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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11

12 COMMITTEE ON JOBS CANDIDATE
ADVOCACY FUND and BUILDING
13 OWNERS AND MANAGERS
ASSOCIATION OF SAN FRANCISCO
14 INDEPENDENT EXPENDITURE
POLITICAL ACTION COMMITTEE,
15 political action committees organized
under the laws of California and of the
16 City and County of San Francisco,

17 Plaintiffs,

18 vs.

19 DENNIS J. HERRERA, in his official
capacity as City Attorney of the City and
20 County of San Francisco, KAMALA D.
HARRIS, in her official capacity as
21 District Attorney of the City and County
of San Francisco, the SAN FRANCISCO
22 ETHICS COMMISSION of the City and
County of San Francisco, and CITY AND
23 COUNTY OF SAN FRANCISCO,

24 Defendants.
25

No. C-07-3199 JSW

**REPLY MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Date: September 17, 2007

Time: 1:30 p.m.

Judge: Hon. Jeffrey S. White

Courtroom: 2

Filed herewith:

1. Supplemental Declaration of Nathan Nayman
2. Plaintiffs' Objections to Defendants' Evidence

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1 **I. INTRODUCTION.**

2 The City’s principal legal arguments rest on cases about contributions to political
3 parties, not independent expenditures. The City’s principal factual arguments rest on
4 newspaper clippings and conjecture. Neither provide a constitutionally valid basis for
5 limiting free speech. This Court should reject these erroneous arguments and instead
6 follow the lead of the Ninth Circuit and three other judges in this District.

7 **II. ARGUMENT.**

8 **A. Limits on Contributions to Independent Expenditure Committees Are Subject**
9 **to Strict Scrutiny.**

10 The Ninth Circuit and two judges in this District have held that limits on
11 contributions to independent expenditure (“IE”) committees such as Plaintiffs trigger strict
12 scrutiny—the most exacting form of judicial review required by the Constitution. *See*
13 Motion for Preliminary Injunction (Dkt. 11) (“Motion”) at 10-14. The City attempts to
14 evade strict scrutiny by retreating to inapposite cases where contributions to and
15 expenditures by IE committees were simply not at issue.

16 **1. The Cases Cited by the City for a Lesser Standard of Review Did Not Involve**
17 **Limits on Independent Expenditure Committees.**

18 The City principally relies on *McConnell v. FEC*, 540 U.S. 93 (2003). It is not a
19 case about IE committees. Instead, it is about something very different—the use of “soft
20 money” by political parties. The Bipartisan Campaign Reform Act of 2002 (“BCRA”)
21 limits flows of “soft money” in and out of political parties. “Soft money” is money not
22 used in direct support of candidates for federal office, but rather to fund state candidates,
23 voter registration drives, get-out-the vote efforts and other “electioneering” activities. *See*
24 540 U.S. at 122-23, 142-61. The Court applied a lower standard of review (“closely drawn
25 scrutiny”) to limits on “soft money,” asking whether they were “closely drawn to match a
26 sufficiently important interest.” *Id.* at 136 (internal quotations omitted). It applied the
27 lower standard because political parties typically work hand-in-hand with candidates and
28 had used this close relationship to undermine direct “hard money” limits and peddle access,

1 creating the appearance of corruption. *Id.* at 151-52; *see generally id.* at 146-64.¹

2 *McConnell*'s holding does not apply to IE committees. IE committees do not work
3 hand-in-hand with candidates, do not peddle access and do not facilitate corruption. By
4 law, independent expenditure committees must be "independent" and cannot coordinate
5 expenditures with candidates. *See* Cal. Gov't Code § 82031. Otherwise, their expenditures
6 are deemed campaign contributions and subject to any applicable limits.

7 The City says *McConnell* "construed the government's interest broadly enough to
8 justify regulation beyond 'contributions made directly to, contributions made at the express
9 behest of, and expenditures made in coordination with' candidates." Mem. Pts. & Auths.
10 in Opp. to Mot. for Prelim. Inj. (Dkt. 19) ("Opp."), at 12 (quoting *McConnell*, 540 U.S. at
11 152). That's wrong. The City tellingly omits half of the first sentence it quotes—cutting
12 words showing that the Court was talking about political parties, not IE committees:

13 *Despite this evidence and the close ties that candidates and officeholders*
14 *have with their parties, Justice KENNEDY would limit Congress' regulatory*
15 *interest only to the prevention of the actual or apparent quid pro quo*
16 *corruption 'inherent in' contributions made directly to, contributions made*
17 *at the express behest of, and expenditures made in coordination with, a*
18 *federal officeholder or candidate.*

17 ¹ The Court devoted pages to describing this close relationship. For example:

19 The record in the present case is replete with similar examples of
20 national party committees peddling access to federal candidates and
21 officeholders in exchange for large soft-money donations. So pervasive is
22 this practice that the six national party committees actually furnish their own
23 menus of opportunities for access to would-be soft-money donors, with
24 increased prices reflecting an increased level of access. For example, the
25 DCCC offers a range of donor options, starting with the \$10,000- per-year
26 Business Forum program, and going up to the \$100,000-per-year National
27 Finance Board program. The latter entitles the donor to bimonthly
28 conference calls with the Democratic House leadership and chair of the
DCCC, complimentary invitations to all DCCC fundraising events, two
private dinners with the Democratic House leadership and ranking members,
and two retreats with the Democratic House leader and DCCC chair in
Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's
donor programs offer greater access to federal office holders as the
donations grow larger, with the highest level and most personal access
offered to the largest soft money donors."

540 U.S. at 151-52 (citations omitted); *see generally id.* at 146-64.

1 *McConnell*, 540 U.S. at 152 (italics mark the words the City omits). Because IE
2 committees do not present the same risk of corruption that political parties do, the lesser
3 scrutiny that the Court employed in *McConnell* is inappropriate here.²

4 The City also misconstrues the plurality opinion in *California Medical Association*
5 *v. FEC*, 453 U.S. 182 (1981) (“*CMA*”). Like *McConnell*, *CMA* did not address IE
6 committees. Rather, *CMA* upheld limits on contributions to multi-candidate PACs that
7 received contributions from at least 50 sources and contributed directly to at least five
8 candidates for federal office. *Id.* at 184-85 & n.1, 195-99. The swing vote, Justice
9 Blackmun, wrote separately to clarify that the limits being upheld did not apply to
10 contributions to IE committees and that “a different result would follow” if they had. *Id.* at
11 203 (Blackmun, J., concurring in part and concurring in the judgment).

12 The City erroneously argues that contributions to IE committees constitute “‘speech
13 by proxy,’ which is not the sort of political advocacy that this Court in *Buckley* found
14 entitled to full First Amendment protection.” Opp. at 7 (quoting *CMA*, 453 U.S. at 195-
15 96). The argument is wrong because the Supreme Court applies the “speech by proxy”
16 rationale to contributions to candidates, not contributions to IE committees. As held in
17 *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the expression conveyed by a candidate
18 contribution “rests solely on the undifferentiated, symbolic act of contributing.” The
19 distinction between contributions to IE PACs and contributions to candidates or parties is
20 the difference between citizens banding together to fund directly the expression of *their*
21 *own* views, and merely facilitating a candidate’s expression of *the candidates’* views. As
22 the Supreme Court put it in *FEC v. Nat’l Conservative PAC* (“*NCPAC*”), 470 U.S. 480, 495

23
24 ² The *McConnell* Court offered an additional reason for not applying strict scrutiny to
25 the soft-money restrictions in BCRA: “*Buckley’s* ‘closely drawn’ scrutiny . . . shows
26 proper deference to Congress’ ability to weigh competing constitutional interests in an
27 area in which it enjoys particular expertise.” 540 U.S. at 137. With all due respect to the
28 residents of San Francisco, the voters who passed Prop. O (of which Section 1.114(c) was
a small part) cannot be said to have the “particular expertise” in campaign finance law
that the United States Congress has. See *id.*; see also *id.* at 115-33 (describing a century’s
worth of federal campaign finance legislation).

1 (1985), “the ‘proxy speech’ approach is not useful in this case [because] the contributors
2 obviously like the message they are hearing from these organizations and want to add their
3 voices to that message; otherwise they would not part with their money.”³

4 **2. Cases Actually Dealing with Limits on Independent Expenditure Committees**
5 **Apply Strict Scrutiny.**

6 Courts apply strict scrutiny to limits on contributions to IE committees, especially
7 when the limits dramatically curb committees’ expenditures. Motion at 10-14. Two judges
8 from this District (Judges Ware and Jenkins) recently applied strict scrutiny in enjoining
9 limits substantially similar to those at issue here, a fact that the City effectively concedes.
10 *See San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, No. C 06-
11 04252-JW, 2006 WL 3832794 (N.D. Cal. Sept. 20, 2006) (“*COMPAC*”), Request for
12 Judicial Notice (Dkt. 14) (“RFJN”) Ex. G; *OakPAC v. City of Oakland*, No. 06-CV-06366-
13 MJJ (N.D. Cal. Oct. 19, 2006), RFJN Ex. E. A third (Judge Wilken) struck down the
14 predecessor to the limits at issue here, although she did not specify the standard of review
15 she was applying in doing so. *San Franciscans for Sensible Government v. Renne*, No. C-
16 99-02456-CW (N.D. Cal. 1999), RFJN Ex. H. The City says little about these decisions,
17 other than that they are “unpublished” or not final. *See Opp.* at 10-11.

18 The City attempts to minimize the significance of *Lincoln Club v. City of Irvine*,
19 292 F.3d 934, 938 (9th Cir. 2002). *See Opp.* at 9-10. In so doing, the City glosses over the
20 fact that Judges Ware and Jenkins both relied on *Lincoln Club* in applying strict scrutiny to
21 the limits at issue in the *COMPAC* and *OakPAC* cases. They did so despite the fact that the
22 plaintiffs could not show that San Jose’s or Oakland’s ordinances barred them from making

23
24 ³ The City’s reliance on *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) also is
25 misplaced. While *Beaumont* holds that the federal ban on corporate contributions
26 extended to nonprofit corporations, the holding does not apply to political action
27 committees or to independent expenditures. Indeed, the Court said that a nonprofit was
28 free to establish a separate segregated fund PAC to be used for political purposes. *Id.* at
149. It also affirmed that *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986),
which barred limits on independent expenditures by nonprofits, remains good law.
Beaumont, 539 U.S. at 191.

1 any IEs, as the plaintiffs in *Lincoln Club* had established. See *COMPAC*, 2006 WL
2 3832794, at *6, RFJN Ex. G; *OakPAC*, RFJN Ex. E, at 3. Indeed, Judge Ware concluded
3 that “[i]t is indisputable that there has been no showing of hardship to COMPAC
4 comparable in magnitude to that suffered in *Lincoln Club*,” and that “[r]ather than facing a
5 complete bar on expenditures, COMPAC faces restrictions on expenditures.” *COMPAC*,
6 2006 WL 3832794, at *6, RFJN Ex. G. Nonetheless, Judge Ware held that “the appropriate
7 level of constitutional review is strict scrutiny.” *Id.*

8 The City insists that while Section 1.114(c) may restrict the expenditures Plaintiffs
9 can make, Plaintiffs can, like the political parties in *McConnell*, “solicit from a wider array
10 of potential donors.” *Opp.* at 8 (quoting *McConnell*, 540 U.S. at 140). Therefore, says the
11 City, Section 1.114(c) does not prevent Plaintiffs from making IEs in the way that the
12 ordinance in *Lincoln Club* did. *Id.* The City forgets that Plaintiffs are not at all like
13 political parties. Political parties are open to everyone and will take money from anyone.
14 In contrast, Plaintiffs have a very specific focus and membership criteria, and solicit money
15 only from their members. *Nayman Decl.* (Dkt. 13) ¶¶ 2, 5, 19-20; *Intermaggio Decl.* (Dkt.
16 12) ¶¶ 2, 5, 8.

17 If Plaintiffs were forced to admit more members or solicit contributions from non-
18 members, their basic nature would change. This is particularly true of the JOBS Fund.
19 JOBS has always had less than 50 members—its bylaws prevent it from taking on more.
20 *Nayman Supplemental Declaration* (filed herewith) ¶ 5. The JOBS Fund only accepts
21 contributions from JOBS’s members. *Id.* ¶ 6. JOBS has no intention of changing these
22 aspects of its or its PAC’s organizational structure. *Id.* ¶ 7.

23 In light of these facts, forcing Plaintiffs to change their fundraising practices as the
24 City urges would violate their right to freedom of association. As with the *Lincoln Club*,
25 Section 1.114(c) is “a double-edged sword, placing a substantial burden on protected
26 speech (i.e., barring expenditures) while simultaneously threatening to burden associational
27 freedoms (i.e., by requiring a restructuring of [Plaintiffs]).” *Lincoln Club*, 292 F.3d at 939.
28 Accordingly, Section 1.114(c) should receive strict scrutiny. *Id.*

1 **B. Section 1.114(c) is Not Closely Drawn to Match a Sufficiently Important**
2 **Interest Or Narrowly Drawn to Serve a Compelling Government Interest.**

3 The City does not even attempt to argue that Section 1.114(c) could survive strict
4 scrutiny. It cannot. The City also cannot show that Section 1.114(c) could survive “closely
5 drawn” scrutiny. The City’s evidence does not meet the threshold required; instead, it
6 shows that Section 1.114(c) targets free speech and association, not corruption.

7 **1. The City has a heavy evidentiary burden to justify Section 1.114(c).**

8 Even under less rigorous scrutiny, the City must prove that Section 1.114(c) is
9 closely drawn to match a sufficiently important government interest. *See Randall v.*
10 *Sorrell*, 126 S. Ct. 2479, 2994-2500 (2006); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377,
11 386 (2000) (citing *Buckley*, 424 U.S. at 25). This requires evidence, not press clippings and
12 conjecture: “We have never accepted mere conjecture as adequate to carry a First
13 Amendment burden.” *Shrink*, 528 U.S. at 392; *see also Randall*, 126 S. Ct. at 2499 (“The
14 record contains no indication that, for example, corruption (or its appearance) in Vermont is
15 significantly more serious a matter than elsewhere.”).

16 “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny
17 of legislative judgments will vary up or down with the novelty and plausibility of the
18 justification raised.” *Shrink*, 528 U.S. at 391. Here, the City argues a novel and
19 implausible theory: that an IE committee’s receipt of more than \$500 from any of its
20 members, to be used to express their views on candidates for office, would corrupt or
21 appear to corrupt such candidates, even though the committee is barred from coordinating
22 its speech with them. The City’s evidence (*see* Dkts. 21-23) falls short of the quantum
23 needed to justify a theory the Supreme Court has rejected. *See Buckley*, 424 U.S. at 45-48.

24 **2. The City’s “evidence” does not establish that Section 1.114(c) matches a**
25 **sufficiently important interest.**

26 The City attempts to argue that its IE limitations were a measured response to
27 corruption. This is, to put it mildly, revisionist history.

28 The 13 meetings of the Ethics Commission (St. Croix Decl. (Dkt. 21) Exs. A-M)

1 focused only briefly, and belatedly, on IE limitations—and then the rationale offered was
2 not one allowed by the Supreme Court. For the most part, the Ethics Commission focused
3 on (1) public financing of campaigns and (2) improved disclosures, neither of which this
4 lawsuit challenges. When the Commission discussed IEs, it was largely in this context.

5 Thanks to Judge Wilken’s ruling, the 1999 mayoralty race did see large IEs, almost
6 all of which favored the incumbent, Mayor Willie Brown, over the challenger, Board
7 President Tom Ammiano. Dkt. 21-11, at 12-28. But lots of speech cannot glibly be
8 equated with lots of corruption, nor (as the City would suggest) were all the speakers
9 business people currying favor. The testimony of the Ethics Commission’s Executive
10 Director does not even suggest that this independent speech amounted to corruption. *Id.* at
11 12-28. Indeed, her testimony shows that six of the seven largest IE PAC expenditures were
12 made by labor union or Democratic Party committees (the State Central Committee, the
13 County Central Committee and the Alice B. Toklas Lesbian and Gay Democratic Club). *Id.*
14 at 15 (the seventh was a business group). The broad range of IEs reflect the fact that a lot
15 of people across the ideological spectrum favored Mayor Brown and feared a Mayor
16 Ammiano. So too the voters, who re-elected Mayor Brown by a margin of 131,983 to
17 89,428. See http://www.sfgov.org/site/elections_page.asp?id=61447.

18 Before the 1999 election and after, the Ethics Commission—at the request of Board
19 President Ammiano and subsequently the full Board of Supervisors—set out to create a
20 system of public financing for elections (which in the main is what Proposition O
21 accomplished). Dkt. 21-3, at 6. To the extent the Ethics Commission discussed IEs at all, it
22 was almost always in the context of how IEs might affect public financing. Most of the
23 discussion was about whether a candidate who agreed to spending limits as the price of
24 public financing ought to have that limit lifted if IEs exceeded a certain level. *E.g.*, Dkt.
25 21-3, at 6, 19, 31; Dkt. 21-4, at 3, 8, 10, 11; Dkt. 21-5, at 11; Dkt. 21-12, at 29. Some
26 discussion focused on a “gap” in the disclosure rules then applicable to IE committees.
27 Dkt. 21-4, at 12; 21-6, at 5-6; 21-7, at 11; 21-9, at 10, 16; 21-10, at 15; 21-12, at 23, 28, 33.
28 At the time, state law required such committees to file reports in even-numbered years—

1 whereas San Francisco held mayoral elections in odd-numbered years. *E.g.*, Dkt. 21-6, at
2 5-6. The Ethics Commission explored and ultimately adopted a regime of much more
3 robust disclosure, with disclosure of major spending required within 24 hours. *E.g.*,
4 Dkt. 21-4, at 12; 21-9, at 10, 16; 21-10, at 15; 21-12, at 23.

5 Until May 15, 2000, the Ethics Commission mainly discussed IEs in this context.
6 Occasionally, however, a speaker would express a desire to limit IEs for constitutionally
7 impermissible reasons such as limiting their effectiveness or creating a level playing field.
8 *E.g.*, Dkt. 21-7, at 8-10.⁴ The response of one “expert witness” (Robert Stern) was
9 enlightening:

10 Commissioners Melbostad and Dockendorff expressed their concern over
11 the impact of independent expenditures on campaigns. They asked Mr. Stern
12 how independent expenditures might be limited. Mr. Stern stated that the
13 courts have thus far prevented municipalities from limiting independent
14 expenditures. He stated that disclosure is the best way to reduce their impact
15 on campaigns, since the public would then know who is financing the
16 independent spending. Mr. Stern suggested that another way to reduce the
17 impact of independent spending is to provide greater public financing to
18 candidates who do not receive independent expenditures. Commissioner
19 Norris asked Mr. Stern if there was any way to anticipate and prepare for last
20 minute spending by independent expenditure committees. Mr. Stern
21 indicated that there is no accurate way to do this. He stated that an effective
22 remedy for independent spending could only be achieved through an
23 amendment to the U.S. Constitution.

24 Dkt. 21-7, at 8.

25 Meanwhile, Board President Ammiano, no doubt smarting from his defeat, asked
26 for an investigation into campaign and IE fund-raising in connection with the 1999
27 mayoralty election. Dkt. 21-10, at 10-11. In particular, he asked the Ethics Commission
28 staff to look for evidence of corruption. *Id.*⁵ The Executive Director reported back to the

24 ⁴ *Buckley* makes clear that such goals are unconstitutional: “But the concept that
25 government may restrict the speech of some elements of our society in order to enhance
26 the relative voice of others is wholly foreign to the First Amendment, which was designed
27 to secure the widest possible dissemination of information from diverse and antagonistic
28 sources, and to assure unfettered interchange of ideas for the bringing about of political
and social changes desired by the people.” 424 U.S. at 48-49 (internal quotations
omitted).

⁵ The Ethics Commission discussed expanding its audits to see whether expenditures
(continued...)

1 Board of Supervisors; as noted, her testimony contains no suggestion of any corruption.
2 Dkt. 21-11, at 12-28. The same is true of the Executive Director’s “remarks” to the Board’s
3 Finance Committee. In response to a statement by Supervisor Yee attacking “the level of
4 independent spending,” the Director said: “IT IS IMPORTANT TO NOTE THAT THE
5 COURTS HAVE THUS FAR INVALIDATED THE EFFORTS OF MUNICIPALITIES
6 TO LIMIT INDEPENDENT EXPENDITURES. IT IS THE COMMISSION’S POSITION
7 THAT GIVEN THESE CONSTRAINTS, PUBLIC DISCLOSURE IS THE BEST WAY
8 TO REDUCE THE IMPACT OF INDEPENDENT EXPENDITURES ON CAMPAIGNS.”
9 Dkt. 21-12, at 28 (emphasis in original).

10 There things stood until a month before the Ethics Commission finished work on its
11 public financing proposal, which became Prop. O. Then, at the meeting of May 15, 2000,
12 “expert witness” Robert Stern suggested a way to work around Judge Wilken’s injunction:

13 Mr. Stern asked the Commission to consider adding a section to the proposal
14 that would limit contributions made to independent expenditure committees.
15 He stated that although the district court found unconstitutional a similar
16 provision in the Campaign Finance Reform Ordinance, the City could now
17 defend the provision, given the influence of independent expenditures in the
18 last mayoral election.

17 Dkt. 21-13, at 7. Apparently Mr. Stern favors free speech only if it has no influence on
18 voters. The “Coordinator” of San Francisco Common Cause, Charles Marsteller (who has
19 filed a declaration in support of the City, Dkt. 22), also spoke in favor of Mr. Stern’s idea.
20 Dkt. 21-13, at 8.

21 At the next meeting (June 12, 2000), Mr. Stern again spoke in favor of limiting IEs.
22 This time, apparently repenting his previous rationale for IE limits, he offered a different
23 justification:

24 Mr. Stern stated that the rationale for limiting contributions to committees is
25 that a committee could theoretically launder money to a candidate. He said

26 (...continued)
27 made by IE committees “are in fact independent” (as opposed to whether donors were
28 being shunted to IEs by campaigns). Dkt. 21-12, at 8-10. There is no evidence in the
record that the Commission expanded its audits. In any event, there is no suggestion that
anyone funneled a nickel to Plaintiffs, who take contributions only from their members.

1 that courts have upheld this rationale as a lawful restriction on contributions
2 to PACs. Thus, San Francisco would be justified in lowering contributions
to committees to \$500, he said.

3 Dkt. 21-14, at 6. Despite the absence of any evidence that any San Francisco IE PAC has
4 ever ‘laundered’ money to a candidate (“theoretically” or otherwise), this rationale
5 apparently carried the day.⁶ At the same meeting, the Commission approved adding IE
6 limits to the proposed legislation. *Id.* at 9. The IE limitation, crammed in with a raft of
7 popular initiatives such as public financing and increased disclosures, passed at the next
8 general election; Prop. O received 53.4% of the vote. Dkt. 21-16, at 8.

9 This, then, is what a fair reading of the administrative record shows: a last-minute
10 suggestion, supported by a series of constitutionally-invalid rationales designed to avoid a
11 court order, leading to the adoption of an ordinance designed to limit independent speech.

12 Eager to avoid a record devoid of any constitutionally valid rationale for
13 Section 1.114(c), the City offers instead a series of newspaper clippings (Dkt. 20 Exs. A-O)
14 and the recollections of the San Francisco Coordinator of Common Cause about telephone
15 conversations he had in 1999 and 2000 (Dkt. 22 ¶¶ 6-10). With all due respect, attempts to
16 limit First Amendment freedoms, if they are to have any constitutional validity, must rest
17 on some firmer foundation than articles in the *Bay Guardian*⁷ and one man’s perception

18 _____
19 ⁶ This rationale makes no sense; IE committees simply cannot “launder” money. The
20 concept of “laundering money” refers to a situation when a person makes a contribution
21 to an intermediary, and the intermediary uses those funds to make contributions to a
22 candidate without disclosing the true source of the funds. The public then does not know
23 who actually made the contribution. Laundering is a device used primarily to get around
contribution limits. *See* Cal. Gov’t Code § 84301 (prohibiting contributions “by any
person in the name of a person other than the name by which such person is identified for
legal purposes”); *id.* § 84302 (prohibiting contributions by intermediaries or agents
without disclosure). This rationale has no application to contributions made to a
committee that will then use the money for independent expenditures.

24 ⁷ The City relies extensively on newspaper articles to insinuate that contractors who
25 gave money to IE committees who supported Mayor Brown corruptly received favorable
26 treatment from Mayor Brown’s administration. *See* Opp. at 1-3. These bold and
27 sensational charges are not supported by competent evidence, let alone indictments or
convictions. The City’s chain of inferences is missing too many links. The projects and
contracts referred to in the articles were not awarded by the Mayor but by various City
commissions and boards, only some of whose members were appointed by the Mayor.
Many of the articles talk not about IE contributions but about campaign contributions—

(continued...)

1 about the consensus views of people who telephoned Common Cause seven years ago to
2 vent. This kind of group-think has no place in First Amendment jurisprudence.

3 The City's declarations and exhibits tell us nothing about why the voters approved
4 Prop. O, much less whether the IE limits were even a factor. In contrast, the cases cited by
5 the City relied on better evidence. In *Shrink*, 528 U.S. at 393-94, the evidence included the
6 criminal conviction of Missouri's former Attorney General on corruption charges and an
7 affidavit from the chair of Missouri's Interim Joint Committee on Campaign Finance
8 Reform, who stated that large candidate contributions—not IE contributions—have “the
9 real potential to buy votes.” In *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th
10 Cir. 2003), the evidence included “testimony of a 30-year veteran of the Montana
11 legislature who stated that special interests funnel more money into campaigns when
12 particular issues approach a vote ‘because it gets results’” and a contemporaneous letter
13 from a state senator to his colleagues urging them to vote for a certain bill to ensure that
14 contributions from a particular PAC would continue to flow to his party. *Id.* at 1093.

15 The City cites *Shrink* for the proposition that newspaper articles can prove that
16 legislation is supported by a sufficiently important government interest. *Opp.* at 11. But
17 *Shrink* involved restrictions that were neither novel nor implausible; indeed, the limits in
18 that case were imposed on contributions to *candidates*. *See Shrink*, 528 U.S. at 394-96.
19 *Shrink* also instructs courts to disregard evidence unless it can be shown to have influenced
20 the voter's thinking. *Shrink*, 528 U.S. at 395 (stating that “absence of any reason to think
21 that public perception has been influenced by the studies cited” calls into question their
22 value as evidence). The City makes no such showing. And the fact that the Ethics
23 Commission drafted the ordinance does not demonstrate that its current director (who was
24 not Director in 2000) knows the voters' purposes in enacting Prop. O.⁸

25

26 (...continued)

quite a different matter. *Buckley*, 424 U.S. at 47; *NCPAC*, 470 U.S. at 498.

27 ⁸ The current Executive Director of the Ethics Commission certainly cannot know the
28 voters' intent with respect to IE limits, as he was not even working for the Ethics

(continued...)

1 **3. Section 1.114(c) is not closely drawn or narrowly tailored to an anti-corruption**
 2 **purpose.**

3 Even if “less rigorous” scrutiny applies, and even if it could be shown that voters
 4 approved IE limits out of concern for corruption, Section 1.114(c) would still be
 5 unconstitutionally overbroad. The City’s theory—based on newspaper articles—is that
 6 City commissions and boards approved contracts or other measures that benefited certain
 7 contributors to IE committees. *See Opp.* at 1-3. If that is truly a concern—as opposed to a
 8 *post-hoc* rationalization—it cannot justify limiting the free speech of people who do not do
 9 business with the City. The proper narrowly-tailored response is that taken by another
 10 section of the Campaign and Governmental Conduct Code. Section 1.126 prohibits
 11 contributions by City contractors or prospective contractors to candidates who would have
 12 to approve such contracts, or whose appointees would have to do so, in the time period
 13 surrounding negotiations or award of such a contract. *See RFJN Ex. C*, at 15-16. In
 14 comparison to a blanket restriction on IE committees, Section 1.126 *is* closely drawn to
 15 match the City’s interest in reducing corruption. Restricting the speech of numerous non-
 16 contractors reaches far too broadly. *Cf. Day v. Holohan*, 34 F.3d 1356, 1365 (8th Cir.
 17 1994) (“the concern of a political *quid pro quo* for large contributions, which becomes a
 18 possibility when the contribution is to an individual candidate . . . is not present when the
 19 contribution is given to a political committee or fund that by itself does not have legislative
 20 power”). Section 1.114(c) reaches far too broadly.

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 24 _____
 (...continued)

25 Commission when Prop. O was passed. *See St. Croix Decl.* ¶ 2 (noting that he became
 26 Executive Director in 2004). Even if the City had offered evidence from a Commissioner
 27 at that time, “an after-the-fact declaration of intent by a drafter . . . [would] . . . by no
 28 means govern our determination how the voters understood the ambiguous provisions.”
Kennedy Wholesale v. State Bd. of Equalization, 53 Cal. 3d 245, 250 (1991) (citing
Carman v. Alvord, 31 Cal. 3d 318, 331 n.10 (1982)).

1 **C. The Loss of First Amendment Freedoms Constitutes Irreparable Injury and**
 2 **the Balance of Hardships Weighs in Favor of Plaintiffs.**

3 **1. The First Amendment has no expiration date.**

4 The City contends that Plaintiffs have slept on their First Amendment rights because
 5 they did not file this lawsuit shortly after Prop. O was passed. *See* Opp. at 14. The City
 6 argues that this passage of time eliminates any claim of irreparable injury. In a First
 7 Amendment case such as this, the City’s argument falls flat. Notably, the City does not
 8 dispute that “the loss of First Amendment freedoms, even for minimal periods of time,
 9 unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 372 (1976), as
 10 Plaintiffs pointed out in their Motion. *See* Motion at 19. Indeed, when a deprivation of a
 11 constitutional right is involved, courts hold that no further showing of irreparable injury is
 12 necessary. *See Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (citing
 13 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948.1 (2007)). In contrast,
 14 the cases cited by the City did not involve the loss of constitutional rights. *See Citibank v.*
 15 *Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (trademark); *Oakland Tribune, Inc. v Chronicle*
 16 *Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (monopolization); *Lydo Enterprises, Inc. v.*
 17 *City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (plaintiff asserted a First Amendment
 18 claim, but Ninth Circuit held that there was no First Amendment violation).⁹

19 **2. Plaintiffs have established First Amendment violations.**

20 Plaintiffs have already demonstrated that “contribution restrictions could have a
 21 severe impact on political dialogue if the limitations prevented candidates and political
 22 committees from amassing the resources necessary for effective advocacy.” *See Buckley*,

23

24

25 ⁹ As one court has explained the *Lydo* case, “[i]n fact, the Ninth Circuit in *Lydo*
 26 seemed inclined to find irreparable harm despite the delay but for its disagreement ‘with
 27 the [district] court’s conclusion that Lydo has made a showing that First Amendment
 28 freedoms are in fact violated.’” *Legal Aid Soc’y v. Legal Servs. Corp.*, 961 F. Supp. 1402,
 1418 (D. Haw. 1997), *rev’d in part on other grounds*, 145 F.3d 1017 (9th Cir. 1998)
 (citing *Lydo*, 745 F.2d at 1214).

1 424 U.S. at 21; Motion at 7-9, 19 (discussing various hardships to Plaintiffs).¹⁰ The City's
 2 suggestion that JOBS's members could alleviate these burdens simply by making IEs
 3 themselves, Opp. at 14, ignores that Plaintiffs' challenge to Section 1.114(c) includes a
 4 freedom of association claim. JOBS and BOMA-SF created Plaintiffs so that their
 5 members could band together to amplify their voices, recognizing that there is strength in
 6 numbers. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both
 7 public and private points of view, particularly controversial ones, is undeniably enhanced
 8 by group association."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290,
 9 296 (1981) ("To place a Spartan limit-or indeed any limit-on individuals wishing to band
 10 together to advance their views on a ballot measure, while placing none on individuals
 11 acting alone, is clearly a restraint on the right of association.").¹¹ Plaintiffs should not have
 12 to sacrifice their associational rights to alleviate the hardship that Section 1.114(c) imposes.

13 **3. The balance of hardships weigh in favor of Plaintiffs.**

14 In addressing the alternate test for a preliminary injunction, the City does not
 15 dispute that questions of law have been raised that are "substantial, difficult and doubtful as
 16 to make them a fair ground for litigation and thus for more deliberative investigation."
 17 *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Instead, it
 18 aims at the other half of the alternate test, contending that the balance of hardships that
 19 would flow from an injunction tips in its favor. Opp. at 15. The City argues that an
 20 injunction could "promote voter cynicism and disengagement . . . and cast a cloud over the
 21 City's system of representative government." *Id.* The City offers no evidence, however,

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 23 ¹⁰ *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1095 (9th Cir. 2003), which
 24 the City cites in claiming that Plaintiffs' Declarations are "insufficient" to establish
 irreparable harm (*see* Opp. at 14), is inapposite. In *Eddleman*, no harm was shown
 because the plaintiffs' witnesses raised *more* money after contributions were limited. *Id.*

25 ¹¹ Ironically, if any of JOBS's or BOMA-SF's members followed the City's
 26 command, its political advertisements would have to disclose who paid for the ad. *See*,
 27 *e.g.*, CFRO §§ 1.162-1.163, RFJN Ex. C, at 34-38. If anything, this would seem *more*
 28 likely to produce "the appearance of corruption," not less, as a candidate could more
 easily determine and then reward the sponsor of the ad. Individuals stand out; PAC
 members are part of a group.

