

² For a detailed analysis of the Court’s cases from *Buckley* through *Citizens United* and beyond, see DANIEL H. LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, *ELECTION LAW—CASES AND MATERIALS* chs. 12-14 (5th ed. 2012). On the Roberts’ Court’s shift toward skepticism in campaign finance, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICHIGAN LAW REVIEW 581 (2011).

³ 130 S.Ct. 876 (2010) (“[W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was ‘closely drawn’ to serve a “sufficiently important interest,” see, e.g., *McConnell v. Federal Election Comm’n*; *Nixon v. Shrink Missouri Government PAC*, we have upheld government-imposed limits on contributions to candidates, *Buckley*, caps on coordinated party expenditures, *Federal Election Comm’n v. Colorado Republican Federal Campaign Comm. (Colorado II)*, and requirements that political funding sources disclose their identities, *Citizens United*” (citations altered)).

⁴ *Arizona Free Enterprise Club Freedom PAC v. Bennett*, 131 S.Ct. 2806 (2011).

In the early 2000s, the Supreme Court upheld a number of important challenged contribution limitation laws. In one case, the Court rejected various Missouri campaign contribution limitations on grounds that the amounts were so low, especially when judged against the \$1,000 federal contribution limitation upheld in *Buckley v. Valeo*.⁵ In another case, *Colorado II*, the Court upheld a challenge to limits on the amount that political parties could contribute directly to and spend in coordination with candidates for the U.S. Senate.⁶ (Coordinated spending is treated like a contribution under the law; federal law gives political parties a special additional amount of coordinated spending in which they may engage without violating federal law.⁷) In a third case the Court upheld new “soft money” campaign contribution limitations contained in the federal “McCain-Feingold” law, the Bipartisan Campaign Reform Act of 2002.⁸

All of those cases were decided while Justice O’Connor was still on the Court. When she retired and Justice Alito replaced her, the Supreme Court’s campaign finance cases moved into a period of intense skepticism of such laws, now even in the area of contribution limitations. In one case, *Randall v. Sorrell*, the Court struck down Vermont’s campaign contribution limitations, which were among the lowest in the country.⁹ (As discussed in Part II below, this case is very important in considering the constitutionality of any new party contribution limitations.) In another case, the Court held that Congress in the McCain-Feingold law could not let candidates raise additional funds from contributors when the candidate faced a well-financed opponent or independent spending campaign.¹⁰ The Court held such a law was motivated to promote equality, a forbidden rationale under the First Amendment. Finally, the Court recently agreed to hear a new campaign finance case next term, *McCutcheon v. Federal Election Commission*,¹¹ challenging provisions of federal law limiting the total amount that a person may contribute to all non-candidate committees in a two-year period. One of the specific challenges raised in *McCutcheon* is whether the limits on contributions to political committees is unconstitutional as applied to contributions to national party committees.¹²

⁵ *Nixon v. Shrink Missouri Government PAC*, 527 U.S. 377 (2000).

⁶ *Federal Election Comm’n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001).

⁷ The Court earlier held in the same case (*Colorado I*) that parties have a constitutional right, like other entities, to spend money on candidate elections *independent* of candidates.

⁸ *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003).

⁹ 548 U.S. 230 (2006).

¹⁰ *Arizona Free Enterprise Club Freedom PAC v. Bennett*, 131 S.Ct. 2806 (2011).

¹¹ No. 12-536, *probable jurisdiction noted*, Feb. 19, 2013.

¹² The Questions Presented and Supreme Court filings are available at <http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/>. Note that this aggregation issue raised by the challengers in *McCutcheon* is not the same as the type of limit before the Council. *McCutcheon* concerns limits on contributions *to* parties from individuals. The Council is considering limits on contributions *from* parties to candidates. I discuss this case in Part V below.

Despite these rulings, it is perhaps significant that the Supreme Court recently declined to hear a challenge to a federal law barring corporations from making *any* contributions to candidates.¹³ In the *Thalheimer* litigation, I was part of the legal team which successfully defended a similar City law against constitutional attack. Attacks on corporate contribution bans have been brought throughout the country, so far unsuccessfully. While a Supreme Court decision to decline to hear a case does not have precedential value, it does indicate that the issue of bans on corporate contributions to candidates is not likely to be subject to successful challenge at any point in the near future.

II. Constitutional Standards for Party Contribution Limitations under *Thalheimer*

A. Limits on Party Contributions to Candidates

The issue of party contribution limitations currently before the Council is an outgrowth of the *Thalheimer* litigation heard in federal court a few years ago before United States District Court Judge Irma Gonzalez.¹⁴ The case involved a challenge to a number of campaign contribution limitations contained in the City's campaign finance law ("ECCO"). Judge Gonzalez, applying applicable Supreme Court and Ninth Circuit precedent in this area, rejected many of the challenges to City contribution limitations. In particular, Judge Gonzalez rejected challenges to the \$500 limitation on individual contributions to candidates; the 12-month time limitation before elections for raising campaign contributions; and the ban on contributions from non-human entities (such as corporations and labor unions, but not political parties) to candidates. As to the last of these challenges, Judge Gonzalez held that the ban on non-human entity contributions was justified to prevent individuals from circumventing (or evading) individual contribution limits by giving through numerous artificial entities. (I will refer to this idea in this memorandum as the "anti-circumvention interest.")

Judge Gonzalez, citing binding Ninth Circuit and Supreme Court authority, struck down the ban on non-human entity contributions to committees which make only independent expenditures as well as the City's ban on candidates contributing money to their own campaigns more than 12 months before the election. The reason behind this determination is that if independent spending can never corrupt candidates (as held in *Citizens United*), then contributions to fund such spending cannot corrupt candidates either.

Judge Gonzalez also held that the ban (and later the \$1,000 contribution limit) on political party contributions to candidates violated the First Amendment. Judge Gonzalez so held despite the fact that political parties are permitted to spend unlimited sums in coordination with candidates on member communications and may make unlimited independent expenditures supporting City

¹³ *Danielczyk v. United States*, No. 12-579, *cert. denied*, Feb. 25, 2013. For Supreme Court filings in the case, see <http://www.scotusblog.com/case-files/cases/danielczyk-v-united-states/>.

¹⁴ Judge Gonzalez's initial opinion concerning the preliminary injunction is *Thalheimer v. City of San Diego*, 706 F.Supp.2d 1065, 1081-83 (S.D. Cal. 2010). The opinion on appeal of the preliminary injunction from the United States Court of Appeals for the Ninth Circuit is *Thalheimer v. City of San Diego*, 645 F.3d 11109, 1128 (9th Cir. 2011). Judge Gonzalez's final opinion on the merits (which was not appealed) is *Thalheimer v. City of San Diego*, 2012 WL 177414 (S.D. Cal. 2012).

candidates. She also reached this conclusion while holding it is constitutional to bar other non-human entities, such as corporations and labor unions, from contributing directly to candidates. The judge held that political parties are different from other non-human entities and have greater First Amendment rights when it comes to involvement in candidate campaigns. She also noted that the chances of circumvention were limited because individuals could contribute no more than \$500 to political parties to use to fund such contributions (the “attribution requirement”—an issue I return to in Part IV below).

Judge Gonzalez’s *Thalheimer* opinions were *the first—and so far as I am aware the only—court decisions* in the United States holding that political parties have a constitutional right to contribute directly to candidates and holding that the constitutionality of the *amount* of such contributions is subject to a detailed and probing judicial review. Judge Gonzalez’s made her initial decision barring the City’s enforcement of the ban on direct party contributions in a preliminary injunction order. When the City and opponents appealed various preliminary injunction issues to the Ninth Circuit, the Ninth Circuit expressly noted that the political party issue was an undecided and close question. It declined to decide the constitutional issue on the merits, citing a general policy to defer to district court decisions on preliminary injunctions when the issues involve First Amendment rights and are close questions.

When the time came for final judgment in *Thalheimer*, Judge Gonzalez reaffirmed her ruling striking the ban and extended it to strike the new \$1,000 limitation, which the City enacted in response to the judge’s initial ruling. Because neither side appealed in *Thalheimer*, the Ninth Circuit never weighed in on the merits of the constitutional issue concerning bans or limits on political party contributions.

The only other recent cases which have touched on these issues involve challenges in other states which did not result in party contribution limits being declared unconstitutional. A federal district court in Illinois held that it did not violate the First Amendment for Illinois to give more generous campaign finance limits to political parties compared to other entities¹⁵—an issue distinct from the question whether a jurisdiction *must* give more generous campaign finance limits to parties. A federal district court in Montana rejected a request for a preliminary injunction challenging Montana’s limits on political party contributions to candidates as too low, distinguishing San Diego’s complete ban and lower limit at issue in the *Thalheimer* case.¹⁶

It is not clear whether anyone would file a challenge to any new City limitation on party contributions to candidates; it may depend upon the size and nature of the limits. It is also unclear whether any federal challenge to any new party contribution limitations would be heard

¹⁵ Illinois Liberty PAC v. Madigan, 2012 WL 4761542, *6-9 (N.D. Ill. 2012).

¹⁶ Lair v. Murry, 846 F.Supp.2d 1116, 1128-29 (D. Mont. 2012). In that case, the judge later issued an order banning the enforcement of *all* campaign contribution limitations in Montana, including the party limitations. Lair v. Murry, 2012 WL 4815411 (D. Mont. Oct. 3, 2012). The Ninth Circuit issued an emergency stay preventing enforcement of the district court’s later order. Lair v. Bullock, 697 F.3d 1200 (9th Cir. 2012). The court specifically noted that under Montana law political party organizations can contribute up to \$22,600 to state candidates. *Id.* at 1212. The case remains pending.

by Judge Gonzalez or another judge.¹⁷ If assigned to Judge Gonzalez, the court likely would apply the same framework to analyze the constitutional issue as the court applied to the issue in *Thalheimer*. If assigned to a different judge, it is possible the other judge would not feel bound by that framework and would apply a different analysis, perhaps one more or less deferential to the City's position. This is especially true because, as explained below, Judge Gonzalez relied upon Justice Breyer's plurality opinion (for just three Justices) in the *Randall v. Sorrell* case, but the Ninth Circuit has since stated that courts are not bound by that opinion because it is not a majority opinion.

In any case, given the reasonable chance that a new case would be assigned to Judge Gonzalez or to another judge who would apply the same framework Judge Gonzalez adopted in *Thalheimer*, I discuss Judge Gonzalez's framework in some detail and suggest that the Council adopt a limit which is acceptable under Judge Gonzalez's framework. However, it is always possible a different federal court may apply a totally different analysis and reaches a different conclusion than one would reach applying the *Thalheimer* framework.

B. Judge Gonzalez's Framework

In the ruling on the preliminary injunction standard in the *Thalheimer* litigation, Judge Gonzalez concluded that the ban on political party contributions was likely unconstitutional.¹⁸ The court began by noting the "exacting scrutiny" applicable to judging the constitutionality of campaign contribution limits: the law must be "closely drawn" to a "sufficiently important" government interest.

The court noted that the Supreme Court in the *Colorado II* case had upheld federal limits on political party contributions to candidates on anti-corruption grounds: "The Supreme Court has recognized a sufficient anticorruption interest in preventing political parties from acting as conduits for large donors wishing to gain influence over candidates." The *Thalheimer* court also later noted that "the record sufficiently demonstrates corruption in San Diego municipal government."¹⁹ This suggests that at least some laws limiting party contributions to candidates would be constitutional.

¹⁷ Under the Local Rules applicable to the United States District Court for the Southern District of California, the case would be randomly assigned to a judge in the district unless the new case is deemed a "related case" to another case. See United States District Court, Southern District of California, Local Rules, Rule 40.1(f), (g) (rev'd Feb. 8, 2013), <http://www.casd.uscourts.gov/uploads/Rules/Local%20Rules/LocalRules.pdf>. It is not clear whether a new challenge would be deemed "related" to the *Thalheimer* litigation and assigned to Judge Gonzalez or not. Even if it is not, there is a chance the case would be randomly assigned to Judge Gonzalez.

¹⁸ The relevant discussion of this issue appears in *Thalheimer v. City of San Diego*, 706 F.Supp.2d 1065, 1081-83 (S.D. Cal. 2010). The quotations in the next few paragraphs are from this discussion.

¹⁹ *Thalheimer*, 2012 WL 177414, at *7. The court explained:

Nonetheless, Judge Gonzalez noted that in *Randall*, the Court struck down Vermont’s very low contribution limits, including limits on those to political parties, because the Supreme Court, after examining five factors, found the limits unconstitutionally too low. Judge Gonzalez wrote:

The Court in *Randall* recognized that it had previously upheld limits on contributions from political parties to candidates in *Colorado II* but noted that the limits at issue in *Colorado II* were “far less problematic” because the limits were significantly higher than the limits in *Randall*. In addition, the limits in *Colorado II* were much higher than the limits on contributions from individuals, “thereby reflecting an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties ‘to circumvent contribution limits that apply to individuals.’” By contrast, the limits in *Randall*, “by placing identical limits upon contributions to candidates, whether made by an individual or by a political party, gives to the former consideration *no weight at all*.” (emphasis in original). The Court concluded that the contribution limits were so low that they “would reduce the voice of political parties ... to a whisper,” and noted that Vermont did “not point to a legitimate statutory objective that might justify these special burdens.” Although the Court acknowledged that campaign finance regulations impose certain burdens to some degree, it held that the limit in that case “nonetheless goes too far.”

Here, as in *Randall*, the City’s contribution limit threatens harm to the right to associate in a political party. The City’s limit does not permit parties in San Diego to make contributions to candidates at all, suggesting the City did not give proper “weight” to individuals’ interest in participating in the political process by contributing to political parties. In addition, the City’s limit restricts the ability of parties in San Diego to assist in candidates’ campaigns by engaging in coordinated spending, and prevents parties from using contributions by small donors to provide meaningful assistance to any individual candidate. Using the example from *Randall*, if 6,000 individuals contributed \$1 each to the Republican Party of San Diego, the City’s limit would prohibit the party from contributing any of that money to a candidate,

The history of corruption stretches back to at least the early 1970s, when the City mayor and eight City Council members were indicted on corruption charges in the Yellow Cab scandal. Then in 1985, San Diego Mayor Roger Hedgecock resigned after being convicted of concealing illegal campaign contributions. In 2001, City Council member Valerie Stallings resigned after pleading guilty to corruption charges. Most recently, three City Council members were indicted on fraud and conspiracy counts involving channeling campaign contributions from the adult entertainment industry in exchange for an agreement to repeal the no-touch laws in strip clubs. Indeed, the Ninth Circuit recently acknowledged that its case law “contains a vivid illustration of corruption in San Diego municipal government involving campaign contributions timed to coincide with the donors’ particular business before the city council.”

Id. (citations omitted).

“thereby thwarting the aims of the 6,000 donors from making a meaningful contribution to [city] politics by giving a small amount of money to the party they support.”²⁰

The Court concluded:

The City argues that San Diego holds nonpartisan elections, unlike the federal elections at issue in *Randall*. However, it is unclear how this fact diminishes the serious effect of the contribution limit on the right to associate in a political party. Indeed, if the City is arguing that there is a larger disconnect between parties and candidates in San Diego, this argument would cut against the City’s argument that parties serve a special danger of corruption when they act as conduits for large donors wishing to gain influence over candidates supported by the parties. The City also argues that the contribution limit does not prevent parties from making independent expenditures (raised from individuals subject to the \$500 contribution limit) and engaging in other party-building and candidate support activities. However, this does not address the complete inability of parties to assist candidates they support by engaging in coordinated spending.

The City then appealed this aspect of Judge Gonzalez’s order to the Ninth Circuit, arguing that *Colorado II* allowed the City to ban direct contributions from parties given other ways (such as member communications and independent expenditures) which parties can spend—and to coordinate as with member communications. After an extensive discussion of *Colorado II* and *Randall*, the Ninth Circuit concluded that “[i]t remains unclear whether the *Randall* plurality opinion actually supersedes *Colorado II* and holds that political parties must be treated different than other contributors, or whether the analysis of ‘special party-related harms’ was merely one case specific factor.”²¹ However, following Supreme Court authority, the Ninth Circuit held that when the question is close an appellate court in a First Amendment case should uphold a district court’s grant of a preliminary injunction and remand for trial on the merits.²²

When the *Thalheimer* case returned to the district court for final rulings, Judge Gonzalez considered the constitutionality of both the original city ban on non-entity (including political party) contributions directly to candidates and the later \$1,000 campaign contribution limit on party contributions to candidates which the Council enacted in response to Judge Gonzalez’s order at the preliminary injunction stage.

As noted above, the district court held it was constitutional for the City to ban non-human entity contributions directly to city candidates aside from political party contributions.²³ As to party contributions, however, Judge Gonzalez affirmed her analysis from the preliminary injunction order. She noted that the Supreme Court in *Colorado II* upheld limits on party coordinated

²⁰ Citations omitted.

²¹ *Thalheimer v. City of San Diego*, 645 F.3d 11109, 1128 (9th Cir. 2011).

²² “Given the close constitutional question here and the narrow nature of our inquiry at the preliminary injunction state, we hold that the district court did not abuse its discretion in concluding that plaintiffs were likely to succeed on the merits of their challenges of the application of these ECCO provisions to political parties.” *Id.*

²³ *Thalheimer v. City of San Diego*, 2012 WL 177414, *20 (S.D. Cal. 2012).

spending “to further the government’s circumvention interest.”²⁴ However, applying *Randall*, the Court held that a total ban on party contributions violated the First Amendment. “In this case, similar to *Randall*, the City failed to provide for a contribution limit applicable to political parties that is sufficiently higher than that applicable to contributions from individuals. Indeed, although the challenged law in *Randall* had identical limits for both contributions, the City in this case *completely bans* contributions from political parties, while allowing individuals to contribute up to \$500.”²⁵

In a significant passage, Judge Gonzalez explained:

By prohibiting contributions by political parties, the City has failed to balance (1) “the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates” with (2) “the need to prevent the use of political parties “to circumvent contribution limits that apply to individuals.” *See Randall*. Rather than simply ‘reduce the voice of political parties’ ...to a ‘whisper,’ this complete ban in effect silences the political parties in San Diego.”²⁶

Judge Gonzalez then turned to the \$1,000 contribution limit enacted in response to her earlier ruling. Again applying exacting scrutiny, Judge Gonzalez relied on Justice Breyer’s plurality opinion’s analysis in *Randall* to consider the constitutionality of the party contribution limits.²⁷ She held that there were “sufficient ‘danger signs’ present here that would suggest the \$1,000 political party contribution limit is ‘sufficiently low as to generate suspicion that [it is] not closely drawn.”²⁸

As to the first “danger sign,” Judge Gonzalez first looked at the amount of the limit, noting that it amounted to \$2,000 per election cycle “which is five times more than the limit struck down in *Randall*. On the other hand, the limit is significantly lower than those upheld in both *Buckley* and *Colorado II*.”²⁹ Further, the court compared the City’s \$1,000 party contribution limit to

²⁴ *Id.* at *13.

²⁵ *Id.* at *14 (original emphasis).

²⁶ *Id.* at *15 (citations altered). Judge Gonzalez held that the ability of the parties to spend unlimited sums on member communications did not solve the constitutional problem because the parties “seek to coordinate their spending to communicate with party members and non-members alike.” *Id.*

²⁷ Judge Gonzalez wrote that “the parties...agree that the provision is subject to the *Randall* analysis.” *Id.* This is incorrect. The City pointed out that the *Randall* analysis was not applicable to review of a limit on political party contributions, but rather to examine a campaign contribution scheme as a whole. Further, the *Randall* analysis appeared in a plurality opinion of the Supreme Court, and such reasoning is not binding on the lower courts. *See Lair v. Bullock*, 697 F.3d at 1204-08 (offering extensive discussion of, and expressing serious doubt whether, plurality opinion of Justice Breyer in *Randall* must be applied by lower courts).

²⁸ *Thalheimer*, 2012 WL 177414, at *15.

²⁹ *Id.* The judge continued:

other jurisdictions. The court noted the limit was greater than that of San Francisco and San Jose, but noted that those cities are “considerably smaller” than San Diego. Further the City’s limit was much smaller than other large cities including New York, Chicago, Houston, Philadelphia, Phoenix, Dallas, Detroit, Jacksonville, Indianapolis, and Columbus. (Some of these cities had no limits.) “Furthermore, although state and federal contribution limits provide four comparisons, it is notable that 20 states, including California, allow political parties to contribute unlimited sums to their candidates in some fashion. Likewise, national political parties may make direct cash contributions of \$5,000 plus coordinated spending of \$43,100 to their candidates for Senate. National political parties also may make coordinated expenditures with their Senate candidate in amounts that range from \$88,400 to \$2,458,500.”³⁰

Finding sufficient “danger signs,” Judge Gonzalez then turned to the five favors listed by the Supreme Court plurality in *Randall*:³¹

(1) The court concluded the \$1,000 limit appeared to significantly restrict funding available for challengers to run competitive campaigns. The court noted that after she barred enforcement of the limit the Republican Party of San Diego made a \$20,000 contribution to a single City Council candidate.

(2) The court concluded that the \$1,000 limit, while not identical to the individual contribution limit of \$500, is sufficiently low that it threatens to harm the right to associate with a political party. The judge, using an example from *Randall* noted that the limit could stop a large number of individuals from banding together to give small contributions to a political party which together would be significant if contributed from a party to a candidate. “Just like in *Randall*, imagine that 6,000 San Diegans each wanted to give \$1 to Plaintiff Republican Party of San Diego because, although unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Republican City Council member.” The limit would “severely inhibit collective political activity by preventing a political party from using contributions from small donors to provide meaningful assistance to any candidate.” The judge concluded that the low limit appeared to give no weight at all to the “required balance”

Thus in *Buckley*, the Supreme Court upheld contribution limits of \$1,000 for individuals and \$5,000 for political committees. As Plaintiffs point out, *Buckley*’s \$5,000 limit for political committees, adjusted for inflation, equals \$19,896.40 today—almost twenty times the City’s challenged limit. Similarly, in *Colorado II*, the Supreme Court upheld limits that were “significantly higher” than the City’s limit: “at least \$67,560 in coordinated spending and \$5,000 in direct cash contributions for U.S. Senate candidates, and at least \$33,780 in coordinated spending and \$5,000 in direct cash contributions for U.S. House candidates.” Finally, the plurality in *Randall* noted that Missouri—whose \$1,075 individual limit the Supreme Court upheld ...—enacted limits on contributions by political parties 10 times higher than limits on contributions by individuals.

Id. (citations omitted or altered).

³⁰ *Id.* (citations omitted or altered).

³¹ The analysis in the next few paragraphs quotes from Judge Gonzalez’s opinion at *17-20, with some citations altered or omitted.

between the need to allow individuals to participate in the process by contributing to parties and the need to prevent circumvention of contribution limitations.

(3) The City's limit did not count the value of volunteer activity, which supported the City's limit (Vermont had counted the value of volunteer activity, which the *Randall* plurality criticized).

(4) The City's limit is adjusted for inflation, which supported the City's limit (Vermont did not index for inflation, which the *Randall* plurality criticized).

(5) The City offered no "special justification "to justify a contribution limit that is so low and restrictive." The court rejected the idea that the limit could be justified based on the City's anti-corruption interest. "Political parties are unlike other individuals and entities because the candidates *do* expressly associate with them and vote on issues advocated/supported by them." However, the court later *upheld* the "attribution rule" on anti-corruption/anti-circumvention grounds. This rule limited the amount of an individual's contribution which a party could contribute to a City candidate to \$500. Significantly, the court noted that "*the City has a strong anti-circumvent[ion] interest in preventing individuals from contributing large amounts of money to the political parties in circumvention of their own direct individual contribution limits.*"³² This analysis is completely consistent with the court's earlier analysis noting that the limit should not prevent *small donors* from providing meaningful assistance to City candidates through political parties.

Finally, turning to the *amount* of the contributions, the Court, following the Supreme Court's *Buckley* decision, said it had "no scalpel to probe" the precise amount of the limits, and noted that the legislative body is usually better equipped to make political judgments. Nonetheless the court concluded that \$1,000 was too low, as it gave "no weight at all" to the required balancing of interests.

At this time, the Court cannot say whether a \$5,000 or \$20,000 limit on contributions by political parties would be sufficient to pass 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 interests set forth above.

III. Setting a Constitutional Party Contribution Limitation After *Thalheimer*

Judge Gonzalez in *Thalheimer* provided a detailed and nuanced analysis of how to judge the constitutionality of a limit on political party contributions to candidates if such a limit is challenged under the First Amendment. As the Council considers enacting a new limit, I suggest that the Council take the following steps:

1. The Council must carefully consider the interests of individuals and political parties in associating for political action and making contributions for purposes of electing candidates to

³² *Id.* at *21.

City office. The Council must *carefully balance* those interests against the City's valid interest in preventing corruption, and in particular the circumvention of contribution limits. The *Thalheimer* court noted the danger of circumvention, and as discussed in Part IV below, the danger of circumvention is much greater than the *Thalheimer* court could have realized given the likely unenforceability of the attribution requirement.

2. In engaging in the careful balancing and weighing of interests, the Council should seek and consider input (such as oral or written testimony and evidence) from a wide variety of interested parties, as well as consider the careful record already assembled by the Ethics Commission in considering this question.

3. If the Council, after a careful process, decides to set an appropriate contribution limitation, it should consider the following factors in setting the amount:

a. It should set a limit which allows political parties to have influence over City elections, and small donors the ability to contribute to political parties to influence the outcome of elections. The limit should foster the ability of challengers to run competitive elections. But the Council may pick a limit which prevents large donors from circumventing the valid \$500 individual contribution limitation (and \$1,000 contribution limitation for citywide races effective this year). The likely unenforceability of the attribution limitation and the Council's decision on how to treat the aggregation rule (see Part V below) are relevant to this determination.

b. It should set a limit which is not so low as to inhibit the competitiveness of elections. In considering this factor, it is very important to consider empirical evidence, such as the evidence submitted by Professor Kousser as to the effect of party contribution limits on electoral competitiveness.

c. It should set a limit which is in line with political party limitations in other large cities. Picking an amount for comparable cities, as opposed to picking among the lowest limits, increases the likelihood of the law being upheld as constitutional. In both *Randall* and *Thalheimer*, it was relevant to the courts that the limits were the lowest or among the lowest in the Nation. According to Professor Kousser's figures,³³ considering those large cities imposing some limits on party contributions to candidates, the mean limitation was \$9,198 and the median was \$4,950 (Kousser notes that Jacksonville's very high \$50,000 limit skews the mean upward and for this reason he suggests looking at medians). Looking at *amounts per resident*, the mean limitation per capita would be \$11,025 per election with a median of \$1,382 (*amounts per voter* were at \$29,277 per election with a median of \$6,203).

d. It should set a limit which (i) does not count the value of volunteer time and (ii) is indexed to inflation.

Putting all these factors together, it is impossible to say precisely how high the limitation would need to be to satisfy constitutional scrutiny if the limitation is challenged. Reasonable judges

³³ All of these figures come from Professor Kousser's revised memo submitted to the Council for this hearing.

may differ on this question. Certainly the better record the Council makes of its deliberations and careful consideration of the issues, the more likely a court would be to uphold the limits regardless of the precise amount. Further, the higher the limitation, the more likely it is to be upheld. The reference of Judge Gonzalez to “a \$5,000 or \$20,000” limitation suggests that a limitation set somewhere between these numbers might satisfy Judge Gonzalez, if she is the judge to review the constitutionality, but it will depend upon what the City puts forth in the record. However, the very high contributions by parties in the 2012 elections (including contributions from a party to a citywide candidate of \$800,000) indicates that if any new limits are challenged, the challengers will point to these high contributions as a benchmark against which to judge the amount of speech being limited by City contribution limitations—just as Judge Gonzalez looked at the \$20,000 contributed to a City candidate once she enjoined enforcement of the contribution ban.

Faced with this uncertainty, I believe that the limits suggested by Professor Kousser—\$10,000 limits for City Council elections and \$20,000 limits for citywide elections (indexed to inflation and not counting volunteer time)—are very likely although not certain to be upheld by a court if adopted after careful consideration by the Council. Professor Kousser, pointing to the greater costs of running an election citywide compared to district-wide, wisely recommends higher limits for citywide races.

I am less certain that the Ethics Commission’s recommendation of \$3,000/\$12,000 limitations would be upheld.³⁴ Those limits are lower, and were based upon Professor Kousser’s earlier recommendations before he had additional data from the 2012 elections to consider in terms of electoral competitiveness. The higher limits would put San Diego in the middle of the pack compared to comparable cities’ limits, and are generous compared to the City’s individual contribution limits (20 times the individual contribution limit in Council and citywide elections).

IV. Effect of Likely Unenforceability of Attribution Limitation

As noted in Part III, central to Judge Gonzalez’s analysis of the political party contribution limit was this notion of balancing First Amendment rights of free speech and association with the City’s valid anti-corruption and anti-circumvention interest. To Judge Gonzalez, there was no good reason to stop a lot of small donors (say 6,000 donors each contributing \$1) from pooling their resources through political parties to donate to candidates. But there was good reason to stop individuals from getting around the individual contribution limitations by giving large sums through political parties—the concern about circumvention of individual contribution limitations. For this reason, Judge Gonzalez upheld the City’s attribution rule, requiring that contributions from parties must come from individual contributions to political parties of no greater than \$500. As Judge Gonzalez wrote, “the City has a strong anti-circumvent[ion] interest in preventing

³⁴ After the Ethics Commission recommended the \$3,000/\$12,000 party contribution limit, James Bopp Jr., counsel for the plaintiffs in the *Thalheimer* litigation, sent a letter dated May 16, 2012 to Mr. Barrett Tetlow, Executive Director to the Republican Party of San Diego (later provided to the Ethics Commission), expressing his opinion “that the proposed limits are way too low and, therefore, are unconstitutional under the First Amendment.” I have not seen any further communication from Mr. Bopp opining on any other proposed City limitations.

individuals from contributing large amounts of money to the political parties in circumvention of their own direct individual contribution limits.”

Since Judge Gonzalez wrote this analysis, however, it has become apparent that the attribution limitation is likely unenforceable. As the Ethics Commission has explained, the California Republican Party has taken the position that state law rules requiring the reporting of campaign finance information to the state preempt any attempt by the City to impose an additional reporting requirement to make sure parties comply with the attribution limitation rules. The Ethics Commission, while not conceding the legal point, believes that this is a reasonable interpretation of state law.³⁵ Further, given the disclosure complexities faced by political parties maintaining both federal and state fundraising accounts to comply with federal and state law, and the numerous transfers between accounts, an attribution requirement on the City level appears unworkable. The City in November 2012 has since deleted the attribution reporting requirement from ECCO.

While the California Republican Party has taken the position that an attribution requirement can otherwise be enforced without a disclosure requirement,³⁶ it is hard to see how the Ethics Commission could effectively do so. The Commission would have to engage in discovery to try to find information on possible evasions of the attribution rule, discovery which parties would likely condemn as burdensome and a fishing expedition. Yet there is reason to believe the limits can easily be evaded.

According to information provided to me by Ethics Commission staff, during an election when the attribution reporting requirement was still in place, the San Diego County Republican Party reported contributions totaling \$700,000 to a candidate before the June primary. Based on a sampling of data reported it appears that only about 25% of the \$500 contributions attributed for this contribution came from individual contributions made in 2010 or later, with some supposedly made as early as 2001 and 2002. In other words, the Republican Party took the position that funds it received more than 10 years ago were being used to make contributions to a 2012 mayoral candidate. Additionally, both the Democratic and Republican parties relied upon the lack of a need to itemize individual contributions under \$100 to account for the bulk of their party contributions in some races. Further, in the 2012 elections, a local developer and strong supporter of a particular candidate for mayor made three contributions to a local political party over the course of three months totaling \$65,000. A few weeks later, the party contributed that same sum, \$65,000, to the candidate supported by the developer. The developer had not made a contribution to the party in the past.³⁷

³⁵ See Cal. Gov't Code § 81009.5; *In Re Olson*, FPPC Opinion No. 01-012, July 9, 2001, <http://www.fppc.ca.gov/opinions/olsonfinal.pdf>.

³⁶ See Letter from Charles H. Bell, Jr. to Hon Tony Young Chairman & Councilmembers Kevin Faulconer, Lorie Zapf, Todd Gloria, and Marti Emerald dated May 14, 2012, at p. 3 (“We are confident that the Ethics Commission has the ability under its enforcement powers to investigate whether any committee, including a political party committee, has accepted contributions that violate applicable city contribution limits, whatever those limits.”).

³⁷ 10News story aired October 18, 2012.

Such a pattern of contributions as well as other evidence suggests that the City needs to set a party contribution limitation under the assumption that parties often will not simply seek to pool many donations from small donors to support party candidates but will instead seek to pass on larger contributions from a few wealthy donors. This raises exactly the danger of circumvention of individual contribution limitations which Judge Gonzalez noted in *Thalheimer* as a reason for the City to enact valid contribution limitations on parties. In other words, without an enforceable attribution limitation, the City is justified in setting a lower overall contribution limit for parties to prevent circumvention of individual contribution limitations.

Finally, I would recommend that the Council repeal the remaining attribution requirement. The attribution requirement may not be enforced effectively without attribution reporting, and such reporting appears to violate state law. I believe it is a mistake to have a political law on the books that is rarely enforced and often flouted—among other things, it creates the opportunity for political opponents to make political hay out of unclear circumstances, it can ensnare the unsophisticated in a political trap, and it creates a culture suggesting that disobeying the law will not have consequences.

V. The Likely Constitutionality of a Party Aggregation Requirement

The final issue the Council must consider is whether to treat all levels of a political party the same for purposes of this contribution limit. Thus, suppose the City enacts a \$20,000 contribution limit for political parties to give to citywide candidates and imposes an aggregation rule. If a county party committee gives \$15,000 to a citywide candidate, the state party committee (or a local or national party committee) of the same party could give no more than \$5,000 to the same candidate.

Such an aggregation rule would be justified by the City's anti-circumvention interest, which Judge Gonzalez recognized in *Thalheimer*. Consider again the supporter of a citywide candidate who wants to contribute \$65,000 to a candidate under a rule capping party contributions at \$20,000. Without an aggregation rule, the supporter could give \$20,000 to three different branches of the same political party, and \$5,000 to another branch of the same political party, to evade both the \$1,000 individual contribution limitation on contributions directly to citywide candidates as well as the \$20,000 party limit. The fear is that local parties, both within and outside California, could become easy conduits for individuals to evade contribution limitations.

To deal with the problem of circumvention through multiple local and state political parties, the federal government, as well as some state and local governments impose aggregation rules for party contributions. On the federal level, limits on party contributions to candidates and coordinated spending are subject to detailed aggregation rules.³⁸ A number of states also impose

³⁸ See 11 C.F.R. 110.3(b), <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=b7039f70bf1c015686336806ef6e1b44&rgn=div8&view=text&node=11:1.0.1.1.18.0.1.3&idno=11>:

aggregation rules.³⁹ Many of these states' aggregation rules, pursuant to state law, also are applicable to local campaign finance laws in places such as Phoenix, Tucson, and Mesa,

(b) *Contribution limitations for political party committees.* (1) For the purposes of the contribution limitations of 11 CFR 110.1 and 110.2, all contributions made or received by the following political committees shall be considered to be made or received by separate political committees—

(i) The national committee of a political party and any political committees established, financed, maintained, or controlled by the same national committee; and

(ii) The State committee of the same political party.

(2) Application of paragraph (b)(1)(i) of this section means that—

(i) The House campaign committee and the national committee of a political party shall have separate limitations on contributions under 11 CFR 110.1 and 110.2.

(ii) The Senate campaign committee and the national committee of a political party shall have separate limitations on contributions, except that contributions to a senatorial candidate made by the Senate campaign committee and the national committee of a political party are subject to a single contribution limitation under 11 CFR 110.2(e).

(3) All contributions made by the political committees established, financed, maintained, or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee. This presumption shall not apply if—

(i) The political committee of the party unit in question has not received funds from any other political committee established, financed, maintained, or controlled by any party unit; and

(ii) The political committee of the party unit in question does not make its contributions in cooperation, consultation or concert with, or at the request or suggestion of any other party unit or political committee established, financed, maintained, or controlled by another party unit.

³⁹ See, e.g., Ariz. Stat. 16-905(D) (“A nominee of a political party shall not accept contributions from all political parties or political organizations combined totaling more than ten thousand twenty dollars for an election for an office other than a statewide office, and one hundred thousand one hundred ten dollars for an election for a statewide office.”); Fl. Stat. 9-106.08(2)(a) (“A candidate may not accept contributions from national, state, or county executive committees of a political party, including any subordinate committee of such political party or affiliated party committees, which contributions in the aggregate exceed \$50,000”); Ky. Rev. Stat. § 121.150 (“(b) The provisions of paragraph (a) of this subsection regarding the receipt of aggregate

Arizona; Jacksonville, Miami, and Orlando, Florida; Memphis and Nashville, Tennessee; Lexington, Kentucky; Billings, Montana; and Minneapolis, Minnesota.⁴⁰

The California Republican Party has suggested to the Ethics Commission that such an aggregation rule is unconstitutional.⁴¹ I am aware of no cases so holding, or of even challenges to these other jurisdictions' aggregation rules. If challenged, the aggregation rule would have a very good chance of being sustained based on the City's anti-corruption and anti-circumvention interest, although nothing in constitutional law is certain. Importantly, even with the aggregation rule nothing would stop innumerable branches of the same political party from engaging in their own efforts, independent of City candidates, to support City candidates for office, over and above their ability to engage in unlimited coordinated member communications with these candidates.

contributions from permanent committees in any one (1) election shall also apply separately to the receipt of aggregate contributions from executive committees of any county, district, state, or federal political party in any one (1) election"); Minn. Stat. § 10A.27(2) ("A candidate must not permit the candidate's principal campaign committee to accept contributions from any political party units or dissolving principal campaign committees in aggregate in excess of ten times the amount that may be contributed to that candidate as set forth in subdivision 1. The limitation in this subdivision does not apply to a contribution from a dissolving principal campaign committee of a candidate for the legislature to another principal campaign committee of the same candidate."); Mont. Code § 13-37-216 ("(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, 'political party organization' means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees: (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed \$18,000; (b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed \$6,500; (c) for a candidate for public service commissioner, not to exceed \$2,600; (d) for a candidate for the state senate, not to exceed \$1,050; (e) for a candidate for any other public office, not to exceed \$650"); Tenn. Code § 2-10-306 ("Aggregate limits -- Exemptions. (a) All contributions made by political campaign committees controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly shall be considered to have been made by a single committee. Such contributions shall not, in the aggregate, exceed: (1) Two hundred fifty thousand dollars (\$250,000) per election to any candidate in a statewide election; (2) Forty thousand dollars (\$40,000) per election to any candidate for the senate; and (3) Twenty thousand dollars (\$20,000) per election to any candidate for any other state or local public office").

⁴⁰ The San Diego Ethics Commission, which compiled this list, can provide more detail if desired.

⁴¹ See Letter from Charles H. Bell, Jr. to Hon Tony Young Chairman & Councilmembers Kevin Faulconer, Lorie Zapf, Todd Gloria, and Marti Emerald dated May 14, 2012, at 1-2.

As noted in Part II, the United States Supreme Court in its next term in the *McCutcheon* case will be considering a *different* aggregation question: whether federal law limiting the total amount that an individual can give *to* political parties in a two-year period for purposes of influencing federal elections violates the First Amendment. These federal limits do not implicate the same anti-corruption and anti-circumvention interests implicated by an aggregate limit for contributions *from* different branches of political parties *to* candidates.

I believe it is unlikely that an eventual Supreme Court opinion in the *McCutcheon* case, even if it strikes down the federal aggregate limits, would affect the constitutionality of aggregate limits applied to contributions *from* political parties *to* candidates. In the event I am incorrect, however, and the Court's opinion does affect the constitutional analysis of such aggregate limits, the City at that time could then simply repeal that aspect of the City's party contribution limitations imposing aggregation.

Conclusion

The Supreme Court in *Colorado II* upheld the constitutionality of federal limits on coordinated party spending with candidates, limits which are aggregated for multiple levels of the same political party. In the *Thalheimer* litigation, the federal district court indicated that a party contribution limit would be constitutional, following the Supreme Court's plurality opinion in *Randall*, if it was set high enough to allow for competitiveness of elections and the ability of individuals of the same party to associate for political speech, upon a showing that the Council balanced First Amendment rights against government interests in preventing corruption and circumvention of valid contribution limitations.

There is no certainty as to how a court would rule should the City enact new party contribution limits and if those limits are challenged as violating the First Amendment. However, the proposed \$10,000/\$20,000 limitations are likely to be upheld as constitutional under the framework set out by the district court in the *Thalheimer* litigation.